BEFORE THE AUCKLAND
LAND VALUATION TRIBUNAL **LVP No. 3/99**

IN THE MATTER	of a claim for compensation under the Public Works Act 1981
BETWEEN	**NICOLL MANAGEMENT CO LTD**
	Claimant
A N D	**MANUKAU CITY COUNCIL**
	Respondent

Before the Auckland Land Valuation Tribunal:

Chair:	His Honour Judge J D Hole
Members:	P J Mahoney Esq R M McGough Esq
Dates of Hearing;	7 March 2000; 12 April 2000; 14-18, 21-24, & 28 August 2000
Counsel:	Mr J R F Fardell & Ms P R Cornelius for the Claimant Ms D Bates QC & Ms K Williams for the Respondent
Date of Decision:	27 October 2000

DECISION OF THE TRIBUNAL

INTRODUCTION

[1] Nicoll Management Co Limited is a land developer. In 1989 the land which is the subject of this claim together with some adjacent land was zoned for reserve or open space purposes under the Manukau City Council's proposed district plan. Both pieces of land are together known as the Meadowland Reserve. It is also zoned for these same purposes under the Council's present operative district plan.

[2] The land surrounding Meadowland Reserve was developed for housing in the early 1990's. It was developed at a time that corresponded with a large influx of Asian immigrants coming into New Zealand. Most of these immigrants settled in the east Auckland area of Howick and Pakuranga. This area was one that proved attractive to them and the architecture of many houses in the area shows evidence of their design preferences at the time they were built.

[3] The Meadowland area developed rapidly. Generally houses within it are large ones on standard 600-700 square metre sections. There are few unit type developments in the area and where they occur they involve a small number of units amongst single dwellings.

[4] From the land it is possible to view the skyline that forms the boundaries of the top of the catchment. The impression from the land is that it is located in a natural depression or basin. Prior to the development of the reserve, the land was generally level and in grass. It was traversed by two shallow water courses. These have been partially excavated at the Nicholas Road end and now lead into a large culvert which runs under Nicholas Road. A drainage trench has been cut through the land without any piping being installed.

[5] The land contains approximately 9077 square metres. It has a frontage of approximately 29 metres onto Nicholas Road. This entrance leads to a large elongated site having a length of approximately 183 metres backing onto the balance of the Meadowland Reserve which has been developed for playing fields. The land

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varies in width from approximately 28 metres at its northern end to some 59 metres at its southern end.

[6] Despite the fact that the reserve zoning was imposed on the land many years ago, the land has not been transferred to the Council. Ultimately, after some prolonged negotiations between Nicoll and the Council, on 26 November 1998 Nicoll lodged a claim seeking $1,540,000 plus costs and interest (inclusive of GST) as compensation for losses arising out of the taking of the land. On 10 November 1999 an amended claim was filed whereunder the compensation sought was increased to $1,870,000 plus costs and interest (inclusive of GST).

[7] Throughout this proceeding both parties have agreed that compensation was to be limited to the value of the land in its existing state and adopting a zoning of Main Residential.

ISSUES

[8] The issues for determination are:

[a] The date at which compensation is to be assessed; viz "specified date"

[b] Meaning of "land in its existing state".

[c] Significance of section 62(1)(c) Public Works Act 1981.

[d] The number of units which would be permitted on the land if subdivided and developed to its full potential. In considering this issue three matters are relevant:

[i] The location and dimensions of the overland flow path;

[ii] The effect (if any) of the transformer located on the left-hand side of the entrance to the land and difficulties inherent in creating cul de sac splays to the Nicholas Road entry;

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[iii] Planning restrictions likely to be imposed by the Council if a multi-unit development were submitted for its sub-divisional and land use consents.

[e] Having determined the foregoing matters, the value of the land needs to be determined. Nicoll claims it is $1,870,000 (including GST). The Council's reply does not specify a figure. However, in her opening statement counsel for the Council noted that the two valuation witnesses for the Council had arrived at figures of $736,000 and $798,000 respectively (including GST).

[f] Having determined the gross value of the land it is necessary to deduct from that sum those development costs not necessarily inherent in the comparable sales. The sum of $210,938 including GST is agreed in respect of some of those costs. However, to this sum there needs to be added such additional costs as are determined by the Tribunal. These relate to the costs (if any) of the creation of a cul de sac and waste water disposal.

SPECIFIED DATE

[9] Section 62 Public Works Act 1981 provides that compensation is to be assessed in accordance with the provisions set out in that section. The starting point is s.62(1)(b):

> *"The value of land shall, except where otherwise provided, be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise ..."*

[10] Where a claim is brought under s.80 (as here) the specified date is the earliest of:

- The date of notification to the Tribunal of what land is to be taken (s.62(2)(b)(i));

- The date of first entry upon the land for construction purposes (s.62(2)(b)(ii));

- The date upon which the land is first injuriously affected by the work (s.62(2)(b)(iii)); or

- The date of any agreement made under s.80(1)(c) or any date specified in that agreement (s.62(2)(b)(iv).

[11] Nicoll says that the specified date is the date of the commencement of the hearing as s.62(2)(b)(i) applies. The Council says it is 26 November 1998 as s.62(2)(b)(iv) applies.

