IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-007222

	BETWEEN	JOHN HALLIDAY HALL Appellant
	AND	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Respondent

Hearing: 27 and 28 October 2009

Court: Wylie J
Mr G J Horsley

Appearances: P J Dale and A H J Commons for the Appellant
M T Parker for the Respondent

Judgment: 9 December 2009 at 11:30am

JUDGMENT OF THE COURT

This judgment was delivered by Justice Wylie
on 9 December 2009 at 11:30am
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:
Hornabrook Macdonald Lawyers, P O Box 91 845, Victoria Street West, Auckland 1142
Crown Law, P O Box 2858, Wellington 6140

P J Dale, P O Box 130, Shortland Street, Auckland 1140

[1] The appellant, Mr Hall, challenges a decision of the Land Valuation Tribunal ("the Tribunal") released on 29 November 2005. The Tribunal fixed the current market value of land offered back to Mr Hall under the Public Works Act at $3,780,000 (excluding GST).

[2] The main issue before us is whether a hypothetical willing purchaser in May 2000 would have bought the land for future residential development, or for more immediate development as a farm park.

Background

[3] Mr Hall originally owned a farm property comprising some 253 hectares situated in the low hills west of Orewa. The property was divided into a number of titles. Approximately 150 hectares was in pasture and it was used for dairying. The balance was covered in mature bush. The property had originally been zoned general rural by the Rodney District Council in its transitional District Plan, but by 1996, and before it was acquired by the Crown, it had been re-zoned Special 11 (Hall Farm Development). This zoning had been promoted and actively sought by Mr Hall. It permitted a farm park type development. We come back to this below.

[4] In 1997 a designation was put in place for a motorway and the property was acquired by the Crown for motorway purposes. It wanted to extend the State Highway 1 motorway so as to bypass Orewa. That extension has now been completed. It bisects the property generally in a north to south direction and separates it into two distinct eastern and western portions.

[5] The Tribunal's decision is concerned with the eastern portion. This portion has a total area of 56.1199 hectares. It is contained in two certificates of title, each comprising a number of lots.

[6] The eastern portion is crossed by a road known as West Hoe Road. There is one block of land to the north of West Hoe Road and another to the south.

[7] The northern block contains 23.2959 hectares. It also has frontage to Sunnyheights Road along its eastern and northern boundaries. Its western boundary borders the motorway. The contour of this block is dominated by three main gullies. Each incorporates a stream and is bush clad. The contour of the balance of the land is rolling with gentle to medium slopes.

[8] The southern block contains 32.8240 hectares. This block is bounded by West Hoe Road to the north west, Maire Road to the north east and east and Grand Drive to the south. The motorway lies to the west. There is an elevated ridge, with two gullies converging in the southern most corner boundary. The contour over the south western part of this block is gentle to easy but the south eastern area is generally steep and broken.

[9] Both titles are subject to various easements and other encumbrances but nothing turns on these for present purposes.

[10] The whole of the eastern portion of the land lies between the motorway extension and Orewa. It is approximately 4 kms west of the Orewa retail and commercial centre and Orewa beach.

[11] The eastern portion of the land is no longer required for a public work. It was offered back to the appellant as required by s 40(2) of the Public Works Act 1981. The Crown obtained a valuation and it offered to sell the land to Mr Hall at a price of $3,250,000. Mr Hall rejected this price. Mr Hall and the Crown agreed that the price should be fixed by the Tribunal – s 40(2A). They also agreed that the current market value should be assessed as at May 2000.

The Land Valuation Tribunal's decision

[12] The Tribunal comprised a District Court Judge, Judge J D Hole, and two valuers, Messrs J W Charters and K G Stevenson. The matter was heard before the Tribunal over four days in September 2005. Its decision was issued on 29 November 2005.

[13] Mr Hall contended before the Tribunal that the market value of the land as at May 2000 was $2,190,000 (including GST). The Crown contended that the value of the land was $4,350,000 (excluding GST).

[14] The Tribunal recorded that its function was to ascertain how, in an arm's length transaction as at May 2000, a willing vendor and a willing purchaser would reach a price. It recorded that the transaction would occur after proper marketing, and that both vendor and purchaser would act knowledgeably, prudently and without compulsion. The Tribunal noted that an examination into the highest and best use of the land was required.

[15] The Tribunal recorded the competing arguments:

a) the appellant was contending that the highest and best use of the land was as a farm park in accordance with its then zoning in the Rodney District Council's plan; and

b) the Crown was contending that the highest and best use of the land was that it be retained undeveloped in the short term, but that ultimately it be used for intensive residential subdivision.

