Waitakere City Council v Estate Homes Ltd

Supreme Court of New Zealand SC 73/2005; [2006] NZSC 112
11, 12 July; 19 December 2006
Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Resource management – Resource consents – Subdivision – Whether jurisdiction to grant consent to form of subdivision not applied for – Whether conditions of consent can be more favourable to applicant than application – Condition requiring construction of road to higher standard than necessary for subdivision – Statutory basis for imposition of condition – Whether condition required provision of "services or works" – Whether compensation payable – Resource Management Act 1991, ss 108 and 407 – Local Government Act 1974, ss 321A and 322.

Constitutional law – Taking of property – Whether condition could amount to a taking – Whether presumption that Parliament did not intend taking without compensation applicable – Whether conditions to be restricted to those required by particular development – Whether conditions in resource consent reasonable and appropriate.

Resource management – Appeals – Whether and when appellate Court to decide issue or remit to Environment Court.

Estate Homes Ltd applied for resource consent for a subdivision. The subdivision was one of several planned or expected along a particular corridor, and the local authority had devised a policy of requiring developers to build an arterial road, rather than just the type of road required by the development, so that when developments were completed there would be an arterial road running through the whole area and connecting two other main roads. The Waitakere City Council's practice was to pay the developer the difference between the cost of the road required by the development and an arterial road. Estate Homes had negotiated with the local authority staff and made an application for consent, including a stipulation that the local authority pay for the difference between a local road and an arterial road. The consent granted included a condition that an arterial road be built and a note that the local authority would pay for the difference between a collector road and an arterial road, this being substantially less than the amount the developer had requested. The developer appealed to the Environment Court, where the developer was allowed to abandon its request for compensation based on a local road and to argue that no road was necessary for the development at all. The Environment Court made orders in favour of the developer and the local authority appealed successfully to the High Court. Estate Homes in turn appealed successfully to the Court of Appeal. In the meantime, by agreement with the local authority, the developer had proceeded with the development, including construction of the

arterial road. The Court of Appeal found that the condition requiring building of an arterial road amounted to a taking by the local authority and that the legislative provisions were to be interpreted in the light of the presumption against takings without compensation. The local authority appealed to the Supreme Court.

Held: 1 The Resource Management Act 1991 envisaged that the Environment Court would consider a matter that was before the Council and consider the decision of the Council to the extent that it was in issue. The Environment Court had to exercise considerable care before permitting a matter to proceed on a basis different from the application before the consent authority. Not every alteration in approach would require an applicant to make a fresh application to the consent authority: it was a matter of degree. In this case, the Environment Court came to be considering the matter on a materially different basis from the appeal to which the Council had exposed itself and the matter should not have proceeded in those terms. Nor was it appropriate for the Environment Court to have allowed the appeal to become a challenge to the lawfulness of the actions of Council officers before the application for resource consent was filed, which was a matter for an application for judicial review in the High Court (see paras [29], [30], [31], [35], [38], [39]).

2 The legislative provisions enabling the imposition of conditions on consents to subdivide were to be construed without regard to the principle of statutory interpretation that Parliament was not to be taken as authorising property to be taken without compensation. A taking occurred when a landowner was compelled to transfer rights under protest and with no choice. If the conditions imposed on a subdivision were unacceptable the landowner did not have to transfer its land and could make application for judicial review if it considered the conditions unreasonable (see paras [51], [52]).

Lloyd v Robinson (1962) 107 CLR 142 adopted.

3 The power to impose conditions on resource consents under s 108(2) of the Resource Management Act was a broadly expressed power which covered the conditions in the present case, and which was subject only to the requirement of a logical connection between the proposed development and the conditions imposed: they were not to relate to external or ulterior concerns, but conditions did not have to be required for the purposes of the subdivision. The requirement to construct roading clearly related to the subdivision for which consent had been sought. It was for the Environment Court on appeal to decide whether they were reasonable and appropriate (see paras [65], [66], [67]).

Housing New Zealand Ltd v Waitakere City Council [2001] 1 NZLR 340 approved.

Newbury District Council v Secretary of State for the Environment [1981] AC 578; [1980] 2 WLR 379 adopted.

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636 (HL) adopted.

Nollan v California Coastal Commission 483 US 825; 107 S Ct 3141 (1987) not adopted.

4 In order for it to be appropriate for the Court to decide the outstanding issues, the Court would have to be satisfied that the decisions would not turn on questions of specialist judgment concerning facts which the legislature contemplated would be determined on appeal from a consent authority by a specialist tribunal. The question of the reasonableness of the conditions might

well turn on planning judgment, and the appropriate course was to refer the question of what level of compensation would make the conditions reasonable to the Environment Court (see para [70]).

5 In the normal case, the Environment Court, if it decided the basis for the compensation was unsound and the condition unreasonable, would invalidate the condition. It was not generally for the Courts to decide what financial allocations should be made for particular roads from a local authority's budget. This case was exceptional as the road had been built by agreement between the developer and the local authority. The local authority's consent to the consent decision must have included a commitment to pay the compensation that would be determined by the Environment Court and that Court was not precluded from increasing the amount of compensation to be paid within the limits of what had been sought in the original application if it concluded that the Council's proposal was inadequate (see paras [75], [76], [77]).

Result: Appeal allowed: matter remitted to Environment Court.

Observation: Rather than negotiating with local authority staff before filing an application for subdivision, it will usually be preferable for an applicant to apply for consent in the terms it considers suitable. If the local authority then grants the application on conditions and the applicant wishes to take issue with those conditions, then the appeal process can be invoked (see paras [40], [41]).

Other cases mentioned in judgment

Auckland Acclimatisation Society Inc v Sutton Holdings Ltd [1985] 2 NZLR 94 (CA).

Belfast Corporation v OD Cars Ltd [1960] AC 490; [1960] 1 All ER 65.

Body Corporate 97010 v Auckland City Council [2000] 3 NZLR 513 (CA).

Coleman v Tasman District Council [1999] NZRMA 39.

Coutts Cars Ltd v Baguley [2002] 2 NZLR 533 (CA).

Kirkland v Dunedin City Council [2002] 1 NZLR 184 (CA).

Sugrue (P F) Ltd v Attorney-General [2004] 1 NZLR 207 (CA).

Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 QB 554; [1960] AC 260.

Shell New Zealand Ltd v Porirua City Council (Court of Appeal, CA 57/05, 19 May 2005).

Shotover Gorge Jet Boats Ltd v Jamieson [1987] 1 NZLR 437 (CA).

Waitakere City Council v Khouri [1999] 1 NZLR 415 (CA).

Wellington Club Inc v Carson [1972] NZLR 698.

Appeal

This was an appeal by Waitakere City Council from the judgment of the Court of Appeal (reported at [2006] 2 NZLR 619) allowing an appeal by Estate Homes Ltd from the judgment of Venning J (reported at [2005] NZRMA 128) allowing an appeal by the Council from the decision of the Environment Court in favour of Estate Homes in respect of the compensation payable by the Council in respect of conditions imposed upon a resource consent. Leave having been granted by the Supreme Court ([2006] NZSC 22), the approved grounds of appeal being: (1) whether compensation should be assessed as if the land had been taken by the Council, or as an ingredient of a condition imposed on the granting of a resource consent, or otherwise; and with what

consequential effect; (2) whether condition 2(o)(vi) satisfied the requirements of the *Newbury* test; and (3) whether the formation and vesting of Marinich Drive constituted "services or works" under s 108(2)(c) of the Resource Management Act 1991.

M E Casey and *R B Enright* for the Council.
D J Neutze and *N D Wright* for Estate Homes.

Casey for the Council: Council's role was as consent authority under the RMA. All it was asked to do (and could do) was to grant a consent under the RMA. The internal roading layout is an integral part of a subdivision proposal. Council's consent was to the roading layout in the application. Roads in a subdivision vest by operation of law (s 238 of the RMA), not through a condition of consent, and vest by action of the developer who submits a survey plan which triggers s 238. No approval of the council is required. There was no consent condition requiring the road, or its vesting. The challenge by Estate is to condition 2(o)(vi). Condition 2(o) is a routine condition requiring all roads to be constructed to Council's standards. In the case of lot 71, note (vi) stated that Council would compensate for the extra 2m difference between arterial and collector road standards. In its application for consent Estate had sought compensation for the difference between an arterial and a local road. Council adopts the reasoning of Chambers J in the Court of Appeal as to the nature and validity of the condition, and the authority under which it was imposed. The only issue Council takes with Chambers J is whether the matter should have been remitted to the Environment Court.