[12] At this point the history becomes relevant. On 19 December 1997 the Council served on Nicoll a notice of desire to acquire land for the purpose of a public reserve. This was a notice issued under s.18(1)(a). On 14 July 1998 Nicoll responded by serving on the Council a notice pursuant to s.18 (2) which referred to the original notice and then required the Council to indicate whether it intended to proceed with the acquisition of the land. The Council did this by letter dated 17 August 1998. Annexed to the brief of evidence of Steven Anthony Culpan as Annexures 4 to 11 inclusive is correspondence between the solicitors for the parties. From it can be deduced that Nicoll and the Council both accepted that the Council would take the land and that compensation would be assessed pursuant to the Act. However, whilst there was agreement on both of these issues, that agreement was subject to the resolution of other matters: in particular, that for valuation purposes an acceptance by the Council that the land was to be treated as being zoned Main Residential. Finally, on 13 November 1998 the Council conceded; provided the compensation claim was received by 4 p.m. on Friday 27 November 1998. . As the claim was filed on 26 November 1998, the Council claims that a section 80 (1)(c) agreement was created as at that date and the "specified date" is as defined in section 62(2)(b)(iv).

[13] For Nicoll it was argued:

[a] That there was no agreement in terms of section 80(1)(c);

[b] Section 80(7) applies which requires a local authority to notify the Tribunal at the commencement of the hearing as to what land is to be taken;

[c] In these circumstances the specified date must be the date of the commencement of the hearing as that was the date of notification as set out in section 62 (2)(b)(i).

[14] It seems that Nicoll's argument proceeded on the basis that, as the Council had signified its intention to acquire the land under the Act, Nicoll's subsequent actions were "simply following the procedure provided for in the Act". Accordingly if the subsequent letters appeared to constitute an agreement this was not the case as Nicol was simply doing what it was bound to do anyway. The reality is different. The land has been zoned for reserve purposes since 1989. Its owner has had a number of opportunities to object to that zoning; but such objections as there have been have been of a perfunctory nature only and decisions on the zoning have not been appealed. This was because there was no prospect of success. It was accepted that the Council would acquire the land in due course. The only issue was how much the Council would pay by way of compensation and when. It is accepted that after the s.18 procedure had commenced, the Council formally signified its intention to take the land. However, the subsequent correspondence shows an acquiescence to this by Nicoll. Indeed, Nicoll was actively seeking an early date for possession of the land to be given to the Council. All that was then required to constitute a section 80(1)(c) agreement was an agreement as to compensation being assessed in accordance with Part V of the Act. This was unconditionally agreed to when Nicoll filed its claim on 26 November 1998.

[15] One other matter has troubled the Tribunal. Section 62(2)(b) treats the issuing of a proclamation as a prerequisite to any of the events constituting a specified date. Here no proclamation has been issued. Under section 80(3) a section 80(1)(c) agreement is deemed to be a section 17 agreement as far as the procedures of acquisition are concerned. Section 17(2) contemplates implementation of the

agreement by declaration or a memorandum of transfer: a proclamation is not required. Annexures 4 and 5 to the evidence of Mr Culpan contemplate a memorandum of transfer (which is further evidence of an agreement being negotiated at that stage). If there is to be no proclamation, can any of the events set out in section 62(b)(2) be said to be a specified date?. Section 5 Interpretation Act 1999 requires a purposive approach to be taken to statutory interpretation. The use of the word "proclamation" seems to indicate the actual transferring of the land in a legal sense and can be said to include the use of a declaration or memorandum of transfer. The arguments of both parties proceeded on this basis.

[16] The Tribunal therefore fixes the specified date as 26 November 1998.

MEANING OF "*LAND IN ITS EXISTING STATE*"

[17] The parties are agreed that the land is to be valued in "its existing state". This is consistent with s.62(1)(c). This means that the Tribunal must ignore the negative impact on value of acts done by the Council in relation to an open trench dug on the land and the stockpiling of fill on the land. Both of these acts had the effect of reducing the value of the land as at the specified date and related to the proposed public work.

SIGNIFICANCE OF SECTION 62(1)(C)

[18] Section 62(1) provides that the amount of compensation is to be assessed in accordance with the provisions therein set out. Of particular relevance is s.62(1)(c):

> *"Where the value of the land taken for any public work has, on or before the specified date, been increased or reduced by the work or the prospect of work, the amount of that increase or reduction shall not be taken into account."*

[19] In this case the public work is the acquisition of the land and its development for a recreation reserve. At this stage a small amount of work has been undertaken upon the land and that was referred to in paragraph 17. Of greater significance, however, is the fact that the adjacent playing fields land has been developed to a considerable extent and in the course of that development the natural water courses have been altered. This has been done upon the basis that the land itself will be

developed in conjunction with the adjoining playing fields land so that both pieces will comprise the complete recreation reserve. The effect of the diversion of the watercourses is that most of the runoff has now been diverted from its original course so that it flows onto the eastern portion of the land.

[20] The Council argued that in assessing compensation the Tribunal should recognise that an overland flow path designed to carry most of the runoff from the adjacent reserve would need to be constructed. There is no argument about this. However, the Council then says that because of the agreement that the land be valued in its "existing state" the flow path should be constructed in the position where most of the runoff has been diverted to (namely the eastern side of the land). Nicoll says that it should be placed in a position where it would have taken the runoff before diversion and relies upon s.62(1)(c).

[21] There are a number of flaws in the Council's argument:

[a] "Land in its existing state" means the land which is the subject of this claim and not any other land including the adjacent playing fields. The watercourse diversion has occurred on the adjacent playing fields reserve. It has been done, however, as part of the development of the entire recreation reserve. That development is included in the concept of the overall public work. However, as the diversion has not been undertaken on the land itself but is contemplated for it, it comes within the definition of "the prospect of work" on the land.

[b] If the Council's claim were accepted, then what the Council is suggesting is that if the diversion by the Council has caused a loss of value to Nicoll's land then that loss should be born by Nicoll notwithstanding the Council caused it. This conflicts with s.62(1)(c); fails to comply with the basic entitlement to full compensation as envisaged by s.60(1); and is inherently unfair.