[16] The Tribunal concluded that the highest and best use of the land is for future intensive residential development, and that its development as a farm park in May 2000 was unlikely. Its conclusions in this regard were set out in paragraph 12 of its decision. We set that paragraph out in full because it was the focus of many of the appellant's arguments. It reads as follows:

> After a careful consideration of both viewpoints, the Tribunal concludes that the highest and best use of the land is for future residential development; and that its development as a farm park in May 2000 was unlikely. In this regard, it generally agrees with the arguments presented by the Crown as set out in paragraph 11. It is clear that the designation of the motorway had had a profound effect on the land as it effectively caused the future residential development at Orewa to be pushed westwards: the motorway provided an obvious barrier between the urban Orewa land and the undeveloped rural land to its west. This effect manifested itself in 1999 with an extension of the MUL and the subsequent Orewa West Draft Preferred Structure Plan. These both now included the subject block. Whilst these documents were simply of a strategic nature, no prudent and reasonable purchaser would have ignored

> their significance. As at May 2000, the farm park concept was untried; and the market for it was inevitably limited. It is difficult to understand how a developer of the land would restrict himself to that sort of niche development when the long term future of the land indicated a more lucrative return. At the relevant time, despite the flat market, there were developers acquiring blocks of land in the area for residential purposes. It was inevitable that anyone acquiring this land would have to compete in that market – even if a farm park subdivision was being contemplated. Even if the reasonable and prudent purchaser did not appreciate this, the willing vendor could not be expected to have closed his eyes to it.

[17] The Tribunal then went onto consider the applicable valuation methodology. It referred to the valuation evidence called by both parties. It preferred an approach based on comparable sales. It considered that alternative valuation methods, such as a hypothetical subdivision valuation, or a discounted cashflow valuation, were inappropriate to use as the primary valuation method. It noted that each of these possible valuation methods is dependent on various indeterminate and debateable inputs, and that a variation in any one input can make a very significant difference to the result. It noted that there were comparable sales in the present case and that there was significant agreement on most of the relevant inputs. It preferred to base its conclusion on those sales.

[18] The Tribunal then went on to consider the comparable sales evidence. It noted the different approaches of the valuers called by the respective parties. It noted that there were significant limitations in regard to some of the land, and in particular, that parts of it were so geographically unstable that they could never be used for residential development. It broke the land into four areas – three of which could be used for development subject to varying degrees of constraint. It adopted a value of $80,000 per hectare for land that was marginally stable and considered to be subject to further instability. It applied the same rate to land with moderate and variable constraints, because as at May 2000, it considered that it would have been difficult, if not impossible, for both a hypothetical vendor and a hypothetical purchaser to know the extent of the geographical constraints. It took the view that the appellant was entitled to the benefit of any doubt that might exist in regard to the land and therefore it amalgamated all land subject to moderate or variable constraints for the purpose of the valuation exercise. The land that was suitable for development, with more limited constraints, was valued at $92,000 per hectare, and

the residual land, with very limited future residential potential, was valued at $25,000 per hectare.

[19] It noted an argument submitted for the appellant that the Crown had previously offered the land for sale at a price of $3,250,000 and that this in some way constrained the fixing of the current market value. It took the view that its function was to determine the current market value of the land in accordance with s 40(2) of the Act, and that the appellant's suggestion that the value was constrained, or that the Crown was estopped, by the previous offer did not express the section's purpose. It considered that the expression "current market value" contained in s 40(2) of the Act is unequivocal and that it does not require any purposive interpretation. It took the view that it was not concerned to interpret the contractual provisions prepared between the parties and further that it did not have jurisdiction to do so. It considered that the Crown's original offer did not preclude it from deciding the current market value of the land.

[20] In summary, it concluded that the current market value of the land as at May 2000 was $3,780,000 (excluding GST).

Notice of appeal

[21] The notice of appeal asserts that the Tribunal erred in concluding that the highest and best use for the land was intensive residential development and that its development as a farm park in May 2000 was unlikely.

[22] The notice of appeal also asserted that the Tribunal erred in holding that it was not limited to the Crown's original offer of $3,250,000. This ground, however, was not advanced in the appellant's points of appeal. It was not argued before us by Mr Dale appearing on behalf of Mr Hall and he confirmed that it is not pursued as a separate ground of appeal. We therefore do not take this issue any further.

The appeal

[23] The appeal is brought under s 26 of the Land Valuation Proceedings Act 1948. That section provides that every such appeal is by way of rehearing. The Court has the power to confirm, discharge or vary the order of the Tribunal, or direct that the matter be referred back to the Tribunal for further consideration as it thinks fit. Generally it is for the Court to make such order as it considers just and equitable in the circumstances of each case.

[24] The approach the Court takes on appeals from the Tribunal was discussed in *Kent's Nurseries & Anor v Upper Hutt City Council* HC WN CIV 2005-485-1958 6 August 2007, Mallon J and Mr R P Young. The Court there noted as follows:

> [49] Any person affected by an order of the Tribunal may appeal to the High Court. The appeal is by way of rehearing. The High Court may confirm, discharge or vary the order of the Tribunal, or refer it back to the Tribunal for further consideration. It may generally make such order as it considers just and equitable in the circumstances of the case.
>
> [50] This means that this Court considers itself the matters that were before the Tribunal and which are the subject of the appeal. It does so on the basis of the record from the Tribunal and must bear in mind any advantages the Tribunal had in seeing and hearing the witnesses and, in this case, in inspecting the property.

[25] The general approach the Court should take on appeals by way of rehearing was discussed in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141. The Supreme Court noted as follows:

a) the appellant bears the onus of satisfying the appeal court that it should differ from the decision under appeal – see [4];

b) it is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it – see [4];

c) the appeal court has the responsibility of arriving at its own assessment on the merits of the case – see [5];

d) no deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because, e.g. credibility is important – see [13]; and

e) the appellate Judge is entitled to use the reasons of the first instance decision maker to assist him or her in reaching his or her own conclusions, but the weight the Judge places on them is a matter for the Court – see [17].