First question – Basis of assessing compensation. The majority in the Court of Appeal starts from the wrong premise that the consent condition amounted to a taking of land for public purposes so as to trigger an obligation to compensate. There was no condition directed to the taking of land – the road was integral to the subdivision plan on which Estate's application and the consent were based. The RMA has a regime to address compensation issues and the common law on "expropriation" does not arise (ss 85 and 185 of the RMA). It does not require the overlay of general public law concepts. The majority decision introduces uncertainty into a core local government function: ensuring connectivity of roading networks. The majority found that the vesting of the road was a "taking" under s 322(2)(a), the requirement to construct the road being an agreement or delegation back under s 322(2)(b). Section 322(2)(a) is not revived under the transitional provisions of the RMA (s 407) because it does not relate to the imposition of a condition. The road was not provided as part of any condition and was not a "taking". The requirement to construct the road was a "services or works" condition under s 108(2)(c). The application of s 322(2)(a) and (b) is no longer in dispute between the parties, but the Court of Appeal decision creates uncertainty which needs to be dealt with. There is no longer any dispute regarding s 108(2)(c).

Second question – The test in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 requires that the condition "fairly and reasonably relates" to the permitted development. The majority judgment was wrong in: (a) finding that the *Newbury* test requires a causal nexus, and that any consent condition imposed under s 108 must be effects-based (that is, arising from effects generated by a proposal), in reliance on one subpart of s 104; and (b) finding that Estate could depart from essential terms of its application, relating to the vesting and construction of the road, on the basis of a flawed

"prejudice" test or a hypothetical "agreement" with Council. Note (vi) qualifies condition 2(o). Without Note (vi) condition 2(o) would offend against the *Newbury* principles. The Council is required to ensure roads are up to standard before accepting them, but also has to consider the local road network as a whole. The Court of Appeal majority at para [73] is incorrect. Unconditional approval would have left the developer with the requirement to create the road (*Lloyd v Robinson* (1962) 107 CLR 142 at p 155). The Council has given consent to what the developer applied for and now the developer is arguing that aspects of the consent are ultra vires. The Council challenges the Court of Appeal majority view that the Council should have granted consent on more favourable terms than the applicant requested. It cannot be right that an applicant can be granted exactly what was applied for and then appeal to the Environment Court. There is no appeal against the requirement to provide the road, only against the standard used for calculating compensation, but the appeal document challenged the validity of the condition, rather than contesting the compensation. The only point between the parties was whether the standard was to be a local road or a collector road.

Venning J said there was a taking of part of the land; Chambers J said there was no taking. In *Waitakere City Council v Khouri* [1999] 1 NZLR 415 no compensation was payable. Take a "greenfields" application. If no road were provided the Council would have refused consent owing to the policies in the District Plan.

The Environment Court thought adherence to the plan unlawful, but the Council is bound to implement the District Plan. The Environment Court considered the application under s 321A of the Local Government Act 1974; it is common ground that s 321A does not apply. The Environment Court assumed that s 321A was a statutory version of the *Newbury* principles, but that is not correct, as s 321A included a requirement of causal nexus which is not required by the *Newbury* principles. The Environment Court went back to the issue of whether the road was needed at all, ignoring the fact that it was part of the application and held the condition unlawful, as it required a road to nowhere. This confused connectivity with connection. The Council intended to achieve connection over the long term as developers developed this strip. The Environment Court and the Court of Appeal said compensation was required for the whole road, but had no jurisdiction to sever or alter an essential condition but only to hold the condition invalid (see *Turner v Allison* [1971] NZLR 833 (CA) and *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 All ER 1).

Section 11 of the RMA removes any right to subdivide unless permitted by a plan or resource consent. Allowing the right to subdivide does not create a right to compensation. Permission to subdivide may be conditional on payment through provision of roads, reserves and so forth. *Lloyd v Robinson*, recently reaffirmed by McHugh J in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 211 ALR 472 (HCA), is a strong case which supports most of the Council's argument. It makes the points that: (1) we are not dealing with schemes of subdivision imposed on the landowner against its own will; (2) the burden imposed by conditions must have some connection with the subject-matter of the consent; and (3) there is no question of expropriating private property by preventing subdivision – it is for the landowner to decide whether to proceed at the price of complying with the conditions.

The Court of Appeal misled itself by reliance on s 104, which does require a causal nexus. The *Newbury* principles do not, but only a "fair and reasonable connection" (*Temwood*). The leading New Zealand case is *Housing New Zealand v Waitakere City Council* [2001] 1 NZLR 340, on appeal from the Environment Court (A 15/2000, 28 February 2000), leave to appeal refused [2001] NZRMA 202 (CA) (see also *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 (HL)). The Court of Appeal, at para [178], indicates that the *Newbury* principles require a causal nexus as in s 321A but there is no such requirement in s 322 (see also *Queenstown Lakes District Council v Hawthorn Estates Ltd* [2006] NZRMA 424 (CA)). The Court of Appeal uses *Dolan v City of Tigard* 512 US 374 (1994) to support its judgment, but *Dolan* is a Fifth Amendment case and the law in New Zealand is quite different. We should follow *Tesco* and *Newbury*, rather than United States jurisprudence. Notice also three dissenting opinions in *Dolan* are close to the reasoning of Lord Hoffmann in *Tesco*. *Tesco* also comments on *Hall v Shoreham-by-Sea*, relied upon by the developer, but this was a case of a local authority using planning processes to avoid paying compensation that would have been due under other processes.

There is no need to remit the case to the Environment Court. The High Court made findings of fact to determine the appeal, which it was entitled to do (*Landrover Owners Club (Otago) Inc v Dunedin City Council* (1998) 4 ELRNZ 252 at p 263). The Council says that it was entitled to impose a requirement for a collector road and this was not contested in evidence. The council was willing to pay for the difference between a collector road and an arterial road. [Reference also made in printed case to *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94; *Brown v Central Otago District Council* (Environment Court, Christchurch, C 56/97, 18 June 1997, Judge Jackson); *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 (SCNZ); *Falkner v Gisborne District Council* [1995] 3 NZLR 622; *London County Council v Marks & Spencer Ltd* [1953] AC 535; *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331; *Queenstown Airport Corporation Ltd v Skipworth* [2001] 2 NZLR 621; *Rodney District Council v Harvey* [1989] 3 NZLR 478; *Rodney District Council v Sunnyheight Nurseries Ltd* [1989] 3 NZLR 472; *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208; *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA); *Bletchley Developments Ltd v Palmerston North City Council (No 1)* [1995] NZRMA 337; *Coleman v Tasman District Council* [1999] NZRMA 39; *Shell New Zealand Ltd v Porirua District Council* (High Court, Wellington, CIV 2003-485-1476, 21 December 2004, Goddard J), (Court of Appeal, CA 57/05, 19 May 2005); and *Sutton v Moule* (1992) 2 NZRMA 41 (CA).]

Neutze for Estate Homes: Estate's position has always been that it would build the road – the only issue is as to the exact measure of compensation. Initially Estate claimed for an additional 5m of carriageway and 6m of reserve. The reason Estate changed was that the Council imposed a number of unexpected conditions. Disputes as to these conditions have all been resolved, except for the roading issue. The Council only offered compensation for an extra 2m of carriageway and eventually agreed it should compensate for an extra 3m of reserve. The Environment Court was invited to modify the condition, but found that there was no power to impose the condition and therefore that it could not be amended (applying *Bletchley*). There is no direct power for the Council to fix compensation, but without compensation the

condition would be unreasonable. The condition is part of the resource consent process and the Environment Court has power to modify the consent. The Environment Court could grant a declaration that the appropriate road was local or collector as the case may be, and Estate could then sue for quantum meruit or on promissory estoppel. Councils often, for the sake of the future, want greater infrastructure than the specific development requires. The Environment Court refers to s 321A of the Local Government Act and to *Rodney District Council v Sunnyheight Nurseries Ltd* and *Bletchley*. Section 321A is irrelevant and so the Environment Court has never properly considered the matter, which should be remitted to the Environment Court to be considered applying s 108(2)(c).

Estate does not accept that the issue is simply whether the basis should be a local or collector road. Expert evidence was given that there might be 300 traffic movements a day from this subdivision on the arterial road out of a total of 5000 – 20,000 movements a day. That is the basis on which compensation should be calculated. The applicant is not bound by the application once it appeals.

If the Court considers there is a gap in the legislation, then see *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530.