[c] It also conflicts with the common law as expressed in such cases as *Pointe Gourde Quarrying & Transport Co v Sub-Intendent of Crown*

> *Lands (Trinidad)* [1947] AC 565, *Housing Commission (NSW) v San Sebastion Pty Ltd* [1978] 140 CLR 196, and *Viaduct Harbour Holdings Ltd v Auckland City Council* [1998] NZRMA 129.

[22] It follows that any alteration to the value of the land as a result of the "prospect of work" on the land must be ignored by the Tribunal.

PERMISSIBLE NUMBER OF UNITS

[23] One of the methods of valuation involves determining how best the land might be used. In this context both parties accept that the best use of the land would be for its subdivision and development as a multi-unit residential housing complex. In its consideration of this issue the Tribunal's focus must be on how an informed and prudent purchaser might have assessed the land as at the specified date. In presenting its case, the Council seemed to lose sight of the task required of the Tribunal. It presented an enormous amount of evidence as to how the Council might view such a project and whether or not the Council might give the requisite consents. Further, despite arguing that the specified date was 26 November 1998 its evidence attempted to present conditions as at the date of the commencement of the hearing. (Indeed some of its evidence was about matters which had arisen well after the commencement of the hearing.) It ignored the fact that any purchaser would have to consider its possible purchase as at the specified date and with the information which existed at that time.

[24] In considering this issue, the Tribunal is mindful of the basic principle expressed by Judge Archer in *Poverty Bay Catchment Board v Forge & Ors* [1956] NZLR 811. While he expressed the principle set out on pages 812 and 813 strictly in valuation terms it is of wider application. In the context of this proceeding, the nominal purchaser is entitled to have regard to all relevant facts within its knowledge, including information available after the specified date. However, it should use that information only for assessing the land at that date. It follows that while the Tribunal is entitled to make use of those facts obtained since the specified date, it is not entitled to assume that such information was available to the nominal purchaser or the Council at the specified date. It is with this principle in mind that

the Tribunal has assessed the detailed evidence presented to it in respect of this issue.

(a) Overland Flow path

[25] A significant feature of the land is that it attracts stormwater runoff from a catchment comprising 70 odd hectares. Unless provision is made to dispose of this runoff, significant flooding problems will result. Some of the runoff will be disposed of through the primary piped system. The balance, however, will flow overland and an overland flowpath needs to be created to contain it. The dimensions and, possibly, the location on the land of the overland flowpath is critical as one determinant of the number of units which the Council might have permitted to be built upon the land. To ascertain the dimensions of the overland flowpath the flow of water through it, together with resultant safety factors need to be taken into account.

[26] The Council's consultant engineer, Michael Steven Smith, referred the Tribunal to Rule 3.B.1.2. of the Council's engineering quality standard relating to stormwater design. It reads:

> *"The design storm annual exceedance probability (AEP) return period shall be as follows:*
> *primary piped system in all urban areas five year (20% AEP)*
> *open channels and overland flowpaths 100 year (1% AEP)."*

[27] Therefore to calculate the flow for which the overland flowpath must be designed, one must:

[i] Ascertain the total runoff the property is likely to receive in a 100 year event; and then

[ii] Deduct from that figure the flow which should be conveyed through the primary piped system; which leaves

[iii] The flow for which the overland flowpath should be designed.

[28] Lance William Gore (who was the engineering hydrologist consultant for the Council) and Mr Smith agreed that the total runoff likely to be received by the land in a 100 year event amounted to 16 cubic metres per second. They agreed that of this, seven cubic metres per second would be conveyed through the primary piped system leaving the overland flowpath to cope with nine cubic metres per second. After some consideration, Gordon Desmond Cuthbert (Nicoll's consulting engineer) generally agreed with their calculations except that he claimed that the total runoff figure of 16 cubic metres per second should have deducted from it 1.5 metres per second of water which is that which would be diverted down Meadowland Drive.

[29] The engineers seemed to accept that in order to ascertain the safety of an open water channel, the velocity depth (VD) needs to be determined. To achieve safety, Mr Smith asserted that a VD of 0.35 should not be exceeded. Mr Cuthbert considered this figure conservative and noted that it had been exceeded by over 100% at 139 Wyllie Road, Papatoetoe (0.82). Mr Cuthbert pointed out that in a major storm it was unlikely that small children (for which the standard is designed) would be outside and thus vulnerable.

[30] None of this information was available to either party as at the specified date. Indeed much of it was obtained after the hearing commenced. Its significance is that in making its assessment of the land, the nominal purchaser, upon obtaining engineering advice, would have discovered that there were major problems associated with the disposal of runoff from the adjoining playing fields land. As Mr Smith put it, "a red flag" would have been raised requiring the nominal purchaser to undertake more comprehensive investigations including consultation with Council engineers.

(b) Location of Overland Flowpath

[31] Nicoll supports the overland flowpath being located so that it divides the property into two unequal portions. It suggests it follow generally the path previously occupied by the original watercourse, although to achieve maximum developmental potential Nicoll thinks this could be moved slightly to the east as shown in Exhibit 80. To achieve this the consent of Council would be required as

part of the diversion would have to be undertaken on the adjacent playing fields land owned by the Council.

[32] On the other hand, Mr Smith on behalf of Council, says that it should be located generally adjacent the eastern boundary of the land so that it follows a path which results from diversionary stormwater works constructed on the adjacent playing field reserve since the reserve zoning was imposed. This proposal is untenable for the reasons set out in paragraph 21.

[33] The actual location of the overland flowpath is of limited relevance. It is the effect of the overland flowpath upon the developmental potential of the land which is relevant. The Tribunal has taken its effect into account in its estimate of the nominal purchaser's expectation of its developmental potential.