[26] The position is summed up in the judgment of Elias CJ at [16] as follows:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[27] We have adopted this approach in considering this appeal.

Competing submissions

[28] Mr Dale argued that the Tribunal erred in concluding that the highest and best use of the land is for future intensive residential development. He submitted, first, that there was insufficient evidence to support that conclusion, and, secondly, that the possibilities for future residential subdivision are too uncertain, both as to timing and as to outcome. He also noted the geotechnical issues and submitted that the evidence did not provide any proper basis for assessing the current market value of the land at $3,780,000 as at May 2000. He submitted that comparable land sales evidence relied on by the Tribunal was unhelpful and that the properties involved in those sales had greater potential for subdivision and/or were under a different zoning regime with greater potential and less risk. As Mr Dale put it, in the case of Mr Hall's land, the possible "upside" associated with residential subdivision was simply "too far out". He argued that the extent and subjective nature of the adjustments made by the Tribunal, to account for prospective intensive residential subdivision,

were such that there was no proper basis for fixing the land's current market value by reference to its future subdivision potential. He submitted that valuing the property in accordance with its existing zoning of Special 11 (Hall Farm Development) was appropriate, because there was minimal risk attached to any development in accordance with that zoning, and because there were no uncertainties as to timing and outcome.

[29] The Crown's case was that the effect of the motorway, plus other changes, such as the inclusion of the land within the Auckland Regional Council's metropolitan urban limit, and the identification of the land in a structure plan for Orewa, showed that it was suitable for future residential development and that in effect, the Hall farm special zoning was obsolete, at least as far as the subject land was concerned. Mr Parker for the Crown submitted that the highest and best use of the land was for more intensive future residential development. He argued that a likely purchaser as at May 2000 was somebody, probably a developer, who would hold the land for future development when the appropriate planning changes were implemented.

Analysis

Market value

[30] Section 40(2) required the Tribunal, and requires this Court on appeal, to determine what was the land's market value. There is no dispute that that value has to be determined as at May 2000.

[31] A property's market value is arrived at by determining what price the property would sell for on the open market, under the normal conditions applicable in the market, for the type and location of the property being valued – see *Boat Park Ltd v Hutchison* [1999] 2 NZLR 74 at 83.

[32] Fundamental to the valuation task is the willing seller-willing buyer principle. This is recognised in the International Valuation Standards Committee Valuation Standards, 2007. The concept of market value is there defined as follows:

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

(see *Australia and New Zealand Valuation and Property Standards*, published by The Australian Property Institute, October 2009 Edition (N.Z.) – Chap 3, para 5.2, p 3.4.4.)

[33] As might be expected the approach detailed in the Standards reflects the case law. The *locus classicus* in this area of the law is the decision of the High Court of Australia in *Spencer v Commonwealth of Australia* (1907) 5 CLR 418. Isaacs J there noted at 440-441:

> All circumstances subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts, and the all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted. ... To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.

[34] It will be noted that Isaacs J refers to the hypothetical prudent purchaser purchasing the land for the most advantageous purpose for which it is adapted. This has become known as the highest and best use and a valuer will normally estimate market value by considering the highest and best use of the subject property. This is because it is assumed that a prudent and well informed vendor will not willingly part

with his or her land for a price less than that appropriate to its highest and best use, and the well informed buyer would not expect to be able to purchase it for less. See R. O. Rost and H. G. Collins, *Land Valuation and Compensation in Australia* (3ed 1984) at 90, cited with approval in *Valuer-General v Tepene Tablelands Ltd* [1993] 2 NZLR 336.

[35] The valuation of land for its highest and best use demands that due weight be given to its potential utility and to the probability of consent being given for such potential use. Potential utility refers to a latent and more beneficial use which may be capable of coming into being, or use existing as a possibility only – see Rost and Collins, supra., p 91; *Tepene Tablelands Ltd* at 345.

[36] It has been argued that the expression "highest and best use" should be discarded in favour of the expression "most probable use" – see R T M Whipple, *Property Valuation and Analysis* (1995) at 139 to 173, especially at 141 to 145. There is some force in this argument although we recognise that the expression "highest and best use" is now in common usage. Nothing turns on any semantic analysis, although it is noteworthy that the International Valuation Standards, adopted by the New Zealand Institute of Valuers, define the expression "highest and best use" as:

> The most probable use of a property which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the property being valued.

(see Australia and New Zealand Valuation and Property Standards, Chap 3, para 6.2 – 6.3, p 3.4.5, and see para 4.2 – "Market Value Basis of Valuation", pp 4.2.1 *et seq*.)

[37] The Courts have recognised that where land possesses unusual or unique features, for example it has potential for an alternative use in the future, then the value of that potentiality must be ascertained from the materials available before the Court. The Court should not, in doing so, indulge in feats of imagination – see, e.g. *Tawharanui Farm Ltd v Auckland Regional Authority* [1976] 2 NZLR 230 at 235; *Raja Vyrichera Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302 at 316; *Tepene Tablelands Ltd* at 345.