The applicant argues that the Court should prefer *Tesco* to the United States cases. But *Tesco* and the *Newbury* principles are concerned with Courts reviewing the legality of planning decisions, not the merits. The New Zealand legislation and the role of the Environment Court are quite different. Venning J ignored the right to have an appeal heard de novo and applied the *Newbury* principles to consideration of the Environment Court decision. The Council can require the developer to pay a fair and reasonable sum towards upgrading roads. The law can protect councils from unfair results in a number of ways (*Housing New Zealand v Waitakere City Council*). The appropriate place for these issues to be determined is the Environment Court. Under s 290A of the RMA the Environment Court has now to have regard to the decision appealed from, but the applicant can have a new set of conditions on appeal so long as the substance of the activity is not changed and there is no prejudice to the consent authority – for example, if the new conditions mean the application should be notified.

Chambers J, at paras [32] and [33], appears to misunderstand Estate's argument. The Environment Court confirmed that if the road area had been left untouched this would not have interfered with the designation in terms of s 176. The key disagreement between the majority of the Court of Appeal and Chambers J is at para [121] and the majority's view is sound.

Lloyd and *Temwood* were appeals to superior Courts on the validity of conditions and did not deal with the merits of the applications. Our argument is that the Environment Court has not yet dealt with the merits of the application, but it appears to be in sympathy with Estate's argument. There was plenty of expert evidence that the road was not needed at all, or was even bad practice, as pedestrians would have to cross it. In *Hall v Shoreham-by-Sea* and *Tesco* it was assumed that the natural order of things is that roads are paid for by the public at large; the criterion in *Hall v Shoreham-by-Sea* was that the developments would create extra traffic. The road in this case is not required by the subdivision. Those who benefit from the road should pay for it and this is the issue to be remitted to the Environment Court. [Reference also made in printed case to *Associated Provincial Picture Houses Ltd v Wednesbury*

Corporation [1947] 2 All ER 680 (CA); *Body Corporate 97010 v Auckland City Council*; *Waitakere City Council v Kitewaho Bush Reserve Co Ltd*; *Bryson v Three Foot Six Ltd*; and *Landrover Owners' Club (Otago) Inc*.]

Casey replying: Local government operates under both the Local Government Act and the Resource Management Act. The costs of new developments are to fall on the developers, not the ratepayers. A road on this axis will be required eventually so that the developments interconnect. The issue is not what roading is required for this development. Estate accepted that the causal nexus test was not the right test, but then counsel addressed you in those terms. The Council has accepted that a condition that an arterial road be built without compensation would be unreasonable, but the Environment Court cannot impose on the Council a financial burden greater than it is willing to pay (see *Coleman v Tasman District Council*). The Council agrees to compensation under its powers as a roading authority, not as a consent authority, and the Environment Court only wears the consent authority hat. The Environment Court can only interfere if the roading requirement is invalid under the *Newbury* principles.

The appeal is de novo, but only about that part of the issue which is appealed. If only one condition is appealed the hearing cannot be a full de novo hearing in the normal sense. The consent order only allowed the developer to proceed; it did not compel it to do so.

The Court should only allow amendments which fall within the ambit of the initial application. Estate did not originally challenge the validity of the condition and should not be allowed to run the appeal now on a different basis (see also *Sutton v Moule* and *Body Corporate 97010*). The law as to the causal nexus test has been changed since *Bletchley*. The Environment Court, when considering conditions, is in the same position as the consent authority and has to have regard to wider considerations than the immediate development. In respect of the *Housing New Zealand* case see also s 283(2), which has a limited causal nexus requirement. The matter need not be remitted to the Environment Court – the High Court decision can be upheld for different reasons.

Cur adv vult

The judgment of the Court was delivered by
McGRATH J.

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Introduction

[1] This appeal raises issues concerning requirements for new public facilities that are sometimes imposed by planning consent authorities when granting consent to the subdivision of land. At times local authorities treat the consent process as an opportunity to secure the construction by developers of additional infrastructure that will serve future community needs, even though it may go beyond what is required to serve the immediate needs of the development concerned. The present case involves the Waitakere City Council's requirement that a developer design, form and construct, as part of its subdivision, an arterial road over its land along the path of a long-standing designation. The Council accepted that it should compensate the developer to the extent that the requirement involved additional road width and more land for road reserve than would otherwise have been required in the subdivision. Differences, however, arose between the Council and the developer concerning the basis on which such compensation should be assessed and paid. These differences have given rise to this litigation.

Background

[2] In September 1999, Estate Homes Ltd purchased a 3.1 ha block of land in Waitakere City for the purposes of subdivision and medium-density residential development. The land had a frontage to its south onto Ranui Station Road, which runs east to west. Since 1989 the land had been subject to the designation of an arterial road, the course of which ran through the land from Ranui Station Road in the south to the point where the road entered adjoining private land to the north. The road eventually linked up further north with Marinich Drive. The purpose of the designation was to provide for the extension of Marinich Drive so that eventually it would become a district arterial road running from Ranui Station Road in the south through to Swanson Road in the north.

[3] It was clear at all times to Estate Homes that in planning its subdivision of the property it would have to take account of the designation.

[4] The Council has never had plans to give effect to the designation by itself building an arterial road. It anticipated that the land alongside the designated road, up to where it joined Marinich Drive, would eventually be subdivided by developers. At all times the Council has envisaged that, as the adjacent land was subdivided, developers would be required to complete the sections of the arterial road that fronted onto their subdivided land, until the arterial road was complete.

[5] A director of Estate Homes, Mr O'Halloran, had discussions with Council officers concerning subdivision of the land prior to acquiring it and seeking subdivision consent. He gave evidence in the Environment Court that he was told that it was the Council's normal practice to require applicants for subdivision consent to undertake the construction of designated roads at the time when the Council gave consent to subdivision of the adjacent land. He said he was also told that the Council's policy was to pay compensation to the developer for road construction to the extent that it was not necessary for the development. He took this to be an assurance that Estate Homes would be paid for any roading not required by the subdivision. In response to what he had been told, he structured the application and layout of associated roading in a manner that met the Council officers' indication of their requirements.

[6] On 25 February 2000, consultants employed by Estate Homes applied on its behalf for subdivision and land use consents under s 88 of the Resource Management Act 1991. It was a premise of the application that Estate Homes would construct all roads in the subdivision, including that shown as lot 71 in its subdivisional plan, which comprised the portion of the designated road that Estate Homes would form as an arterial road. Mr Cuthers, a traffic engineer with the Council, gave evidence concerning the functions of different types of major roads in a hierarchy provided for in the Council's Code of Practice for Infrastructure and Land Development. District arterial roads come below strategic arterial and regional arterial roads. They cater mainly for traffic between major nodes or suburbs of the city, and carry a high proportion of through traffic. Collector roads collect traffic from local roads and distribute traffic from arterial roads. They also act as local main roads supplementary to the primary network. The main function of local roads is to give access to abutting land. They have limited, if any, through traffic. Carriageway and road reserve width varies for each type of road.

[7] The application addressed the question of compensation as follows:

> "**Compensation**
> Our client has requested compensation for the construction of the arterial road for:
>
> - Additional road reserve width from 17m to 23m (180 x 6 = 1080m^2); and
> - Additional carriageway width from 8m to 13m (184 x 5 = 920m^2)."

[8] The Council did not require notification of Estate Homes' application and on 26 June 2000 it consented to it, subject to a number of conditions. These included condition (2)(o) which, together with a relevant note concerning compensation, provided:

> "(o) Design, form and completely construct the proposed new roads (Lots 71 – 75) in accordance to the Code of Practice for City Infrastructure and Land Development to the satisfaction of the Council. Notes:
>
> . . .
>
> (vi) Compensation for the extra 2m width of carriageway will be paid by Council when the arterial road, (Lot 71) is vested in Council as legal road. Provide an estimate of this cost for approval prior to construction of the road to enable funds to be budgeted."

[9] Note (vi) indicated that the Council would pay compensation for the cost of construction of 2 m of the 13-m width of carriageway for the district arterial road, rather than for 5 m of "additional carriageway" width as Estate Homes had requested. This indicated the Council's willingness to pay costs of construction of the arterial road to the extent that they were additional to the cost of construction of a collector road rather than a local road. No reference was made in the consent to Estate Homes' request for compensation for additional road reserve width of 6 m, again reflecting the difference between arterial and local road standard.

[10] Estate Homes gave notice of its objection to the Council's decision and subsequently, on 2 April 2002, it appealed to the Environment Court against a number of conditions imposed in the grant of consent, including that in condition 2(o)(vi). Prior to the Environment Court hearing, Estate Homes and the Council agreed, and the Environment Court ordered by consent under s 116 of the Resource Management Act, that the subdivision consent should become operative. Estate Homes was then able to and did proceed with the subdivision works, including those for the section of arterial road. It had completed those works by the time the Environment Court heard its appeal in late August 2003. By that time all issues raised in the appeal, other than the adequacy of the compensation specified in condition 2(o)(vi), had been resolved between the Council and Estate Homes, and the appeal proceeded solely against the provision that note (vi) to the condition made for compensation.