(c) Dimensions of Overland Flow Path

[34] Mr Cuthbert initially thought it should be 9 metres wide. Mr Smith disagreed. Ultimately the Council's position was that it would need to be 18 metres wide to safely cope with the 100 year flood. Given the task of the Tribunal, it is not appropriate for the Tribunal to determine the its exact dimensions as at the specified date. Suffice to say that the with the "red flag" raised, the nominal purchaser would have to allow for it to be in excess of 9 metres and given his prudent nature might well allow for one of about 14 metres.

(d) Effect (if any) of Transformer and Cul de Sac Splays

[35] The planning consultant for the Council, David John MacPherson considers that the transformer could be moved with relative ease. Indeed this might be necessary in any event because it may require upgrading.

[36] Cul de sac splays are required under the District Plan to enable ease of access onto Nicholas Road. In this case, there is insufficient room for the splays to be created on the land. To create the splays, a small portion of one of the adjoining sections might be required and this could prove costly if not impossible.

Notwithstanding this, however, when considering this factor in relation to the overall proposed development, it becomes a minor matter which must be capable of resolution without great cost. The Tribunal doubts that this is a matter which should have much bearing on the ultimate valuation of the land. In any event the lack of a corner splay is likely to have resulted from the Council's requirement for this land to be a reserve rather than as a housing development site.

(e) Planning Restrictions

[37] The Tribunal has spent much time considering plans put forward by Nicoll proposing a 24 unit development and plans put forward on behalf of the Council for a 19 unit development.

[38] It is not the function of the Tribunal to determine whether or not the Council would give its consent to any specific proposed development of the land. The function of this Tribunal is to ascertain the nature of the processes employed in obtaining planning consents and the likelihood of those consents being obtained. It needs to do this so that it can assess the time constraints and risks facing a nominal purchaser as at the specified date.

[39] The general thrust of Nicoll's case is that in cases similar to this one planning consents have been available on a non-notifiable basis. Therefore, to be consistent with its past practice, the Council would be obliged to grant its non-notifiable consent to a development of 24 units on the land.

[40] Whilst consistency of practice is something the Tribunal can have regard to, it must also have regard to the legal obligations imposed on a Council considering such a development by the Resource Management Act 1991. The general principle can be gleaned from ascertaining if resource consent applications should be notified in accordance with s.93 of the Act. This, needs to be considered in conjunction with s.94 of the Act which sets out the exemptions.

[41] In considering the general principle, the Court of Appeal in *Bayley v Manukau City Council* [1999] 1 NZLR 568 stated at page 576:

> *"Before section 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect. The appropriate comparison of the activity for which consent is sought is with what either is being lawfully done on the land or could be done there as of right. ... then at the second stage of its consideration, the authority must consider whether there is any adverse effect, including any minor effect, which may affect any person. It can disregard only such adverse effects as will certainly be de minimis, ... and those whose occurrence is merely a remote possibility. With no more than that very limited tolerance, the consent authority must require the applicant to produce a written consent from every person who may be adversely affected…"*

[42] It is accepted by both parties that a subdivision of the land into 5 lots resulting in the development of 19 or more units would require both a subdivision and land use consent. In this regard the Council planning officer, Robert Choon Ngon Chan, considered that there were six matters of concern:

[a] The cul de sac intersection design with Nicholas Road: This has already been dealt with.

[b] The over-length private access location and its effects on adjoining residential properties: Mr Chan admitted that this was a minor matter capable of resolution.

[c] The non-compliance of the "Y" shaped turning head carriageway: again, Mr Chan agreed that this was of minor consequence.

[d] The availability of adequate existing sewerage disposal services: this will be dealt with later, but essentially comes down to a question of what money, if any, Nicoll should have to pay.

[e] The overland flowpath: this has been dealt with; and obviously is an essential matter.

[f] The need to fully comply as far as reasonably practical with all relevant development and performance standards for multi-unit developments.

[43] In terms of performance standards including site coverage, it is clear that a development of 24 units could meet Council's criteria. However, there is also a requirement that any proposed development should be compatible with the surrounding area. It is in respect of this requirement that problems arise.

[44] The area surrounding in the immediate vicinity comprises houses on individual sections. To erect 19 or more units on 9,077 square metres of land in that area involves a development of much greater density than that in the nearby area. Having said this, however, it is possible to look to other developments where a similar incompatibility has occurred. The Moore Street development immediately springs to mind as does the Wyllie Street development. Furthermore, the Sacramento development in the same general region involving a large number of units on a comparatively small site, is also incompatible with its immediate surroundings.

[45] In considering this issue the Tribunal is conscious that since Nicholas Road was developed the residential home market has changed dramatically. In the last five years or so the requirement has been for town houses on small sites, rather than individual houses with their own gardens. The Council has recognised this in accepting that 19 units on the land is a reasonable figure. However, the Council's incompatibility argument certainly lacks substance when one considers what the Council has permitted on other occasions.

[46] The obdurate stance taken by Mr Chan however, can be supported by an analysis of the legal position. In this regard the statement of the Court of Appeal in *Bayley* mentioned in paragraph 41 is pertinent. As at the specified date the Council would have had a good case for requiring even a 19 unit development of the land to be subjected to the notified procedure set forth in s.93 of the Act.

[47] This does not mean that having undergone the notified procedure an application for 19 or 24 units would have failed. By the time any resource consent application was determined (including possible appeals) the precedents referred to in paragraph 44 would have become realities. This seems to be recognised by the Council in its concession that a 19 unit development should be considered as

acceptable for the purposes of this proceeding. The question then needs to be asked whether there is much difference between a 19 unit development and a 24 unit development from a planning point of view.

[48] It seems to the Tribunal that if a 24 unit development can be created which complies with the applicable performance standards, then there is little difference from a compatibility point of view between that and a 19 unit development. It follows, that whilst there is always some risk associated with the obtaining of resource consents, in this case, given the concession of Council to 19 units, the risk is more in terms of time constraints rather than as to the likelihood or not of the development ultimately proceeding. The risks are no greater than those affecting comparable developments.