[38] Potential use refers to uses to which the land is reasonably capable of being put in the future. In *Tepene Tablelands Ltd*, it was noted at 345 as follows:

> Potential use means a use which is a realistic possibility in the foreseeable future. Moreover, foreseeable future itself does not have a very extended life. Without trying to being definite about it we think that it is unrealistic to anticipate that a purchaser of land will, except in the most extraordinary circumstances, be thinking ahead much more than the next decade. That is, therefore, the timeframe of the foreseeable future in this context. Furthermore, potential which will be realised, if at all, towards the end of the period of the foreseeable future is much less likely to be reflected in the value of land than something which has a realistic possibility of occurring within the next few years. There is no rule of thumb for this kind of assessment and it is unlikely to be helpful if we were to explore it further.

[39] Mr Dale urged us to accept that the hypothetical willing purchaser should be considered to be risk adverse. He referred us to the decision in *Chief Executive of Land Information New Zealand v Luke* HC AK CIV 2007-404-0057 11 May 2007 Harrison J and Mr P Young.

[40] We are not persuaded that there is anything to be gained by clothing the hypothetical willing purchaser with this attribute. In *Luke* the land in question was designated for defence purposes. Its underlying zoning was rural. The council wished to develop the land for a marine industry cluster and it had agreed to purchase the land for this purpose. The respondent argued that the hypothetical willing purchaser was a developer who would acquire the land for residential development and that this was its highest and best use. At issue was whether or not a hypothetical purchaser would have assumed that he or she could secure residential zoning in the face of the council's opposition and preference to develop the land for the marine industry. Both the Land Valuation Tribunal, and the High Court on appeal, considered that a prudent, well informed and "risk adverse" developer would hardly be likely to speculate on a favourable result, through exercising his or her statutory rights of challenge to the council's commitment, by agreeing to pay a higher price fixed according to residential use. The Court considered that prudence and familiarity with the legal process would inform the hypothetical developer that he or she would be buying years of litigation, with the associated costs and loss of opportunity on capital, without a probable or real prospect of success.

[41] The notion of a risk adverse developer discussed in *Luke* has to be seen in context. The Tribunal and the Court were considering the hypothetical willing purchaser's appetite for the risks involved with any residential development in the face of the Council's opposition. While both the Tribunal and the Court referred to a risk adverse purchaser, in reality they were considering what a prudent and knowledgeable purchaser would do. In our view, attributing risk adversity to the hypothetical willing purchaser adds nothing to the concept because the willing purchaser is considered to be acting knowledgeably, prudently and without compulsion. We decline to accept Mr Dale's argument.

[42] In the present case the Tribunal recorded that it was obliged to ascertain how, in any arm's length transaction as at May 2000, a willing vendor and a willing purchaser would reach a price. It noted its assumption that the transaction would occur after proper marketing and that both vendor and purchaser would act knowledgeably, prudently and without compulsion. It noted that an examination into the highest and best use of the land was required. In our judgment the Tribunal's approach to the issues before it cannot be faulted.

[43] Against this background, we turn to consider what was the highest and best or most probable use of the subject property as at May 2000. As noted the appellant argued that the highest and best use was a farm park type development – with the 56 hectares being subdivided into 57 lots and with the balance being held in common ownership. The Crown argued that the highest and best use was a more intensive residential subdivision into 227 to 252 lots.

[44] The evidence established that as at May 2000 there were two primary factors that a knowledgeable and prudent purchaser would have taken into account – first the land's planning status, and secondly, its physical limitations.

Planning status

[45] Both parties adduced expert planning evidence.

[46] It was common ground that a prudent purchaser informing himself or herself about the land in May 2000 would have had regard to the operative planning documents at both district and regional level, to any draft planning documents, and to any other pertinent reports or documents which might suggest how the regulatory regime could change in the future.

[47] As at May 2000, the following regional documents existed:

a) **Auckland Regional Policy Statement:** This had been operative since 31 August 1999. It showed the land as being included within the metropolitan urban limit. Initially the regional council did not include the land within the metropolitan urban limit, but the district council appealed to the Environment Court and the metropolitan urban limit was extended by consent.

b) **Proposed Regional Plan Sediment Control:** This required that any earthworks for the development obtain consent as a restricted discretionary consent. The document was not operative.

c) **Regional Growth Strategy 2050:** This document had been adopted in November 1999 and it showed the subject land as "future urban". This document had no statutory force. It had, however, been jointly adopted by the regional council and by all territorial authorities in the region. As at May 2000, it was regarded as an influential contextual document when considering future development areas. It provided a framework for future decision making.

[48] At the district level, there was:

a) **Rodney District Council's Transitional District Plan:** It had been operative since 1993. The subject's land was zoned Special 11 (Hall Farm Development Area) zone. That zoning had been introduced in 1996.

b) **Proposed Plan Change 62:** This introduced financial contributions. It was not operative.

c) **The Draft Orewa West Structure Plan:** This had been released on 28 March 2000. It identified large parts of the land as being suitable for residential development. Parts were shown as being suitable for medium intensity development, parts for medium low intensity development and parts for open space. Two possible school sites were shown.

[49] In November 2000 the proposed District Plan was notified. Although this document was referred to by the planners – in particular Mr Julyan for the Crown – we accept that it should be disregarded. The evidence established that the Rodney District Council maintained strict confidentiality about its draft proposed plan. The most that a prospective purchaser would have been able to glean as at May 2000 was that the proposed plan was in draft form, and that it had been in the course of preparation since 1998. It was not known when the proposed plan was to be notified. It was known that the Rodney District Council was late with the release of its proposed plan and it could probably have been anticipated that the proposed plan would have been notified in late 2000 or early 2001. The hypothetical willing purchaser would not have considered it likely that the Draft Orewa West Structure Plan could have influenced the proposed district plan. The structure plan was then in draft only, and it would have been very unlikely that it would be finalised before the proposed plan was notified.

