IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-1638
[2024] NZHC 3740

UNDER	the Declaratory Judgments Act 1908
IN THE MATTER	of the Public Works Act 1981
BETWEEN	ATTORNEY-GENERAL in respect of the Minister for Land Information Plaintiff
AND	AUCKLAND COUNCIL Defendant

Hearing: 29 October 2024

Appearances: N C Anderson and S J Smith for plaintiff
N R Hall and AGA Trask-Coombs for defendant

Date of judgment: 10 December 2024

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 10 December 2024 at 3.30pm.
Pursuant to Rule 11.5 of the High Court Rules.

……
Registrar/Deputy Registrar

Solicitors:
Crown Law, Wellington
Simpson Grierson, Auckland

[1] The parties (the Crown and the Council) seek my declaration as to the approach to assessment of compensation under the Public Works Act 1981 for acquisition or taking of land subject to the Reserves Act 1977.

Introduction

[2] Under the Reserves Act, a "reserve" is "land set apart for any public purpose".[1] Such land generally is vested in the Sovereign or a local authority.[2] Reserves are to be administered and maintained to specified ends referable to that purpose,[3] unless and until reservation of the land as a reserve is revoked.[4] While reserved, the Registrar-General of Land must not give effect to any dealing with the reserve "except in conformity with the trusts upon which the reserve is held for the time being".[5]

[3] Under the Public Works Act, the Crown (and local authorities) may acquire or take land required for public works.[6] 'Land' includes "any estate or interest in land".[7] Where land is so acquired or taken, "the owner of that land shall be entitled to full compensation from the Crown" (or local authority).[8] The amount of compensation predominantly is to be assessed by reference to "that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise".[9] The 'specified date' generally is the date on which the acquired or taken land vests in the acquirer or taker.[10]

[4] Essentially at issue is if such acquired or taken land's open market value is to be determined with (as the Crown contends) or without (as the Council contends) reference to any limitations imposed on it by the Reserves Act and consequent land use zoning. If without, the Council accepts the land's valuation must include an allowance for the expense of obtaining revocation of the land's reserve status and rezoning for the land's most likely alternative use.

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1 Reserves Act 1977, s 2, definition of "reserve".
2 Sections 12 and 14.
3 Sections 17–23.
4 Section 24.
5 Section 112.
6 Public Works Act 1981, ss 17(1) and 26.
7 Section 2, definition of "land".
8 Section 60(1).
9 Section 62(1)(b).
10 Section 62(2).

[5] The result of the parties' different contentions, in reference to agreed exemplar reserves for acquisition by the Crown, is:

Full compensation ($ million)	***Crown***	***Council***
Constellation Reserve	15.292	25.170
Rook Reserve	1.554	4.203

Background

[6] For the purpose of my declaration, with reference to supporting documents, the Crown and Council agree:

5. The Auckland Northern Corridor Improvements Project (the Project) is a government work undertaken by Waka Kotahi NZ Transport Agency (NZTA) to develop a direct road between the North Shore of Auckland and State Highway 16 to the west of Auckland.

6. As part of the Project, NZTA realigned part of State Highway 18 and constructed a motorway-to-motorway connection between State Highway 1 and State Highway 18.

7. To carry out those parts of the Project, NZTA required portions of land from two recreation reserves subject to the Reserves Act and vested in Auckland Council. These were:

   7.1 approximately 88,657 square metres of Constellation Reserve, which is a reserve described as Lot 1 Deposited Plan 98275 comprised in certificate of title 422165 (Constellation Reserve); and

   7.2 approximately 5,919 square metres of Rook Reserve, which is a reserve described as part of Lot 300 Deposited Plan 152320 comprised in the now-cancelled certificate of title NA85D/951 (Rook Reserve).

   (Collectively, the Reserves.)

8. Auckland Council agreed to sell those portions of the Reserves to the Crown in accordance with the PWA and this land has been, or will be, acquired by the Crown under that Act.

Acquisition of part of Constellation Reserve.

9. Constellation Reserve was a block of land located at 1 Upper Harbour Highway and 60 Paul Matthews Road, Rosedale and classified under the Reserves Act as a recreation reserve. It is located adjacent to the area known as North Harbour Industrial Estate and opposite a residential housing area known as Unsworth Heights (Unsworth Heights). Prior to its acquisition the land contained (amongst other things) grassed open space, hockey facilities and associated infrastructure including all-weather fields, a grandstand, changing facilities and other support buildings. Before being vested in one of Auckland Council's predecessors as a recreation reserve, the land was vested in Neil Construction Ltd.