Environment Court decision

[11] In its notice of appeal Estate Homes contended that the Council had wrongly required it to vest in the Council that part of its land which fell within the designated area, and to pay the cost of what was a public work. We are satisfied that Estate Homes sufficiently indicated in its notice of appeal that it wished to seek compensation for the entire cost of forming the arterial road and for the full value of the land which would become road reserve. At the commencement of the hearing of the appeal in the Environment Court, the Council submitted that it was not open to Estate Homes to seek compensation on that basis, and that it should be confined in its appeal to what it had originally sought in its consent application. This submission was rejected by the Environment Court for two reasons. First, the Court took the view that Estate Homes' statement concerning requested compensation did not go to the substance of its application for consent and, being incidental, should not confine the scope of its appeal. Secondly, the Council had made plain to Estate Homes, before it lodged its application, that there was no prospect of the Council granting it a subdivision consent unless the application was made in terms that met the Council's wishes concerning the construction of the road. The Environment Court decided it would be "repugnant to equity" in those circumstances to allow the Council to rely on the wording of Estate Homes' application for consent as restricting what it could seek on appeal. The appeal hearing in the Environment Court accordingly proceeded on the basis that Estate Homes was able to seek compensation for the entire cost of the arterial road and the value of all land in lot 71, which would be vested in the Council as arterial road.

[12] In its reserved judgment on the appeal,[1] the Environment Court observed that the designated arterial road was being developed in a piecemeal fashion as and when affected pieces of adjacent land were developed, and that it might be many years before it became a continuous road. The judgment said that Estate Homes' main argument for further compensation was that there was no causative link between the proposed subdivision and the Council's requirement for construction of a road on lot 71. Accordingly, Estate Homes had argued that it should be compensated for the cost of all the land forming the road and for all construction costs. Alternatively, if the Environment Court were to find that a road was required by the subdivision, Estate Homes sought compensation for land value and construction costs in excess of those for the standard of road that was required. In the Court's view, the subdivision did not give rise to the need for any road in lot 71.

[13] The Environment Court also said that condition 2(o)(vi) had been imposed by the Council under its powers to require payment by a developer of a fair and reasonable contribution to the cost of forming a new road which was required by new or increased traffic, attributable to the subdivision, and to take land for the purposes of forming such a new road. In its view, for condition 2(o)(vi) to be valid, such new or increased traffic not only had to be attributable to the subdivision, but also had to be the reason for the new road.[2] As well, the condition imposed by the Council had to fairly and reasonably relate to the development. The Court decided that these requirements were not satisfied in the present case. Its judgment concluded:

> "In so far as its decision of 26 June 2000, granting the appellant land use and subdivision consents, required the appellant to form and construct a road on Lot 71 of the plan of subdivision without compensation for the whole cost of formation and construction, and for the value of the land on which it was constructed, the respondent acted unlawfully."

[14] The Environment Court left it to the parties to resolve the amount of compensation to be paid to Estate Homes by agreement or, if necessary, in a separate civil proceeding.

Appeals to High Court and Court of Appeal

[15] The Council appealed to the High Court against the Environment Court's decision on questions of law. The High Court's judgment was then the subject of a further appeal by Estate Homes to the Court of Appeal. The substantive legal issues in both appeals centred around the statutory source and the scope of the Council's power to impose the condition concerning roading within the subdivision and whether the particular condition had been lawfully imposed. It was common ground that Estate Homes, as promoter of the subdivision, was effectively required by the Council's officers to provide roading of a higher standard than was necessary to service the immediate needs of the subdivision. Indeed, Council witnesses accepted that an application for consent which did not provide for an arterial road would inevitably have been declined. The parties were in dispute, however, over what entitlement to compensation Estate Homes had in these circumstances.

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1 (A 153/2003, 16 September 2003, Judge C J Thompson, Commissioners P A Catchpole and R M Priest).

2 The Environment Court decided that the source of these powers was ss 321A and 322 of the Local Government Act 1974. Although ss 321A and 322 were repealed by the Resource Management Act, recourse to them was available under s 407 of that Act.

[16] In the High Court, Venning J allowed the Council's appeal.[3] He held that the Council's roading requirements were made under the power to impose conditions concerning "services or works" conferred by s 108(2) of the Resource Management Act, rather than under the power to require financial contributions under s 321A of the Local Government Act, as the Environment Court had decided. Venning J found that the condition was valid but, because an additional strip of 2 m of land was required for the arterial road, the Council was required to pay compensation for that land under s 322(2)(a) of the Local Government Act.

[17] Estate Homes appealed, with leave, to the Court of Appeal against the High Court judgment. A majority of the Court of Appeal, Baragwanath and Goddard JJ, allowed the appeal.[4] Chambers J dissented and it is convenient to outline his reasons first. Chambers J agreed with the High Court Judge that condition 2(o)(vi) had been imposed under s 108(2)(c) of the Resource Management Act, rather than under s 321A or s 322 of the Local Government Act. It followed, according to Chambers J, that there was no right to statutory compensation. No taking of land was involved as, on deposit of the plan, the road would automatically vest in the Council. Compensation became an issue because of an administrative law challenge to the reasonableness of what the Council proposed to pay Estate Homes for the additional works it would be required to undertake in constructing the arterial road. This came down to whether, absent the designation, a subdivision of the kind applied for by Estate Homes would have required a collector road, as the Council had decided, or a local road, as Estate Homes submitted. Chambers J would have referred this question back to the Environment Court for decision rather than have it decided in the High Court.

[18] The majority of the Court of Appeal took a completely different approach to Estate Homes' right to be compensated. Baragwanath and Goddard JJ decided that they should ascertain the meaning and application of the relevant statutory provisions by reference to the principle, having effect as a rule of statutory interpretation, that where there was a taking of private property under legislative authority, there was a presumption that the legislation would be read as providing for compensation. The majority decided that in the circumstances there had been a taking.

[19] Applying this approach, the majority felt able to read s 322(2) of the Local Government Act as a provision unqualified by its immediate context. It was an independent source of authority for taking of land for the purposes of forming a new road. So read, s 322(2) empowered the Council to acquire lot 71 for the purposes of forming the arterial road, subject to the requirement for compensation in accordance with s 247F, which invoked provisions of the Public Works Act 1981. The fact that Estate Homes had made in its application to the Council only a limited claim to be compensated was not an impediment to its right to claim full compensation on appeal. The basis on which compensation was to be paid was referred back to the Environment Court for decision. The majority accordingly rejected the view of Chambers J that, when read in its context, s 322(2) gave a power to take land only where the Council itself was to perform the work involved.

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3 *Waitakere City Council v Estate Homes Ltd* [2005] NZRMA 128.
4 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619.

Issues in this Court

[20] This Court has given the Council leave to appeal against the Court of Appeal's judgment.[5] The main issues in the appeal are conveniently summarised in the grounds approved by this Court:

> "(1) Whether compensation should be assessed as if the land had been taken by the Council, or as an ingredient of a condition imposed on the granting of a resource consent, or otherwise; and with what consequential effect.
> (2) Whether condition 2(o)(vi) satisfied the requirements of the *Newbury* test.[6]
> (3) Whether the formation and vesting of Marinich Drive constituted 'services or works' under s 108(2)(c) of the Resource Management Act 1991.
> (4) Whether the High Court was empowered under Rule 718A to determine the nature of the road which, but for the designation, would have been appropriate; or whether it should have referred that matter back to the Environment Court."

The scope of the Environment Court's jurisdiction

Permitting an increase in the amount of compensation claimed

[21] Estate Homes had prepared its application to the Council on the premise that it would construct an arterial road along the route shown in the designation. The application recorded that it had requested from the Council compensation in the amount of the extra costs associated with a road of that kind. Estate Homes' application also indicated that it considered costs associated with a local road rather than a collector road were the appropriate comparison. The extra costs sought comprised the difference between the cost of constructing a local road, with a carriageway width of 8 m, and that incurred in constructing the arterial road, with a 13-m carriageway. Estate Homes had also requested compensation in its application for the additional width of road reserve it would provide, which would be 23 m for the arterial road compared with 17 m for a local road. Although compensation for additional land was not addressed in the Council decision, the Council subsequently accepted that compensation had been requested for the value of the additional strip of land, and that this should form part of the compensation package.