[50] Both the 57 lot farm park type development advocated for Mr Hall, and the 220 plus residential development advocated for the Crown, would have required resource consent as at May 2000.

[51] The farm park development would have required resource consent, because the operative zoning applied to the whole of the original farm – some 253 hectares. The intention of the zoning was to create a buffer between the rural area to the west, and the urban area of Orewa, by providing for low density rural residential type development. The total number of privately owned lots permitted was 200. The

transitional plan contained a concept plan and required that development generally be in accord with that plan. The concept plan did not show the motorway designation. Nor did it show another designation in relation to Grand Drive. It was common ground that these changes, which were subsequent to the introduction of the zone, made it impossible for the subject land to be developed in a manner generally consistent with the concept plan. The planners agreed that a subdivision comprising some 57 lots as proposed by Mr Hall would require resource consent as a non-complying activity and that it would be processed on a notified basis. Mr Warren for the appellant estimated that if there were no appeals, consent could be obtained within a 12 to 14 month period and that if there were appeals, consent could be obtained within a 30 to 39 month period. He considered the prospects of securing the requisite resource consents were good. His views were supported by another planning witness called by the appellant – a Mr Hartley. Mr Julyan considered that the outcome was more difficult to predict. Another planning witness called by the Crown, Mr Bradbourne, agreed that he would have advised a client in May 2000 that a positive outcome would have been likely and that a 57 lot residential subdivision would ultimately have been granted the necessary resource consent approvals. He also agreed with the timeframes suggested by Mr Warren.

[52] Accordingly we accept that a 57 lot farm park development was a potential use which could have been made of the land, that it was likely that the requisite consents could have been obtained, and that they could have been obtained within a 12 to 39 month timeframe.

[53] Any proposal for a residential subdivision comprising 220 plus lots also required resource consent as a non-complying activity. It would also have been notified. Mr Warren considered that any such application would have been unlikely to succeed as at May 2000. In his view it could not pass either of the threshold tests contained in s 105(2A) of the Resource Management Act 1991, because the district council had not completed the structure planning exercise and introduced appropriate zoning into the district plan, and because infrastructural issues were far from resolved. In his opinion, the prospects for approval of more intensive development were reliant on completion of the structure plan process and its adoption by the council. He stated that in May 2000, he would have advised a prospective purchaser

that the introduction of the structure plan provisions into the then un-notified proposed district plan was at least five years distant and probably much further away. He noted that the introduction of the structure plan proposals would have necessarily been by way of a variation to the proposed district plan. A privately initiated plan change was not then possible, because such a change can only be sought in relation to an operative district plan. He considered that it would not be unrealistic to suggest that implementation of the structure plan through the district plan provisions could be as far away as 10 years. He suggested that a likely timeframe would be 9 to 10 years.

[54] Mr Warren's views were supported by Mr Hartley. He accepted that a shorter timeframe may have been possible, but only on a "best case" scenario.

[55] Mr Julyan did not comment on the prospects of success on any resource consent application for a 220 plus lot residential subdivision. Rather he considered that it would have been reasonable for a developer to expect that the draft Orewa West Structure Plan would be incorporated into the proposed district plan within approximately five years.

[56] Mr Bradbourne noted that finalisation of the draft Orewa West Structure Plan, and its inclusion into the district plan would have provided the means to bring about a more positive outcome for a non-complying activity application. He thought it may have been possible for subdivision approvals, based on the structure plan, to be in place within approximately 8 years. He acknowledged that there was a risk that that timeframe could extend out to 11 years.

[57] In cross-examination, Mr Julyan accepted Mr Bradbourne's evidence in this regard.

[58] On the evidence, we accept that a knowledgeable and prudent purchaser as at May 2000 would have been aware that it was unlikely that a 220 plus lot residential subdivision could have acquired the requisite resource consents in the short term.

[59] Mr Warren in his brief of evidence suggested that no weight should be given to the draft Orewa West Structure Plan, and that as at May 2000, a prudent purchaser could not have been confident about what provision would ultimately be made for development of the subject property in the final version of the plan, or when that final version would be adopted by the council.

[60] We do not agree with this assessment. Rather we think Mr Bradbourne's conclusion is more realistic. A knowledgeable and prudent purchaser would have been aware of and considered the regional and district planning documents. They indicated that the property had been identified for inclusion in any future urban area.

[61] In our judgment the Tribunal did not err when it concluded in paragraph 12 of its decision that no prudent and reasonable purchaser would have ignored the significance of the extension to the metropolitan urban limit, and of the subsequent draft Orewa West Structure Plan. We accept that these documents were non statutory but we agree with the Tribunal that the motorway designation put in place in 1997 provided an effective and obvious barrier for development between urban Orewa and the undeveloped farm land to the west. In our judgment a knowledgeable and prudent purchaser in May 2000 would have been aware of the possibility the subject land would be re-zoned for residential development, and to the possibilities which that re-zoning would offer. He or she would also have been alive to the likely timeframe – namely 8 to 11 years. Similarly, the hypothetical willing vendor would have been aware of these issues.