(f) Conclusion

[49] Taking all these factors into account the Tribunal believes that the notional purchaser would be entitled to conclude at the specified date that the land would be capable of accommodating a multi-unit residential development of up to 21 units. To adopt a greater number of units introduces an unacceptable level of risk.

VALUATION ISSUES

(a) Overview

[50] The area in which the land is situated was the subject of extensive, conventional residential development during the early to mid 1990s. This dropped off markedly about the time of the Asian economic downturn. Since then the market has firmed but in the late 1990s there was a change from the conventional single unit household development to a more intensive multi-unit housing concept. Examples of this are the Sacramento and Eastgate developments. By the specified date the multi-unit type development was gaining in popularity due to a changing demand. This was reflected in a number of parcels of vacant land being acquired by developers for intensive multi-unit development. As was mentioned by Mr Cant, in the immediate vicinity of the land there were few parcels of vacant land available for

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residential development. In these circumstances the Tribunal considers that the approach taken by both Nicoll and the Council that this land might well be acquired for an intensive multi-unit type development is correct.

[51] The consensus of evidence (except for Mr Hebditch) was that there has been little or no appreciable movement in land values between the specified date and the date of hearing.

(b) Principles

[52] The following matters have been taken into account. They are not set out in any particular order. They are:-

(i) The value is to be the amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise. (s.62(1)(b));

(ii) Where the value of the land taken for any public work has on or before the specified date been increased or reduced by the work or the prospect of the work, the amount of that increase or reduction is not to be taken into account. (s..62(1)(c));

(iii) Nicoll is entitled to receive full compensation for the taking of the land. (s.60(1) One of the effects of this is that the benefit of the doubt must be in favour of Nicoll rather than the Council. However, this does not mean that the Tribunal is entitled to embark upon a frolic of its own although the Tribunal does not have to accept either parties' valuation evidence. (*Doherty v Commissioner of Highways (No 2)* [1974] 7 SASR 57 at 83);

(iv) The best evidence of the market value of the land is that of comparable sales of other land either before or after the specified date. In the circumstances the Court is entitled to take into account evidence of sales which occurred after the specified date provided that evidence

tends to confirm what would have been the reasonable expectations of a well informed and reasonable purchaser at the specified date. *(Poverty Bay Catchment Board v Forge* [1956] NZLR 811);

(v) The sales comparison approach is the preferred approach to value. However such evidence is not always necessarily conclusive and sometimes it is not even available. In the latter situation where there is no comparable evidence available, the residual value approach as adopted by Mr Hebditch may be employed. However, it should not be regarded as a primary method of valuation, but rather employed as a cross-check provided it stands the test of a comparison with the actual market sales (*Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 at 84).

(vi) The comparative sales approach adopted in this exercise can be applied on either or both of the following basis:-

(a) By comparing the sales evidence on a simple area per hectare basis;

and/or

(b) By comparing the same evidence on a potential residential development basis.

(vii) Put simply, the process of valuation is the breaking down of market evidence to simple common denominators with the application of that denominator to the land. The denominator selected can vary from case to case and will be dependent on the quality of the evidence adduced.

(c) Evidence

[53] Mr R P Young, an experienced registered valuer was called to give evidence on behalf of the claimant. Mr Young assessed the value of the property at $1,784,000 (inclusive of GST). His valuation was based on the 24 unit development concept plan (plan number 179-1-2) as prepared by Fraser, Thomas Shaw Partners. He ascribed a value to the development site assuming a development of up to 24 residential units, at an average price of $83,125 per residential unit, together with an allowance for infrastructure costs totalling $210,937.

[54] The valuation as such was determined by Mr Young effective as at March 2000, being the date of commencement of the hearing.

[55] Mr Young confirmed that he had provided earlier valuation advice on this property under a report dated 28 November 1998 at which time he assessed the value at $1,540,000, then based on a notional 26 unit development. In that assessment he adopted an average of $65,000 per residential unit less a deduction for estimated infrastructure improvements estimated at that time at approximately $150,000.

[56] In support of his valuation assessment dated March 2000, Mr Young relied solely upon the recorded sales of two other vacant development sites in nearby Meadowland Drive. The first of these being described as Lot 194 which was purchased in September 1998 as an 11 unit development site at a price of $820,000. This sale price based on a notional 11 unit development is equivalent to $74,545 per residential unit. The property was subject to a later agreement for sale dated November 1999 at an increased price of $990,000 inclusive of GST. Mr Young discounted this latter sale on account of the terms, to reflect an effective cash price of $945,300 equivalent to $85,940 per unit. However this sale did not proceed as there is an ongoing dispute between the original subdivider developer and the Council regarding the vesting of part of Meadowland Drive as public road. The same property was the subject of a further conditional agreement in May 2000 to Johnston Homes Limited at a price of $980,000 including a vendor's mortgage for a substantial part of the purchase price. Mr Young analysed this conditional

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agreement arriving at an adjusted sale price of $957,247 representing a unit sale price of $87,022 per residential unit. This latter sale is conditional upon the vendor reaching agreement with the Council for the vesting of the Meadowland Drive portion of the property as public road by November of this year. It is apparent that the prices established by these two recent sales were unaffected by the dispute over the legalisation of Meadowland Drive as there is such a similarity in prices and yet one sale mentioned the problem whilst the other did not. In short, the issue of the undedicated portion of the road was not a factor affecting price.