[22] In granting its consent to the subdivision application, the Council stipulated in condition 2(o) that the proposed new roads should be constituted in accordance with the relevant Code of Practice and to the satisfaction of the Council. It addressed the request for compensation in its note (vi), which effectively said that compensation for construction costs of an extra 2-m width of carriageway would be paid by the Council. This indicated that the Council would pay compensation based on the difference between construction costs for an arterial road and a collector road. Estate Homes, of course, had sought to be reimbursed a greater sum based on the difference in costs of constructing a local road. The second point of difference was whether the extra strip of land

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5 [2006] NZSC 22.

6 The *Newbury* test is a reference to common law requirements that planning consent conditions must be imposed for the purposes of the Resource Management Act, fairly and reasonably relate to the permitted development and not be unreasonable. They were expressed in this way in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

required for road reserve would also be the subject of compensation. As indicated, the Council eventually accepted that there should be compensation for taking additional land but based on additional requirements for a collector road.

[23] The majority of the Court of Appeal decided that it had been open to the Environment Court to vary conditions of consent to the subdivision, even if this resulted in conditions about compensation more favourable to the applicant than those it had originally sought, as long as no prejudice arose to other affected parties, such as the Council, or to the public. Subject only to these considerations, the original consent application could properly be amended in the course of the hearing of an appeal concerning the validity of the Council's original condition.

[24] Before us Mr Neutze, for Estate Homes, argued that a further factor supporting the Court of Appeal's decision on this point was that the hearing was "de novo". He reminded us that the Court of Appeal had seen the applicant's statement concerning the compensation it was seeking as incidental to the application for consent. The Court had also decided that it would be unfair to Estate Homes not to let it claim full compensation on appeal, when the form of its application had been heavily influenced by what Council officers had indicated would be acceptable.

[25] Mr Neutze further argued that there were sound policy reasons favouring a flexible approach to the terms of applications for consent at the appeal stage. The Environment Court could, and should, reasonably accommodate changing requirements of the parties in relation to proposed developments. Counsel said that this would not lead to the subject-matter of an appeal "mutating" into something that was quite different from what was before the consent authority. He supported his submission by reference to the Court of Appeal's decision in *Body Corporate 97010 v Auckland City Council*.[7]

[26] Estate Homes' application for resource consent was made under s 88 of the Resource Management Act. Under s 88(2), applications for consent must be made in the prescribed form and manner and must include an assessment of environmental effects. There is provision for the local authority to treat as incomplete and return an application which does not include an adequate assessment of effects, or information required by regulation. Under ss 93 and 94 of the Act, a consent authority must give public notification of the application unless satisfied that those adverse effects will be minor. The Council decided not to notify Estate Homes' application in this case. Its decision granting consent records that it considered the application under ss 104 and 108 of the Act, which respectively stipulate matters for consideration in granting consent and provide for conditions that may be imposed.

[27] The applicant had a right of appeal to the Environment Court, under s 120 of the Act, against the decision of a consent authority. Notice of appeal must be given in the prescribed form under s 121. The notice must state the reasons for the appeal and the relief sought. Under s 290(1), the Environment Court has "the same power, duty, and discretion" in dealing with the appeal as the consent authority. Under s 290(2) it may confirm, amend or cancel the decision to which the appeal relates.

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7 [2000] 3 NZLR 513.

[28] These statutory provisions confer an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. As Mr Neutze submitted, they contemplate that the hearing of the appellate tribunal will be "de novo", meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal.[8] The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.

[29] We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application. The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision to the extent that it is in issue on appeal.[9] Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal.[10] In the planning context, the decision of the local authority will almost always be relevant because of the authority's general knowledge of the local context in which the issues arise.[11]

[30] The approach that must be followed where it is said that a tribunal has allowed an application on a different basis from that on which it was originally made is consistent with this principle. As the Court of Appeal has recently said:[12]

> "**[7]** We think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. Whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority."

[31] In the present case we are satisfied that Estate Homes should, on appeal, have been constrained by what it had recorded in its application to the Council as the basis on which it sought compensation if it was to construct an arterial road. The Council, as respondent in the Environment Court, was prejudiced by the course that was taken concerning the amount of compensation that could be sought for the arterial road. In stating in its consent decision the basis on which it was prepared to pay compensation, the Council exposed itself to an appeal to the Environment Court on the ground that its intended provision of

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8 *Shotover Gorge Jetboats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) at p 440 per Cooke P; *Wellington Club Inc v Carson* [1972] NZLR 698 per Woodhouse J.

9 *Body Corporate 97010* at p 525.

10 *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA) at para [4] per Gault J.

11 Section 290A, which was enacted by s 106 of the Resource Management Amendment Act 2005, now requires the Environment Court in determining an appeal to have regard to the decision that is the subject of appeal.

12 *Shell New Zealand Ltd v Porirua City Council* (CA 57/05, 19 May 2005) at para [7] per Anderson P.

compensation was insufficient to make its requirement of construction of the road to an arterial standard a reasonable one. The risk that the Council assumed was that the Environment Court would decide that additional compensation on the basis originally sought by Estate Homes was necessary for the condition to meet common law requirements which limit the generality of broadly expressed powers to impose conditions. But the Council did not thereby put itself at risk of the amount of compensation becoming at large before the Environment Court. The Council was entitled to assume that the maximum payment that the Court might determine to be necessary to make the condition reasonable would be no greater than one set on the basis reflected in Estate Homes' application for consent.

[32] The Environment Court should also have recognised that local authorities are in general not subject to the jurisdiction of the Environment Court in relation to their functions as a roading authority. These functions include determining when they will fund work on designated roads.[13] While the Council had a policy of having developers build designated arterial roads running through their land at the time of its development, it might have wished to reconsider the application of the policy to this particular subdivision if an appeal against its terms of consent were to put the Council at risk of having to pay the total costs associated with the arterial road.

[33] For these reasons we are satisfied that the Environment Court should not have permitted Estate Homes to present its appeal on a basis departing so significantly from the compensation that it was seeking at the time of its original application. The decision to do so made the issues considered on appeal substantially different from those raised in the application and addressed by the Council.

[34] The Council consented to an application by Estate Homes, under s 116 of the Resource Management Act, for the subdivision consent to commence prior to the hearing of the appeal. At that stage the Council did not complain that its consent had been granted on a false premise. We do not, however, accept the Council thereby compromised its right to object to Estate Homes proceeding at the appeal hearing on a wider basis than advanced in its original application. We shall return to the significance of s 116 on another point later in these reasons.

[35] When, on appeal to the Environment Court, an applicant seeks to have an application granted on a materially different basis from that put forward to the Council, considerable care is required before the Environment Court permits the matter to proceed on that different basis. Not every alteration in approach would require an applicant to make a fresh application to the Council, rather than to proceed by way of appeal. It is a question of degree. Furthermore, as the majority of the Court of Appeal recognised, the question of any prejudice to other parties, and the general public, is always relevant. Where, as in the present case, the Environment Court came to be considering the matter on a materially different basis from that to which the Council exposed itself, the matter could proceed on the wider basis only with the Council's consent and then only if the Court was satisfied that other persons and the public were not prejudiced. In the present case, the Council had good reason to oppose the

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13 *Coleman v Tasman District Council* [1999] NZRMA 39 at p 45 per Doogue J.

wider basis for the appeal and the matter should not have proceeded in those terms at all. In consequence, the decision of the Environment Court was on a materially different basis which prejudiced the Council and cannot stand.

[36] We accordingly uphold the threshold argument of the Council and will consider its appeal on the basis that the matter truly at issue before the Environment Court should have been simply the question of whether the appropriate compensation was to be based on a local road or a collector road.

Permitting a challenge to the Council's actions before application submitted

[37] By allowing Estate Homes to present its appeal on a broader basis, the Environment Court also allowed the appellate proceeding to develop into a challenge to the lawfulness of the earlier actions of the Council officers, who had sought to persuade Estate Homes to submit an application for subdivision that accommodated the designated arterial road and provided for Estate Homes to build it. The appeal thereby became a collateral challenge to the validity of administrative action involving the proposed exercise by the Council of a statutory power to refuse any application for consent which did not provide in this way for the arterial road on the subdivided land. The Council did not in the end exercise its power, because Estate Homes submitted its application in terms of what it understood to be the requirements if it were to be approved.

[38] There are difficulties in what occurred. The appeal to the Environment Court was an inappropriate proceeding in which to bring a challenge to administrative actions that did not form part of the Council's decision-making process in respect of the application which was actually submitted. Any challenge to the lawfulness of the prior actions of Council officers should have been brought by way of judicial review in the High Court, thereby meeting the requirement that "the right remedy is sought by the right person in the right proceedings".[14] The appellate authority of the Environment Court under s 290 of the Resource Management Act was confined to the decision against which Estate Homes was appealing, and the Environment Court did not have authority to go behind the application which was the subject of that decision in order to determine the appeal.[15] In the present case the proceedings in the Environment Court were the wrong proceedings. That Court did not have statutory jurisdiction to determine the lawfulness of the prior actions of Council officials because its appellate jurisdiction was confined to the Council's decision on the application. The Environment Court, accordingly, could not go behind the application in hearing and deciding the appeal, let alone decide the appeal on a basis more favourable to Estate Homes than it had sought in its application.