[62] The timeframe is certainly reasonably long. We agree in general terms with the observations in *Tepene Tablelands Ltd*. The longer the timeframe, the less likely it is that potential foreseeable uses will be reflected in the value of the land. As against this, there is the fact that both the regional and territorial authorities were in broad agreement as to the future use to which the land should be put. In our experience, such agreement, while not unique, is rare. Moreover, it is not a situation where one form of development could be undertaken immediately as opposed to another some years hence. Both probable uses required planning consent. On a worse case scenario for each, the difference was between 39 months and eleven years – a difference of seven and three-quarter years.

Geotechnical constraints

[63] Both parties called a number of specialist engineers and surveyors who gave evidence in regard to land stability, geotechnical issues and the likely costs of the engineering works necessary to ready the land for subdivision.

[64] We have touched on the contour of the land above. The engineers generally agreed on the geological condition of the land and on the constraints it presented for future development.

[65] A Dr Toan, who was called by the Crown, classified the land into three principal zones:

a) Zone A which he considered was suitable for medium to high density development with few constraints;

b) Zone B which was suitable for low to medium density development with some care and possibility some stabilisation measures; and

c) Zone C – less stable land, suitable only for low density development, requiring detailed investigation and likely to need cost stabilisation measures. Zone C was divided into a number of sub-zones.

[66] Evidence was given by a Mr Chapman for Mr Hall. Mr Chapman did not take issue with much of Dr Toan's analysis. Rather his evidence tended to emphasise the geotechnical uncertainties. He asserted that there were significant risks attached to the land, in particular with groundwater, and that further geotechnical analysis would be required.

[67] Mr Melville-Smith called by Mr Hall gave evidence that approximately 30% of the site fell within Zone A, 25% within Zone B and 45% in Zone C. In oral evidence Mr Archbold, a surveyor, confirmed that Zone A comprised 19.1 hectares, Zone B comprised 10.9 hectares and Zone C comprised 9.1 hectares. The balance of the land was covered with vegetation and was steep or unstable.

[68] Mr Archbold prepared concept subdivision plans showing what development was possible given the land's geotechnical constraints.

a) One of the plans produced showed a 57 lot farm park type subdivision. The residential lots able to be created were within either Zones A or B and in areas identified as being suitable for development. It was this plan which was used by the valuer called by Mr Hall – a Mr Colcord – in undertaking his valuation.

b) The other plan was based on the Draft Orewa West Structure Plan. It showed that the land could be developed for a 227 lot subdivision, again predominantly using land identified as being within either Zone A or B. This plan was used by the Crown's valuer – Mr Roberts – in preparing his valuation. A further plan was prepared showing development of some of the more marginal Zone C areas. If these areas were stabilised, it was possible to obtain an additional 25 lots.

[69] There was some difference of opinion between the experts as to the costs of undertaking the requisite engineering works. The earthworks necessary for the 220 plus lot subdivision were assessed by a Mr Melton for the Crown at $15,277,000 or $67,300 per lot. The costs for a 57 lot subdivision were assessed at $4,638,000 or $81,400 per lot.

[70] A Mr Tik, who gave evidence for Mr Hall, accepted that these costs were reasonable, but he suggested that they did not allow for any geotechnical stability, ground water, or issues relating to the potentially difficult nature of the earthworks to be undertaken. He considered that the value of the earthworks might have been significantly under estimated.

[71] As against this, we are mindful that Dr Toan discussed the role of ground water, and the need for it to be reticulated. The plans produced by Mr Archbold proposed onsite treatment through a reticulated stormwater. A Mr Stenberg who gave evidence on behalf of the Crown, confirmed that the areas to be developed were those areas where instability was unlikely and major earthworks could be avoided.

He also confirmed that the earthworks estimate included estimates for the treatment and retention of all reticulated stormwater and road run off.

[72] The Tribunal did not get into the detail of this debate. Nor do we. It is not necessary to do so, because as we observe below, there is comparable sales evidence. A hypothetical subdivision calculation, or a discounted cashflow analysis, is unnecessary, and indeed in many respects inappropriate.

[73] Having considered the evidence, we are satisfied that the geotechnical constraints applying to the land did not preclude a 220 plus lot subdivision. Nor did they preclude a 57 lot farm park type development. In both cases the geotechnical constraints could be addressed with the appropriate remediation works. While further investigation was necessary, there was nothing inherent in the nature of the land which would have frightened off the hypothetical willing purchaser, or which would have dampened the expectations of the hypothetical willing vendor.

[74] Nor is there anything in the evidence to suggest that the Tribunal erred when it broke the land down into four areas – Areas A, B, C and the balance of the land. Indeed given the evidence, an analysis based upon the land areas, and the different remediation works required in relation to each, was in our view appropriate. We are also satisfied, on the evidence, that as at May 2000, it would have been difficult for any prospective purchaser to know the full extent of the geotechnical constraints, particularly with the Zone B and C land. We agree with the Tribunal's observations in this context and we agree that therefore it was appropriate to treat both areas of land in the same way for the purposes of the valuation exercise.