[57] The other significant sale relied upon by Mr Young is the sale of Lot 195 on the northern side of Meadowland Drive. This is a site of 3837sm which initially sold in September 1998 to Shannon Resources Limited at a price of $730,000. On an assumed 11 unit development, this represents approximately $66,364 per residential unit. The same property was resold by Shannon Resources Limited in June 1999 for a price of $840,000 after having been on the market for only one month. The analysed price of this latter sale after adjusting for the vendors mortgage, equates to a cash sale price of $804,300 or $73,188 per residential unit assuming a maximum of 11 units were built. A feature of this resale was the inclusion of a condition stating that the parties acknowledged that the purchase price included a deduction of some $95,000 from the original asking price to take into account additional engineering and foundation costs to be incurred because of the main stormwater drain which traversed the property.

[58] The Tribunal was advised that this particular property was the subject of a resource consent application by the purchaser to the Council for development of 11 dwelling units. At the time of hearing the Tribunal was advised that the Council had declined the consent for the requested 11 unit development.

[59] Mr Young was very clear in his opinion that these two sales, namely Lots 194 and 195 Meadowland Drive being within some 200 metres of the subject property, both acquired for multi redevelopment purposes provided the best and only reliable market evidence for the assessment of the value of the reserve land owned by Nicoll. Mr Young stated to the Tribunal that in his opinion there was little movement in the

residential land market between his valuation date of early 2000 and the Council's claimed effective valuation date of November 1998.

[60] Mr Young in reaching his conclusion as to value categorically stated that he felt it was not necessary to consider sales of other vacant development sites acquired for multi unit development, as the sales in nearby Meadowland Drive provided him with sufficient evidence to reach a conclusion as to the market value of the subject reserve land.

[61] The Council called valuation evidence from Mr B A Cork, another experienced registered valuer. Mr Cork in his brief of evidence provided an assessment of the compensation payable to the claimant, with an assessed value for the land at $716,500 (inclusive of GST). This valuation was based on a notional 19 unit development, adopting a land component of $55,000 per residential unit less a deduction for agreed development costs of $210,937 plus further deductions for the cost of forming the cul de sac and the prospect of a sewerage upgrade levy being imposed on the sub-divider totalling approximately $117,565.

[62] In support of his assessment on the notional unit development approach, Mr cork also assessed the value of the property on a comparative area basis. On this approach he adopted a base value of $138 psm for the total site area and then deducted from the assessed figure of $1,252,600 an amount equivalent to approximately 15% to allow for the land lost because of the required overland flow path and the cul de sac formation. He also made further deductions for agreed development costs totalling $210,937 plus an allowance for extra costs for the formation of the cul de sac as well as the likely sewer upgrade totalling $117,565. This resulted in an indicative value on a comparative area basis of $736,230 (inclusive of GST). Interestingly this figure as submitted by Mr Cork at the Tribunal hearing, was substantially less than his earlier valuation advice to the Council under a previous report dated November 1999. At that time he assessed the value of the same land at $912,000 (inclusive of GST) based on $138 psm less a deduction for 7.5% for the area required for the overland flow path and a further allowance for infrastructure/development costs of approximately $246,375. In his earlier valuation

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advice of November 1999 Mr Cork had not made any assessment of the value of the property based on the notional unit development approach.

[63] In support of his assessed value for compensation at $716,500 Mr Cork detailed a number of sales of development land in the general Howick/Botany Downs area, with the majority of these sales being acquired for multi unit residential development purposes. Of the 12 sales referred to by Mr Cork, he concluded an adjusted per square metre rate applicable to the subject reserve land at $138 psm from which he then deducted the agreed development costs, together with further allowances for cul de sac formation and sewerage upgrade. His sales analysis included development sites ranging in area from 2602sm being a small development site in Kilkenny Drive, to larger development sites of 1.215 hectares and another at 1.1913 hectares in East Tamaki Road and Ti Rakau Drive. The analysed sales evidence included the two properties in Meadowland Drive namely Lots 194 and 195. However, Mr Cork included only those transactions which were recorded up to June 1999 and therefore excluded the agreement for resale dated May 2000 in respect of the property at Lot 195. Initially Mr Cork was of the view, however, that the sales of the two sites at Meadowland Drive between Nicoll, Thompson and Eclipse Fund Limited did not represent open market transactions as there was the suggestion of an association between the various principals.

[64] In respect of the subsequent resale of these two same parcels of land Mr Cork was firmly of the view that the sale of these two sites to Shannon Resources did not represent open market transactions and were “out of line with the wider range of evidence when analysed on a raw land value per unit basis”. He also stated it was not reliable to act on purported purchase offers, especially in the light of other evidence where sales have actually been completed. In the circumstances, he gave limited recognition to these market sales of development sites in Meadowland Drive, upon which Mr Young for Nicoll placed total reliance in his assessment of compensation. Mr Cork preferred to have regard to the wider basket of market evidence which included some 10 sales of other development sites, most of which were located to the south in the expanding development area of Botany Downs/East Tamaki.

[65] The council also called evidence from a Mr C F Hebditch, a property developer with considerable experience in the residential development market. Mr Hebditch produced a brief of evidence to suggest a value attributable to the subject land assessed on a residual development approach at $710,000 plus GST – assuming a 19 unit development as per the Harrison Grierson plan. Alternatively, Mr Hebditch opined that if a 24 residential unit development were possible, then the value of the land would increase to $935,000 plus GST.

[66] In reaching his conclusion as to the value of the land on the residual development approach, Mr Hebditch acknowledged that the development budget based on either a 19 or 24 unit development did include a number of variables. He also conceded that any minor adjustment to the figures contained within the budget could give rise to a substantial difference in the derived residual land value. This is best illustrated by reference to his budget where on the notional 24 unit development, he confirmed to the Tribunal that if the projected sale price of the 24 completed units were increased by say 5.0% then this would have the effect of increasing the land component from $935,000 to approximately $1,070,000, whilst if the sale price of the completed units were increased by 10.0% this would have the effect of increasing the derived land component to approximately $1,335,000.