[39] New Zealand law has largely avoided jurisdictional complexities in relation to the manner in which administrative action can be challenged.[16] But the authority of the Environment Court to decide collateral matters depends on whether the issues are squarely raised by the proceeding that is directly before

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14 Wade and Forsyth, *Administrative Law* (9th ed, 2004), p 281 and Knight, "Ameliorating the Collateral Damage Caused by Collateral Attack in Administrative Law" (2006) 4 NZJPIL 117, pp 119 – 120.

15 The bar under s 296 of the Resource Management Act to bringing judicial review proceedings until the right of appeal to the Environment Court is exercised, and the appeal determined, does not apply to a challenge to irregularities in actions of Council officials prior to the submission of an application for planning consent (*Kirkland v Dunedin City Council* [2002] 1 NZLR 184 (CA) at para [22]).

16 See *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 (CA) at paras [47] – [49].

it. In the present case the evidence concerning the prior discussions with Council officers was relevant in the appeal only to the extent that it threw light on the nature of the condition imposed concerning the arterial road.

The Council's requirement for an arterial road

[40] Condition 2(o) of the Council's consent is expressed as a requirement which Estate Homes had to meet to the satisfaction of the Council before it was entitled to a certificate of compliance with the consent for the subdivision enabling deposit of the subdivisional plan.[17] On its terms, the condition requires that the roads proposed in the application, including the arterial road shown in lot 71, are to be designed, formed and constructed in accordance with the Council's Code of Practice. There is, however, undisputed evidence concerning the advice given to Mr O'Halloran by Council officers concerning the nature of the subdivision and the framing of the application for consent. Read in that context, it is clear that Estate Homes made provision for the arterial road in its subdivision because it was informed that the Council would require that amenity to be provided or it would not consent to the proposed subdivision. In those circumstances, it is not appropriate to treat the condition simply as a stipulation of the standards to be met in relation to roading provided for in the application.

[41] This should not be taken as endorsing the approach taken by Estate Homes in the present case. It will usually be preferable for an applicant for a subdivision consent to apply for that consent in terms that the applicant considers suitable. If the Council then grants the consent on conditions, and the applicant wishes to take issue with those conditions, the appeal process can be invoked. Matters will become needlessly complicated if, as in the present case, an applicant attempts to challenge conditions of consent on the basis of what it would have applied for, had it not been concerned to comply with stipulations stated by Council officers. While the problem of delay may tempt applicants to act in a strategic way in order to expedite the process, this will not provide a justification for seeking to reopen the terms of the consent application at the appeal stage.

[42] The reality in the present case is that the application was expressed in terms that reflected a Council policy of requiring developers to provide for and build an arterial road along the path of the designated road running through their properties. In this context condition 2(o) is to be read as a requirement that Estate Homes construct the road shown on lot 71 of its plan to arterial road standards, making appropriate provision from its land for road reserve. The note concerning compensation incorporates the Council's recognition that its requirement of an arterial road for that subdivision, without Council compensation for the additional element in construction costs, would breach common law requirements of reasonableness. In stipulating, as it did in the note, that it would pay compensation for "the extra 2m width of carriageway", the Council sought to bring the condition within those requirements by making it reasonable.

Was there a taking?

[43] Before addressing the various statutory provisions identified as providing authority for the Council's requirement that Estate Homes construct an arterial road on lot 71, it is necessary to consider the approach taken in the

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17 Under s 224C of the Resource Management Act.

Court of Appeal to interpretation of the legislation. As indicated, the majority identified what it saw as two conflicting principles which needed to be reconciled in interpreting the legislation. The first was a general principle of statutory interpretation that:[18]

> "Subject to inconsistent legislation and compliance with the general law it is the right of every person to use his assets as he pleases and to be compensated if they are expropriated for public purposes."

[44] The other principle, reflected in resource management legislation, was that land development required "principled, systematic and sensitive controls" without any expectation of or right to compensation.[19] Following an extensive discussion in their reasons, taking both principles into account, the majority proceeded to construe the statutory provisions in light of the presumption of compensation for public taking.

[45] New Zealand law provides no general statutory protection for property rights equivalent to that given by the eminent domain doctrine under the Fifth Amendment to the United States Constitution, under which taking of property without compensation is unconstitutional and prohibited. The New Zealand Bill of Rights Act 1990 does not protect interests in property from expropriation. The principal general measure of constitutional protection is under the Magna Carta, which requires that no one "shall be dispossessed of his freehold . . . but by . . . the law of the land".[20] One of the effects of this measure is to require that the power to expropriate is conferred by statute, and the statutory practice is to confer entitlements to fair compensation where the legislature considers land is being taken for public purposes under a statutory power. Furthermore, as Professor Taggart has pointed out, the Courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid.[21] It was no doubt in this spirit that the majority of the Court of Appeal invoked s 322(2) of the Local Government Act, which is a provision which authorises the taking of land subject to compensation in stipulated circumstances.

[46] The common law presumption of interpretation applies, however, only if there is actually a taking. It is necessary in the present appeal accordingly to inquire whether the Council's requirement, as a condition of its subdivision consent, that Estate Homes construct an arterial road over lot 71 of its subdivision and cause the land to be vested in the Council as road reserve amounts to a taking.

[47] In general, where permission to develop land is refused, with the consequence that it is greatly reduced in value, the Courts have not applied the statutory presumption and have treated what has happened as a form of regulation rather than a taking of property.[22] This explains why New Zealand planning legislation restricts, without compensation, the right to develop land and requires approval of all subdivisions.[23] The legislation, of course, also

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18 At para [128].
19 At para [136].
20 Chapter 29 of Magna Carta, which remains part of New Zealand law under s 3(1) and the First Schedule to the Imperial Laws Application Act 1988.
21 Taggart, "Expropriation, Public Purpose and the Constitution", in Forsyth (ed), *The Golden Metwand and the Crooked Cord* (1998), pp 104 – 105.
22 Wade and Forsyth, p 805, citing *Belfast Corporation v OD Cars Ltd* [1960] AC 490.
23 Sections 11 and 218 – 220 of the Resource Management Act.

enables landowners to apply for consent to subdivide, which they may obtain if they comply with conditions that are lawfully imposed in accordance with purposes for which the consent authority was entrusted with the relevant discretion.

[48] If a lawful condition to a subdivision consent requires the giving up of land in exchange for the right to subdivide, no expropriation or taking will be involved and the common law presumption of interpretation will not apply to the empowering legislation. If a condition is unlawfully imposed, for example for a purpose outside those for which power to impose conditions of subdivision consent is given, that will not convert a regulatory requirement into a taking of property. The remedy for the landowner is to seek invalidation of the condition in the Courts or, if the legislation permits, the substitution of a different outcome on appeal.

[49] Consistent with the view that conditions of consent to subdivision of land do not amount to a taking is the characterisation by the Court of Appeal of the scheme of the Water and Soil Conservation Act 1967. The Court has said that the Act did not deprive landowners whose applications for water rights were refused of anything: it simply denied them privileges. It followed, in the Court of Appeal's view, that there could be no claim to an expectation of compensation in consequence of the refusal.[24]

[50] The Court of Appeal held in *Waitakere City Council v Khouri*[25] that compensation was not payable in respect of the vesting of any road in a council under s 316 of the Local Government Act. That was, of course, a different question from that in the present case, which deals with the compensation payable by the Council for any extra width of road required by it to comply with what it calls its "connectivity" policy.

[51] Professor Stoebuck, writing in relation to the constitutional position in the United States, observes that a distinguishing characteristic of eminent domain transfer is that it involves the transfer of rights which "may be compelled over the transferor's immediate, personal protest".[26] The notion is that there is a forced acquisition of a landowner's rights under a power belonging to the state which allows the landowner no choice. In our view, that absence of choice must be present in a taking of property before the principle of statutory interpretation applied by the Court of Appeal in this case can be invoked.

[52] Such absence of choice is a far cry from the facts of the present case, where the provision of roading to be vested in the Council was part of the terms on which consent to subdivision was given. If the requirements were unacceptable, Estate Homes was not required to transfer its land. On the general principles we have discussed, the requirements placed on it by condition 2(o)(vi) accordingly do not amount to a taking of its land. This was recognised by the High Court of Australia in *Lloyd v Robinson* where, speaking of giving approval to subdivisions conditional on the applicant giving up land for purposes including roads, the Court referred to the presumption of interpretation and said:[27]

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24 *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94.
25 [1999] 1 NZLR 415.
26 Stoebuck, "A General Theory of Eminent Domain" (1972) 47 Wash LR 553, p 557.
27 (1962) 107 CLR 142 at p 154.