Other evidence

[75] In our view there is also force in the argument made for the Crown, namely that a farm park type development close to the motorway might not have the sort of appeal to lifestyle owners as land further away from such an intrusive influence. That in our view is a realistic concern. We also note that the evidence disclosed that as at May 2000, nobody in the area had developed a farm park style development. It

was an unknown concept as far as the market was concerned. These factors militate against the arguments presented for Mr Hall.

Highest and best use

[76] In our view, the Tribunal's conclusion that the highest and best use of the land as at May 2000 was future residential development was correct in regard to much of the land. The portents were favourable, and both the hypothetical willing vendor, and the hypothetical willing purchaser, would have been aware of those portents. Both would have recognised that it was likely that the land would be re-zoned for residential purposes, albeit over a 8 to 11 year timeframe, and neither would have discounted that likelihood in agreeing on the land's then market value.

[77] We now turn to consider the valuation evidence.

Valuation evidence

[78] It is the possibility of the land being used for more intensive residential development which in our view has to be taken into account. That possibility has to be recognised, because we have found the highest and best use for much of the land as at May 2000 was for future residential development. We bear in mind that the land should not be valued as though it had already been built on. It is the possibilities offered by the land, and not its realised possibilities that must be taken into consideration – see *Raja Vyrichera Narayana Gajapatiraju* at 313; and *Carlton Heights Ltd v Minister of Works* [1963] NZLR 973 at 976.

[79] The appellant called valuation evidence from a Mr Colcord. Unfortunately, Mr Colcord did not base his analysis on the highest and best use of the land. Rather, he based his analysis primarily on sales of land with potential not dissimilar to that available under the Special 11 Hall Farm Development Zone. He took the view that that use was the highest and best use for the land as at May 2000. He considered that any prospective purchaser of the subject block would have taken this option, as being the lower risk option.

[80] As we have already noted, in our view Mr Colcord was in error in this regard, and as a result, his valuation is not of great assistance.

[81] We record that Mr Colcord concluded – based on comparable sales – that the land was valued at $40,000 per hectare and that its total value, with some adjustments in respect of land subject to covenants, was $2,188,000. The sales evidence referred to by him comprised land which was either zoned for rural purposes or for "Countryside Living". The rate per hectare disclosed by these sales ranged from $36,881 to $65,175. He considered the hypothetical subdivision approach ($2,150,000) and the discounted cashflow approach ($2,229,000) and adopted a market value of $2,190,000.

[82] Mr Colcord did go on to consider the draft Orewa West Structure Plan, and he did collate evidence of some sales, to show that a market did exist for land with potential, but only on the basis that the potential could be realised either immediately, or within a very short timeframe. The sales of land referred to by him in this context ranged in value from $124,026 to $203,737 per hectare. He considered that these blocks were not comparable to the subject site, and that the sales could not be compared without major subjective adjustments which tended to distort the quality of the comparison. Having excluded evidence of comparable sales, he then went on to express the opinion that it was more appropriate to adopt either the hypothetical subdivision approach, or the discounted cashflow approach in arriving at a value for the land. Using the hypothetical subdivision approach, he assessed a negative value to the land as at May 2000 of $2,856,000. Using a discounted cashflow approach, he considered that the land was valued at $429,000 excluding GST. His calculations showed a positive cashflow - $6,934,908, but the effect of discontinuing and deferring the cashflow reduced the value to $429,000.

[83] The Crown called evidence from two valuers – a Mr Roberts and a Mr Gamby.

[84] Mr Roberts had prepared an initial valuation dated 2 September 2002. That valuation had an effective date of May 1999. Mr Roberts expressed the view that the highest and best use value for the land was urban development at some future stage.

He considered evidence of sales of land zoned or likely to be zoned for future urban uses. The evidence included sales of "green field" sites situated within the Orewa/Silverdale area which had occurred on or around the relevant date. Mr Roberts was assuming that the subject land would be able to be subdivided within a four to five year time frame, and that the subdivision would yield approximately 150 lots. He adopted a valuation of $55,000 per hectare, giving an overall valuation of $3,086,595.

[85] Mr Roberts undertook a further assessment as at May 2000. That further assessment was based in the draft Orewa West Structure Plan. It took into account the various subdivision options identified in the plans referred to above. He referred expressly to subdivision plans showing a 57 lot yield under the Special 11 Hall Farm Development Zone, a 227 lot yield based upon the draft structure plan, and a 252 lot yield again based on the draft structure plan together with the partial development of some of the marginal areas. He adopted the development costs estimated by Mr Melton. Mr Roberts' preferred approach was to use comparable land sales. The future urban block land sales referred to by Mr Roberts included land in the Silverdale area, and also in Orewa and in Whangaparaoa. A number of the blocks of land were affected by draft structure plans. A number had been purchased by Fulton Hogan Holdings, a property development company. On a per hectare basis, the prices paid ranged from $64,128 per hectare to $274,801. Most were in the range of $140,000 to $165,000. In most cases the structure plans were still in draft but they had been in the public domain for rather longer than the draft Orewa West Structure Plan. Mr Roberts assessed most of the subject land at $80,000 per hectare, giving a valuation, based on a potential yield of 227 lots of $4,248,660. Other land referred to as "tolling land" was valued at a lesser per hectare figure, to give a total market valuation of $4,490,000. He also valued the property by reference to the hypothetical subdivision plans which had been prepared, and by reference to the discounted cashflow method. He assessed the market value at $4,350,000.