[67] The residual valuation approach as adopted by Mr Hebditch must therefore be treated with a considerable degree of caution unless it is clearly supported by reference to and direct comparison with actual market transactions of other development sites analysed in a similar manner.

(d) Additional Development Costs

[68] The parties agreed that developments costs of $210,938 including GST should be deducted from the gross value of the land. A schedule of these costs is set out in Appendix 3 of Mr Smith's evidence. The Council submitted that additional costs associated with the creation of a cul de sac ($63,090) and waste water disposal ($64,395) should be added to this sum.

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[69] As far as the cul de sac is concerned, bearing in mind the Tribunal is not approving any particular development plan, the Tribunal considers that it is impossible to ascertain these costs with any particularity. Rather, an informed notional purchaser would provide a contingency against such costs. Based on the evidence, the Tribunal considers that the sum of $30,000 should be set aside to cover this contingency.

[70] Gerard Frances Cleary is an engineer employed by the Council in its water business unit. He stated that in the event of there being a development involving more than 18 residential units, a developer would be required to contribute towards the upgrade of a downstream waste water system in the sum of $64,395.

[71] Nicoll accepted that this was Council policy. However it claimed that it had already effectively paid this contribution when it did the original subdivision in Nicholas Road. Its argument was that if this land had been subdivided at the same time as the original Nicholas Road subdivision was done, then only one contribution would have been required. The obvious answer to this is that the Tribunal is not concerned with the original subdivision: rather, it is concerned with a second subdivision and such contribution as emanates from it. The tribunal accepts Mr Cleary's statement that each subdivision is treated separately. In any event, there is no evidence as to what contribution was paid when the original Nicholas Road land was subdivided.

[72] Nicoll advanced a second argument: that the land was not subdivided at the same time as the original Nicholas Road subdivision because of its reserve zoning and that it was known that it would be acquired by the Council. In these circumstances, its value was reduced by the amount of any second contribution because of the prospect of work on the land (the work being its taking and development as a reserve). This section 62(1)(c) argument was not supported by evidence. Whilst the shape of the land is some indication that, had the reserve not been contemplated, the subdivision of it and the Nicholas Road subdivision might have proceeded differently, there is evidence that the Meadowland land holding was subdivided in stages. There is no evidence that at any time was it contemplated that the Nicholas Road subdivision would have been carried out in conjunction with

other land. For the Tribunal to accept the argument, there had to be an evidential basis for it.

[73] Mr Cleary indicated that there was inadequate capacity in the public waste water system for a fully developed catchment including Nicoll’s land. If Nicoll disputed this, it was entitled to provide evidence of capacity in which case the contribution would be waived or reduced. Nicoll indicated that there was a dispute concerning the adequacy or otherwise of the public waste water system. Whilst Mr Cuthbert gave some evidence to support Nicoll's position, this was rather inconclusive. We prefer the evidence of Mr Cleary which supports the view that there is a real risk that the notional purchaser would be faced with the prospect of making a substantial contribution to meet the Council’s requirements in obtaining consent to a multi unit residential development exceeding 18 units. In the circumstances, the Tribunal considers that $64,395 should be added to the development costs figure which would be allowed for by a prudent informed purchaser.

[74] The Tribunal concludes that the additional development costs are:

Agreed costs:	$210,938
Cul de sac contingency:	$30,000
Waste water contribution:	$64,395
Total:	$305,333

CONCLUSION

[75] Having considered all the evidence presented by the valuers, planners and other expert witnesses, the Tribunal is of the view that the most appropriate manner in which to assess the value of the reserve land is to have regard to its specific location, its physical characteristics and potential for high density residential development.

[76] As indicated in paragraph 49, the Tribunal accepts that a prudent informed purchaser aware of the planning requirements applicable to this land and the prospect of having to make provision for an overland flow path to dispose of surface storm water, as well as meet associated developments costs, would base a purchase price for this property on a likely maximum development potential of up to 21 units.

[77] In determining the price to be paid for such a large development site accommodating up to 21 units consideration should be given to the following market transactions which, from the evidence presented to us, provide the clearest market indicators:

[i]	Lot 194 Meadowland Drive – maximum density 11 units	4023sm	
	sale price 9/98 -	$820,000	= $74,545 per unit
	Resale agreement 11/99	$945,300	
	site area 4023sm maximum density 11 units =	$85,936 per unit	
[ii]	Lot 195 Meadowland Drive – Maximum density 11 units	3839sm	
	Sold September 98 -	$730,000	
	Plus stormwater/drainage	$ 70,000	
	Effective price	$800,000	= $72,727 per unit
	Resale 6/99	$804,300	
	Plus allowance for Stormwater drain/engineering	$ 70,000	

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	Adjusted sale price	$874,300	= $79,480 per unit
[iii]	Eaglehurst Drive, East Tamaki – Developed for 8 units	3160sm	
	Sold 3/99 -	$540,000	= $67,500 per unit
[iv]	Claremont Way – Developed for 12 units	4357sm	
	Sold 4/99 -	$698,400	= $58,200 per unit

[78] These specific market transactions and others, provide a very clear indicator of the buoyant and strong market for multi unit development sites which existed from 1998 through to late 1999. The evidence also confirms what is generally recognised in the sale of large development sites, in that the greater the size or unit number that can be accommodated on a site, the lower the average price per unit/$psm. This is particularly evident from the two sales recorded in the Eaglehurst Drive and Claremont Way locality. These two properties are both in very close proximity and both development sites sold within one month of each other.

[79] Based on these key indicator sales it is evident that unit prices ranged from $58,200 to $85,936. Accepting the evidence that there was little market movement during 1998-1999, the evidence shows that the earlier sales of Lots 194 and 195 Meadowland Drive, rather than being high as suggested by the Council, were indeed conservative. The subsequent 1999 sales evidence in respect of these two lots, which the Tribunal accepts as bona fide sales, must be given significant weight.