10. The parties each sought valuations of the required portion of Constellation Reserve for the purpose of assessing compensation under the PWA.

11. On 25 September 2017, a valuer engaged by the Crown, Roberts McKeown, valued the required portion of Constellation Reserve at $15,292,000 (plus GST if any).

12. On 20 November 2017, a valuer engaged by Auckland Council, Telfer Young, valued the required portion of Constellation Reserve at $25,170,000 (plus GST if any).

13. In light of the monetary difference between the valuations acquired by the parties and the fact the predominant basis for the difference was differing views as to the appropriate approach required by the PWA in respect of valuing reserves, the parties could not agree upon the compensation Auckland Council was entitled to under ss 60 and 62 of the PWA for the required portion of Constellation Reserve.

14. Owing to the parties' disagreement, on 31 May 2018, an agreement for advance compensation was entered into between the parties. That agreement recorded, amongst other things, that:

    14.1 Auckland Council agreed to sell to the Crown the required portion of Constellation Reserve;

    14.2 the Crown agreed to pay Auckland Council $15,292,000 (plus GST if any) for the required portion of Constellation Reserve, by way of advance compensation, being the Crown's valuation of that land; and

    14.3 the advance compensation was agreed to be paid without prejudice to Auckland Council having the amount of compensation finally determined either by agreement between the parties or otherwise as provided for in the PWA.

15. Advance compensation for the acquisition of the required portion of Constellation Reserve was paid on 26 June 2018.

16. The Minister of Conservation provided written consent to the required portion of Constellation Reserve being declared a road in accordance with s 114(2)(e) of the PWA on 12 June 2018.

17. The required portion of Constellation Reserve was acquired by the Crown on 26 November 2021 pursuant to s 114 of the PWA by Gazette notice. This had the effect of removing the Reserves Act status of the required portion of the Constellation Reserve Land.

Acquisition of part of Rook Reserve.

18. Rook Reserve was a block of land located at R12 Rook Place, Unsworth Heights and classified under the Reserves Act as a recreation reserve. It adjoins the Unsworth Heights residential development. The land was unbuilt and comprised largely grassed open space with small pockets of trees. Before being vested in one of Auckland Council's predecessors as a recreation reserve, the land was vested in Neil Construction Ltd.

19. The parties each sought valuations of Rook Reserve for the purpose of assessing compensation under the PWA.

20. On 25 September 2017, a valuer engaged by the Crown, Roberts McKeown, valued the required portion of Rook Reserve at $1,554,000 (plus GST if any).

21. On 16 December 2017, a valuer engaged by Auckland Council, Telfer Young, valued the required portion of Rook Reserve at $4,203,000 (plus GST if any).

22. In light of the monetary difference between the valuations acquired by the parties and the fact the predominant basis for the difference was differing views as to the appropriate approach required by the PWA in respect of reserves, the parties could not agree upon the compensation Auckland Council was entitled to under ss 60 and 62 of the PWA for the required portion of Rook Reserve.

23. Owing to the parties' disagreement, on 25 October 2018, an agreement for advance compensation was entered into between the parties. That agreement recorded, amongst other things, that:

    23.1 Auckland Council agreed to sell to the Crown the required portion of Rook Reserve;

    23.2 the Crown agreed to pay Auckland Council $1,554,000 (plus GST if any) for the required portion of Rook Reserve, by way of advance compensation, being the Crown's valuation of that land; and

    23.3 the advance compensation was agreed to be paid without prejudice to Auckland Council having the amount of compensation finally determined either by agreement between the parties or otherwise as provided for in the PWA.

24. Advance compensation for the acquisition of the required portion of Rook Reserve was paid on 7 December 2018.

25. The Minister of Conservation provided written consent to the required portion of Rook Reserve being declared a road in accordance with s 114(2)(e) of the PWA on 24 September 2018.

26. The required portion of Rook Reserve is yet to be surveyed and acquired.

[7] Also for the purpose of my declaration, registered valuers Alan Roberts (of Roberts McKeown) and Ian Delbridge (formerly of Telfer Young) agree:

16. Both compensation valuations relate to Council owned public reserves which are subject to the Reserves Act 1977.

17. Both valuers have prepared valuations in accordance with Section 62 of the Public Works Act 1981, and in particular subsection 62(b)(i) and (ii). The section describes what is known as the "before and after" approach.