> "Given the necessary relevance of the conditions to the particular step which the Board is asked to approve, there is no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss. But it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion: . . . If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a quid pro quo is received, namely the restored right to subdivide the first."

[53] From time to time developers will consider that requirements have been imposed by a consent authority, in approving a proposed subdivision, which are excessive and subject the developer to unfair pressure to submit to them because of the economic imperative of acting promptly on the consent. The risks to developers associated with challenges to the requirements by way of appeal, including those associated with delays, may be significant and we are not unsympathetic to the problems they face with regulatory processes. These circumstances, however, provide no sound basis for reading legislative stipulations of the powers of consent authorities as involving takings of property, for which the presumption is that there is provision for compensation. The owner of the land has recourse to judicial remedies, which include challenging the lawfulness of requirements imposed and, where the statute permits it, a fresh assessment of the merits of the requirement on appeal. If the landowner does not wish to take advantage himself of these procedures, then, as the High Court of Australia observed in *Lloyd v Robinson*, "the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions".[28]

[54] For these reasons we are satisfied that, in imposing the condition concerning the arterial road, the Council was not taking property so as to be required to pay compensation. The legislative provisions are to be construed without regard to that principle of interpretation.

The statutory basis for the arterial road requirement

[55] The Environment Court concluded that, insofar as the condition related to construction of the arterial road, s 321A of the Local Government Act applied and, insofar as the condition concerned vesting of land for road reserve in the Council, the applicable provision was s 322(2). Section 321A(1)(a) provides for a council, as a condition of approval of a scheme plan, to require the owner of land to pay a reasonable contribution towards the cost of forming new roads required because of new or increased traffic owing to a subdivision. The difficulty with its application, however, is that the present case involved no

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28 At p 154.

requirement for a payment to the Council by Estate Homes. Nor did it require dedication of a strip of road for any purpose in terms of s 321A(1)(b). Section 321A simply does not apply.

[56] Section 322(1) of the Local Government Act is concerned with situations where the council agrees with the owner of land that, instead of the owner making provision for new roads and doing the necessary work, the council itself will construct roads in a subdivision in return for the owner transferring land to the council. Councils are also given power by s 322(2)(a) to take, purchase or otherwise acquire land for forming a new road. As previously noted, when they do so provisions for compensation in the Local Government Act will apply. Sections 247F and 247G provide for such compensation to be assessed under the Public Works Act.

[57] We accept, as the majority of the Court of Appeal and Venning J concluded, that s 322(2) is a source of statutory authority for the taking of land that covers wider ground than the narrow circumstances provided for in s 322(1). The context in which s 322(2)(a) appears is, however, important and indicates that the power which it confers only covers situations in which formation, diversion or upgrading work is to be undertaken by the council. If the council wishes to take land for any purpose in that context, s 322 gives the necessary power. But in the present case, where the applicant itself was to do the works, and the land would vest in the Council by operation of law on deposit of the plan, on its terms s 322 has no application. The contrary view of the Court of Appeal majority was of course based on its conclusion that there had been a taking of land, which invoked a presumption that there would be compensation. We have rejected the view that the presumption applies and we do not accept that s 322 has any application.

[58] In his judgment in the High Court, Venning J concluded that the condition was one requiring Estate Homes to perform "works" and was authorised by s 108(2)(c) of the Resource Management Act, which is the successor provision to s 321A. In the Court of Appeal, Chambers J agreed with this analysis.

[59] A statutory power to impose conditions on the grant of a planning consent is provided for in s 108 of the Resource Management Act. Insofar as it is relevant, s 108 provides:

> **108. Conditions of resource consents –** (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).
>
> (2) A resource consent may include any one or more of the following conditions:
>
> . . .
>
> (c) A condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:

[60] The majority of the Court of Appeal did not accept that the phrase "services or works" was apt to cover construction of roading which was not reasonably required as a consequence of the subdivision, but which would serve regional purposes. On the terms of s 108(2)(c), however, the question of whether a condition requiring roading be constructed to a stipulated standard is in the nature of a requirement to provide "services or works" should be

determined by reference to whether the roading provided for under the subdivision plan, which forms part of the consent application, fits with the phrase "services or works". In our view, plainly it does. The language of s 108(1)(c) accordingly directly empowers imposition of a condition requiring that the roading stipulated in the application be carried out as a condition of the consent, and provides the statutory authority for the Council's requirements concerning the arterial road.

Was the Council's requirement lawful?

[61] In imposing the requirement that Estate Homes design, form and construct an arterial road along the course of the designated road, the Council was acting under s 108(2)(c). In order for that requirement to be validly imposed it had to meet any relevant statutory stipulations, and also general common law requirements that control the exercise of public powers. Under these general requirements of administrative law, conditions must be imposed for a planning purpose, rather than one outside the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.[29]

[62] The Environment Court decided that Estate Homes' subdivision could have been designed to operate perfectly well without roading along the Marinich Drive axis. The Court added that, while the road might be used because it was there, it could not be said that subdivision-generated traffic had caused the need to construct that road. The Court was, however, proceeding on the basis that s 321A applied, which was common ground at the hearing.

[63] Venning J, on appeal, correctly decided that s 108(2)(c) was the empowering provision rather than s 321A. He did not accept that administrative law principles required that there be a cause and effect link between the subdivision and a condition such as the arterial road requirement. It was sufficient that Estate Homes had chosen to incorporate a road along the designated path in its application. In these circumstances, requiring Estate Homes to construct an arterial road and contribute an extra 2 m of land was a condition that fairly and reasonably related to the development plan and the subdivision and was also a reasonable requirement. What was not relevant was that a hypothetical subdivision could have been designed to operate effectively without construction of Marinich Drive.

[64] The majority in the Court of Appeal appears to have decided that, in combination, s 104 and common law principles required that there be a causal link between conditions that might be imposed and effects of the proposed subdivision.[30] We see nothing, however, in the requirement under s 104 to have regard to effects on the environment that would restrict imposition of conditions of consent to circumstances where they would ameliorate the effects of the proposed development. Such a narrow approach would be contrary to the breadth with which the power under s 108(2)(c) to impose conditions is expressed.

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29 Footnote 6 above: see also *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 at p 572.

30 At para [161].

[65] In *Tesco Stores Ltd v Secretary of State for the Environment*[31] the House of Lords considered the United States' approach concerning when the imposition of a planning condition amounts to an unreasonable exercise of planning power. Under that approach, which has been developed in the context of the eminent domain provision in the Fifth Amendment, United States Courts apply a "rational nexus" test.[32] This requires a planning authority imposing a condition which obliges a contribution to infrastructure to demonstrate that the development will cause a need for new public facilities.[33] The House of Lords rejected that standard as appropriate for judicial review of planning conditions because it would necessarily involve an investigation of the merits of planning decisions. Lord Hoffmann said:[34]

> "No English court would countenance having the merits of a planning decision judicially examined in this way. The result may be some lack of transparency, but that is a price which the English planning system, based upon central and local political responsibility, has been willing to pay for its relative freedom from judicial interference."

[66] In New Zealand, the planning system interpolates a right of appeal on the merits to specialist tribunals, but this does not diminish the force of Lord Hoffmann's dictum as a reminder of the distinction between whether a consideration is material to a decision and the weight to be given to it. We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development.[35] This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not, for example, relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so.

[67] It was for the Environment Court, in the exercise of its appellate role, to decide whether the conditions were appropriate. In addition to the matters mentioned, the Court was required to take into account the policy of the Council as reflected in its plan. As Venning J emphasised, Estate Homes chose to apply for subdivision consent incorporating a road along the path of the designation. The Council's requirement that it be constructed to the standard of an arterial road cannot be said in these circumstances to lack the necessary degree of relationship to the subdivision proposed. It is beside the point that approval for the subdivision could have been sought with a different roading format which did not include a road along the designated path. The requirement to construct an arterial road clearly related to the subdivision for which Estate Homes was prepared to, and did, seek consent.

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31 [1995] 1 WLR 759.
32 The test was laid down by the Supreme Court of the United States in *Nollan v California Coastal Commission* 483 US 825 (1987).
33 As well, the authority must show that the contribution required is proportionate to that need and will be used to provide the facilities.
34 At pp 781 – 782.
35 *Housing New Zealand Ltd v Waitakere City Council* [2001] 1 NZLR 340 (HC) at para [24] (Full Court, Fisher and Glazebrook JJ).