[80] Recognising the various physical characteristics of the sales evidence in relation to the land, and the potential of a multi-unit development of up to 21 units, the Tribunal is satisfied that an appropriate unit rate is below that indicated by the 1999 sales of Lots 194 and 195, but above the development sites in Eaglehurst Drive and Claremont Way. The Tribunal determines a unit rate of $70,000 as appropriate in the circumstances. On this basis, the value of the land is as follows:

Maximum 21 unit development:
21 units @ $70,000 per unit = $1,470,000

Less allowance for:

Agreed development costs	$ 210,938
Allowance for sewerage upgrade	$ 64,395
Contingency/cul de sac costs - say	$ 30,000

Land value in 'existing state'	$1,164,667	(inc GST)
Say	$1,165,000	(inc GST)

[81] The Tribunal also accepts that an informed purchaser would have regard to prices paid by other developers/purchasers for larger land holdings in the general locality, and in particular those sites acquired for multi unit residential development purposes. In this respect, the Tribunal is of the view that the following development site sales in the general and wider locality provide a very useful guide as to the price to be paid for the subject reserve land acquired as a potential multi unit development site.

[82] The seven sales with appropriate adjustments for location, contour and other physical characteristics, do in our view, provide compelling evidence:

Location	Site Area	Sale Price/Date	Sale Price $psm	Adjust	Indic Value $psm
617 East Tamaki Rd	4028sm	9/97 $630,000	$156.40	+5.0%	$164.22
559 East Tamaki Rd	3922sm (4 titles)	9/98 $607,000	$154.77	+5.0%	$162.51
Eaglehurst Drive	3160sm	3/99 $540,000	$170.89	-5.0%	$162.35
Claremont Way	4357sm	4/99 $698,400	$160.29	-5.0%	$152.28
East Tamaki Road/Kilkenny Drive	1.2150ha	9/99 $1,528,000	$125.76	+7.5%	$135.20
Lot 194 Meadowland Drive	4023sm	9/98 $820,000	$203.83	-20%	$163.06
Resale Lot 194	4023sm	11/99 $945,300	$234.97	-20%	$187.98
Lot 195 Meadowland Drive	3839sm	9/98 $730,000	$190.15	-15%	$161.63
Resale Lot 195	3839sm	8/99 $804,300	$209.51	-15%	$178.08

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[83] The above summary of vacant development sites all purchased with potential for multi development, indicate prices adjusted to the Nicholas Road land, generally ranging from $162 to a maximum of $188 psm.

[84] Applying this to the undeveloped land in its existing state effective as at November 1998 provides a value as follows:

Site area 9077 sm @ $170 psm =	$1,543,090	
Less agreed development costs	$ 210,938	
Allowance for sewerage upgrade	$ 64,395	
Plus contingencies/possible additional cul de sac costs	$ 30,000	
Assessed undeveloped land value	$1,237,757	
– Say	$1,238,000	(inc GST)

[85] Having regard to both common denominators used in this case, we consider the appropriate compensation payable for the land is $1,200,000 (inc GST).

INTEREST

[86] The council submitted that no interest should be awarded because possession of the land remains with Nicholl. *Poverty Bay Catchment Board v Forge (supra)* was cited as authority. In that case, without discussion, interest was awarded from the date of possession. It seems clear that there possession post-dated the specified date. The case cannot be used as authority that the Tribunal should ignore section.94 Public Works Act 1981 which gives the Tribunal the power to award interest "*at such rate as it thinks fit………between the specified date , or where appropriate, the date on which the claimant gives vacant possession of the land (whichever is the later) and the date of making the award"*. As possession in this case has not been taken, in accordance with section 94 such interest as may be awarded should run from the specified date.

[87] Interest is awarded to compensate a successful party for not having the use of its asset or damages over the relevant period. Ever since the Council zoned the land as reserve, Nicholl has known that the Council would ultimately acquire the land for that purpose. In practical terms the land has been of no use to Nicholl since then. These comments are reinforced by those of McMullin J in the Court of Appeal in *Minister of Works v Cromwell Farm Machinery Ltd [1986] 2NZLR 29 at 36* when he referred to claimants in compensation cases as being forced to become litigants of a special kind because of the exercise of statutory powers of expropriation over which they have no control. In these circumstances, bearing in mind the statutory requirement for full compensation, this is a case where interest should be awarded to Nicholl from the specified date.

[88] The Council thinks that if interest is awarded it should be at between 6% and 8%. being the average floating first mortgage rates applicable during the relevant period. Nicholl seeks 11% being the highest rate allowable under the Judicature Act and District Courts Act. Neither of those statutes applies to compensation cases as section 94 and the *Cromwell Farm Machinery* case show. In that case interest at 14% was awarded: it was at a time when high interest rates were the vogue. The test is to determine what Nicholl could have earned on $1,200,000 had that sum had been available to it over the relevant period. There is no evidence. However, this aspect of the market place is well known to the Tribunal. Nicoll is a property developer. It is unlikely that a property developer would invest on first mortgages: something more akin to its occupation is more likely. Generally an investor in real property seeks to achieve a minimum of 10% return. Higher returns are often achieved from this type of investment but the higher the return the greater is the risk. In assessing interest in these circumstances the Tribunal must look at a relatively risk free investment return because the return is certain.

AWARD

[99] Compensation in the sum of $1,200,000 plus interest thereon from 26 November 1998 to the date of this decision at 10% is awarded to Nicholl. Costs are reserved. If costs cannot be agreed upon, Nicholl is to submit its memorandum in

support of its application for costs within 14 days of the date of this decision. The Council has 10 days thereafter to respond. Nicholl has 7 days thereafter to reply.

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Judge J D Hole (Chairman)