[86] Mr Gamby summarised the comparable sales evidence of both Mr Colcord, and Mr Roberts. He undertook a review of both valuations. He took the view that if there was an adequate volume of comparable sales of land that had subdivision potential now or in the future, this was the best evidence from which to commence a

valuation of the subject land's subdivision potential. He expressed the view that there was ample comparable sales evidence to consider. He noted that neither the hypothetical subdivision approach, nor the discounted cashflow approach provided robust conclusions. He endeavoured to stand back and look at the land sales evidence, and to consider what a prudent purchaser would do favoured with all the information in the market as to the land's constraints and opportunities. He expressed the opinion that the comparable land sales approach provided the best evidence as to value, and that the future subdivisional potential of the land had to be accounted for by an adjustment upwards to rural residential lifestyle block values, or downwards from the future residential block values. He noted that the Special 11 Hall Farm Development Zone provided the start for a fall-back valuation, but that it had to be adjusted upwards to reflect the additional value of the future subdivisional potential. He considered that the subject land's value could be around $3,650,000, exclusive of GST.

[87] As noted, the Tribunal concluded that the highest and best use of the land was for future residential development. It was critical of Mr Colcord's use of lifestyle block sales, saying that it could not accept his valuation based upon that sales evidence. It dismissed any valuation based on a hypothetical subdivision approach, or on a discounted cashflow approach. It considered that the inputs required for both approaches were too uncertain to assist. It placed the land into three main categories, and used rates per hectare varying between $92,000 and $25,000, to arrive at a rounded valuation of $3,780,000.

[88] The valuations can be summarised as follows:

Mr Colcord: $2,190,000 ($40,000 per hectare)

Mr Roberts: $4,350,000 ($80,000 per hectare)

Mr Gamby: $3,650,000 ($65,000 per hectare)

Tribunal: $3,780,000 ($67,000 per hectare)

The per hectare figures are approximate only and are noted simply for the purposes of comparison. Each valuation was undertaken on a more detailed basis allocating certain values to some parts of the land and other values to other parts of the land.

[89] We have agreed with the Tribunal that the highest and best use, or the most probable use of the land, is for future residential development. There was sales evidence of comparable land. It could not be ignored as Mr Colcord suggested. In our view Mr Gamby's views in this regard were correct. The comparable sales evidence, in the circumstances, provided the best evidence to support the valuation. Having considered the evidence, we accept that the comparable sales evidence that was available was capable of being analysed to reach a conclusion as to the market value of the subject land as at May 2000.

[90] We are mindful that the valuers and the Tribunal inspected all of the comparable properties. It is clear from the evidence and from the Tribunal's decision, that all were aware of the limitations and constraints relevant to each. Valuation is a subjective exercise, and in our view the Tribunal was entitled to take the approach it adopted. The comparable sales evidence did justify a per hectare value of $92,000 for the most easily developed land and a figure of $80,000 for the land which required rather more remedial engineering works. A value of $25,000 for the balance of the land was also appropriate. The existence of that residue land, retained in its natural state, adds to the amenity of the prospective subdivision.

[91] Mr Dale submitted that a per hectare figure of $92,000 for the best land was excessive given that Mr Roberts' value on a per hectare basis was $80,000. This argument does not stand close analysis. Mr Roberts valued most of the land, a total area of 55.7204 hectares, at $80,000 per hectare. The Tribunal valued only the area A land, with a total area of 19.1 hectares, at $92,000 per hectare. This figure was towards the bottom end of the comparable sales values discussed by Mr Roberts and Mr Gamby. We accept that it was appropriate because the land the subject of the comparable sales evidence was subject to different structure plans which were generally at a more advanced stage than the draft Orewa West Structure Plan. As noted above, if the Tribunal's total valuation is extrapolated across all of the subject

land, it produces a per hectare figure of $67,000. That figure is readily justifiable by references to the comparable sales evidence.

[92] It is clear to us that Mr Roberts and Mr Gamby valued the land by reference to its potential. They did not assume a successful and completed residential development. This is because both followed a comparable sales approach, which necessarily reflected the potential offered by the land. The Tribunal followed the same approach in its decision.

[93] The hypothetical subdivision approach, and the discounted cashflow approach assume a completed residential development. The hypothetical subdivision approach notionally improves the land for its most beneficial use by making assumptions and estimates. Similarly the discounted cashflow approach seeks to determine the benefit arising from future development of the land by estimating future cashflows. Both methods are subject to many assumptions and estimates. As a result, both can lead to significant error particularly where development is some years away. We agree with the Tribunal that in the present case, neither the hypothetical subdivision approach, nor the discounted cashflow approach, was a suitable approach to the valuation exercise required.

Summary

[94] In summary, we can see no reason to amend the Tribunal's valuation. It is justified both in principle, and by reference to the comparable sales evidence which was available.

[95] The appeal is dismissed.

[96] The respondent is entitled to its costs and reasonable disbursements. We direct that costs be fixed on a 2B basis.

[97] We trust that counsel will be able to settle costs. If there is any difficulty, the same can be referred to us by written memoranda. The respondent is to file any memorandum required within 10 working days of the date of this judgment. The

appellant is to file its memorandum in response within a further 10 working days. We will then deal with the issue of costs on the papers, unless we require the assistance of counsel.

Wylie J

G J Horsley