[68] That leaves the question of whether the requirement was reasonable. From the Council's point of view, it presumably made economic sense for it to have the road constructed to the standard required for an arterial road in the course of the development, with all land required for road reserve vested in the Council, so that it did not later have to acquire further land and widen the road to arterial standard. Whether it was reasonable to impose that preference on Estate Homes comes down to whether the basis the Council proposed for compensation for the road and required land was reasonable. Its proposal was to reimburse the additional costs of construction over and above those for a collector road. Subsequently it has agreed to pay for the extra strip of land required for the road reserve of an arterial road on the same basis.[36] Estate Homes argues that to make the Council's requirement reasonable it should have based its proposal on cost and land requirements for a local road.

Reference of appeal back to Environment Court

[69] Mr Casey, on behalf of the Council, urged us to resolve this issue, as Venning J was prepared to do in the High Court, by acting under R 718A of the High Court Rules. That rule gives the High Court power to make any decision it thinks should have been made. Alternatively, the Court may direct the decision maker to reconsider the matter.

[70] In order to decide that it was appropriate to decide outstanding issues in this Court, we would need to be satisfied that they would not turn on questions of specialist judgement concerning facts which the legislature contemplated would be determined on appeal from a local authority by an expert tribunal. That is not the case here. Specifically, we are not satisfied that the question of whether a collector road or a local road was the appropriate basis for assessing the extra costs associated with an arterial road turns solely on Council documents concerning the thresholds set for individual types of road. In our view the ultimate questions may well turn on planning judgment. Accordingly, we propose to refer the question of what compensation would make the Council's requirement to construct an arterial road reasonable at common law to the Environment Court for determination.

[71] The appeal is accordingly referred back, under s 26 of the Supreme Court Act 2003, to the Environment Court for determination.

Approach to be taken in determining the appeal

[72] Under s 290 of the Resource Management Act, the Environment Court has the same powers, duties and discretions as did the Council in respect of its decision granting consent. The Court will be able to confirm, amend or cancel the condition which is in issue in the appeal if it concludes that is appropriate. This Court has, however, decided that the requirement to build an arterial road was authorised under s 108(2)(c) of the Resource Management Act and that the requirement was sufficiently related to the subdivision for which consent was sought to meet common law requirements. The remaining important question for the Environment Court, and the reason the matter is referred back to it, will be the determination of whether it was reasonable for the Council to impose the condition on the proposed basis for payment towards costs of the road.

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36 We have been advised that the Council has paid and Estate Homes has accepted, without prejudice pending the determination of this appeal, compensation for additional construction costs and the value of an extra 3-m strip of land. The payments have been calculated on the basis that a collector road is the appropriate comparator.

[73] On the argument we have heard, that will turn on whether, in the absence of a designation, it would have been appropriate for the road shown as lot 71 of the subdivision plan to be built to the standard of a collector road or a local road. Other ways in which Estate Homes could have organised the subdivision, so as not to include a road on lot 71, will not be relevant. We have concluded that this specific decision is a matter of planning judgment which is appropriately taken by the specialist appellate Court whose members, of course, have already heard evidence that was directed to the central issue.

[74] At all stages the focus of the successive appeals has been on the condition's requirement for construction of an arterial road, including the proposed compensation. The Council was not, of course, required to address compensation in a note to its condition in relation to roading. It could have addressed compensation by agreement with Estate Homes. It chose instead to stipulate the basis for compensating Estate Homes in a note to the condition it was imposing requiring an arterial road. The note was thereby incorporated in both the condition and the Council's decision. As a result it forms part of what may be addressed by the Environment Court in the appeal under s 290.

[75] We are conscious of the fact that the road has now been built by Estate Homes. We state first, however, what the position would have been if that had not occurred, as that will be the normal situation. If the Environment Court decides that the Council's basis for compensation was unsound and the condition was unreasonable, in the normal course it would be able to invalidate the condition. It should then allow the Council to decide whether it wishes to maintain its requirement for an arterial road. If it does, the Council could agree to substitution by the Environment Court of a condition requiring additional compensation sufficient to make the requirement reasonable. If, however, the Council is unwilling to accept the additional financial burden, the Court would have to address other options for determining the appeal. In general it is not for the Court to decide what financial allocations are to be made for particular roads from a local authority's planning budget. The Council's discretion in this must be respected when considering remedies. For that reason, in a normal case it will usually not be open to the Environment Court to amend the condition in a way that increases the Council's financial contribution to the road.

[76] The present case, however, is exceptional. The road has been built by Estate Homes and the Council has obtained what it sought to achieve in imposing the condition. That followed the Environment Court's order under s 116 that the consent should commence, despite the outstanding appeal. That order was made on Estate Homes' application but with the consent of the Council, which was expressed to be subject to condition 2(o)(vi). Mr Casey submitted that, if the condition were found to breach administrative law requirements, this Court should not require the Council to meet any additional costs of roading found to be payable to make the requirement of an arterial road reasonable. He rightly emphasised, and we have already recognised, that it is not part of the Environment Court's general role to supervise the Council's decisions on the allocation of roading funds. Mr Casey also emphasised that Estate Homes had been prepared to build the arterial road knowing that it might not be paid more than what the Council had decided was appropriate. On the other hand, as Mr Neutze argued, the Council consented to the application for an order that the consent commence, knowing that this would lead to the road

being constructed, as it desired, and fully aware that the Council would still face an appeal over the appropriateness of the condition in relation to compensation for Estate Homes.

[77] We have concluded that in this case the Council's commitment to pay compensation formed part of the consent decision of the Court. It is therefore part of what the Council can "confirm, amend or cancel" under its statutory powers. The Council is no longer able to abandon its requirement for an arterial road. It has achieved that result through a process involving a Court order to which it consented. Whatever the Council meant by making its consent subject to the condition, it did not give a clear indication that its consent to the works being undertaken was on the basis that it would not have to meet extra costs if the Environment Court found its proposal for compensation was inadequate. In those circumstances we do not consider the Council is now able to raise its right to determine roading expenditure as a factor that should preclude the Environment Court from exercising its statutory jurisdiction to amend the condition, if it decides that it is unreasonable, so that there is an increase in the sum that the Council is presently committed to pay towards the cost of the road. Within the limits of what was sought in the original application, the Environment Court will, in these circumstances, have jurisdiction to amend the condition accordingly if it finds that compensation on the basis of note (vi) to condition 2(o) is unreasonable. The Court should indicate what adjustments would have to be made to the condition to make it reasonable, covering the basis of compensation for additional costs of construction and for any additional land required for an arterial road.

Conclusion

[78] There is an obvious alternative to the approach taken by the Council in this case of using the statutory planning consent process to secure construction of additional infrastructure to meet the long-term needs of the city. It would be open, although not necessarily as advantageous to local authorities, for them to proceed by way of side agreements with developers to undertake certain work, and provide where necessary additional land, for an agreed amount of compensation. Such side agreements could be reached prior to consent decisions being taken by the local authorities. This approach would dispense with the need for councils to impose conditions requiring additional services and works, while at the same time committing themselves to payments for the additional element.

[79] In proceeding in the way that the Council did in this case, local authorities take the risk that their requirements are invalid, in terms of administrative law standards, if the compensation stipulated in the conditions that impose the infrastructure requirements is inadequate. If local authorities choose to proceed in this manner, they also leave themselves open to challenges on appeal concerning the adequacy of additional payments they offer. If, as well, they co-operate in allowing development works to proceed, while the reasonableness of their requirements for extra infrastructure remains in issue in an appeal, local authorities risk being required to pay what the Environment Court decides is appropriate for the completed infrastructure they wanted to have done within the limits of what was sought in a developer's application. This is what has happened in the present case.

[80] Developers do not of course have to reach agreements with local authorities and have rights of appeal against conditions they impose in their capacity as consent authorities. The decisions developers take will, however, no

doubt continue to be strongly influenced by economic considerations, including the cost of delay in proceeding with developments. In the end, developers will always have to decide which way of proceeding best serves their interests overall.

Result

[81] For the reasons given, the appeal is allowed. The judgment of the Court of Appeal is set aside. In its place there will be an order referring the appeal back to the Environment Court to be determined in accordance with this judgment.

[82] The Council has been partially successful in this appeal and is entitled to costs in the sum of $10,000 plus reasonable disbursements. Costs in the other Courts are to be fixed by those Courts.

Appeal allowed: matter remitted to Environment Court.

Solicitors for the Council: *Kensington Swan* (Auckland).

Solicitors for Estate Homes: *Brookfields* (Auckland).

Reported by: Bernard Robertson, *Barrister*