18. This approach is premised on the following underlying principles:

18.1 The property is to be valued in accordance with its highest and best use.

18.2 The value is to be assessed on the basis of a willing buyer and a willing seller. This principle contemplates an imaginary sale in the open market as at the date of valuation between willing parties. Both parties are fully informed, but neither party is over anxious to deal. The buyer is motivated but not compelled to purchase, whilst the seller is similarly motivated but under no duress to sell.

18.3 The principle of liberality which holds that the dispossessed owner should be given the benefit of any reasonable doubt.

18.4 The principle of equivalence which can be described as: "the fundamental principle that the owner's compensation should be equivalent to what they have lost by reason of the compulsory acquisition" (referring to Squire Speedy *Land Compensation* (New Zealand Institute of Valuers, Wellington 1985) at 6–7).

19. In other words, the owner is to be no better off or no worse off as a result of the acquisition.

20. This approach takes into account any "injurious affection" which may be described as follows: "…any loss in value to the residue of an owner's land resulting from the taking of land for an essential work or from the preliminary steps of the requiring authority" (referring to Speedy at 36).

[8] The Crown and Council further agree:

27. In sum, the valuer engaged by the Crown adopted the following approach to valuing the Reserves:

27.1 to take account of restrictions imposed on the use of the land by the Reserves Act, the Reserves were valued on the basis that they were land equivalent to rural land but with adjustments for location;

27.2 the Reserves were then valued on an assumption that they were zoned for their most likely alternative zones and uses;

27.3 the difference between the values of the Reserves' alternative uses and their current uses were determined and multiplied by percentage factors representing the likelihoods the Reserves could be rezoned and used accordingly (in this case, a 20% chance); and

27.4 the difference between the valuations as reduced by the percentage factors were added to the valuations of the Reserves as reserves to recognise their market value is increased by the chance they could be used for an alternative purpose.

28. The Crown considers this to be the appropriate approach required by the PWA.

29. The valuer engaged by Auckland Council adopted the following approach to valuing the Reserves:

29.1 the Reserves were valued for their highest and best use on the assumption that their reserve status had been or will be revoked and

the land had been or will be rezoned to its most likely alternative zone and use; and

29.2 taking into account, by way of a deduction from value, the costs of rezoning the land for its most likely alternative zone and use.

30. Auckland Council considers this to be the appropriate approach required by the PWA.

Statutory context

—Declaratory Judgments Act 1908

[9] Under the Declaratory Judgments Act 1908, if the validity, legality or effect of something a person wishes to do depends on the construction of legislation, I may determine any question as to that construction.[11] Subject to any appeal to the Court of Appeal, my declaration is binding on the parties.[12]

—Public Works Act

[10] Section 60(1) of the Public Works Act provides:

> **60 Basic entitlement to compensation**
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> (1) Where under this Act any land—
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> (a) is acquired or taken for any public work; or
>
> (b) suffers any injurious affection resulting from the acquisition or taking of any other land of the owner for any public work; or
>
> (c) suffers any damage from the exercise (whether proper or improper and whether normal or excessive) of—
>
> (i) any power under this Act; or
>
> (ii) any power which relates to a public work and is contained in any other Act—
>
> and no other provision is made under this or any other Act for compensation for that acquisition, taking, injurious affection, or damage, the owner of that land shall be entitled to full compensation from the Crown (acting through the Minister) or local authority, as the case may be, for such acquisition, taking, injurious affection, or damage.

[11] Section 62(1) goes on to provide:

> **62 Assessment of compensation**

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11 Declaratory Judgments Act 1908, s 3.

12 Section 8.

(1) The amount of compensation payable under this Act, whether for land taken, land injuriously affected, or otherwise, shall be assessed in accordance with the following provisions:

(a) subject to the provisions of sections 72 to 76, no allowance shall be made on account of the taking of any land being compulsory:

(b) the value of land shall, except as otherwise provided, be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise, unless—

(i) the assessment of compensation relates to any matter which is not directly based on the value of land and in respect of which a right to compensation is conferred under this or any other Act; or

(ii) only part of the land of an owner is taken or acquired under this Act and that part is of a size, shape, or nature for which there is no general demand or market, in which case the compensation for such land and the injurious affection caused by such taking or acquisition may be assessed by determining the market value of the whole of the owner's land and deducting from it the market value of the balance of the owner's land after the taking or acquisition:

(c) where the value of the land taken for any public work has, on or before the specified date, been increased or reduced by the work or the prospect of the work, the amount of that increase or reduction shall not be taken into account:

(d) the special suitability or adaptability of the land, or of any natural material acquired or taken under section 27, for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only pursuant to statutory powers, or a purpose for which there is no market apart from the special needs of a particular purchaser or the requirements of any government department or of any local authority:

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

(f) the Tribunal shall take into account, by way of deduction from the total amount of compensation that would otherwise be awarded, any increase in the value of the parcel of land in respect of which compensation is claimed that has occurred as a result of the exercise by the New Zealand Transport Agency of any power under section 91 of the Government Roading Powers Act 1989.

Section 62(2) defines the "specified date", relevantly here the earlier of either "the date on which the land became vested in the Crown" or (possibly) "the date on which the land was first entered upon for the purpose of … the carrying out of the work".

The parties' contentions

—for the Crown

[12] For the Crown, Nicholai Anderson submits, when reserve land is acquired under the Public Works Act:

(a) the restrictions on use and disposal because of the Reserves Act and all other restrictions that apply to the land, such as zoning, are relevant to assessing the market value of the land; and

(b) allowance can be made for the chance the restrictions because of the Reserves Act and other restrictions can be removed and the land used for its highest and best use.

[13] Mr Anderson placed particular weight on the Privy Council's decision in *Corrie v MacDermott*,[13] relating to the value of land acquired for public purposes, which land was subject to extensive restrictions on its use and sale or lease. The Board first referred to the established principle of compensation:[14]

> The value which has to be assessed is the value to the old owner who parts with the property, not the value to the new owner who takes it over. If, therefore, the old owner holds the property subject to restrictions it is a necessary point of inquiry how far these restrictions affect the value.

The chance of those restrictions being discharged must also be considered,[15] and "a restriction which prevents selling, though it must be taken into account and may very well affect the value, does in no way reduce the value to nil".[16] The Board also referred to a range of English authorities which applied the principle noting, for example, the value of land acquired for railway construction could not be measured by the value of unrestricted land in a similar position, because use of the land acquired was restricted.[17]

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13 *Corrie v McDermott* [1914] AC 1056 (PC).
14 At 1062.
15 At 1064.
16 At 1064.
17 At 1065, referring to Lord Shand "The Princes' Street Gardens Arbitration" in Robert Abercromby Gordon (ed) *The Law of Compensation for Land Acquired Under Compulsory Powers* (8th ed, Stevens & Sons Ltd, London, 1938) 916.

[14] Mr Anderson drew attention to *Hutt River Board v Lower Hutt Regional Council*,[18] in which riverbank land was acquired for a road extension and a Council yard. In dispute was if the land should be valued either as riverbank land suitable for only limited development, or as industrial land or at least with potential for industrial purposes. The Land Valuation Court observed:[19]

> When valuing land which has a potential value it is usual either to value the land with and inclusive of the potential, or to value the land as it stands and add something for the potential. It is neither a usual method of valuation, nor one acceptable to the Court, to assume the existence of those possibilities on which the potential value is based, and to value the land in accordance with those assumptions. Such a method disregards the well-established proposition that it is the possibilities of the land which must be taken into consideration and not its realized possibilities.

In doing so, the Court rejected a proposition zoning might be disregarded, if compensable by the zoning authority.

[15] Mr Anderson found support for the Crown's preferred approach by analogy from courts' approach to the valuation of land under the Rating Valuations Act 1998. At issue in *Valuer-General v The Trustees of the Christchurch Racecourse* was valuation of racecourse land classified as a reserve, therefore subject to restrictions on alienation and its uses for a specified purpose.[20] On appeal, the Judge found the Land Valuation Tribunal erred in rejecting valuations which took as a starting point the land with its restrictions,[21] stating:[22]

> What must be valued is the owner's estate or interest with the limited powers of use and restrictions on disposal applicable thereto. A prospective purchaser is accordingly likely to be limited to one who is either going to conduct a racecourse or lease the land for that and ancillary purposes. The prospect of a speculator as purchaser intending to dispossess the Racing Club and develop the whole land was so remote in 1987 as to be totally discounted. The fictional prospective purchaser would consider other available land which would undoubtedly be rural land.

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18 *Hutt River Board v Lower Hutt City Council* [1960] NZLR 1107 (Land Valuation Court) at 1109.

19 At 1111.

20 *Valuer-General v The Trustees of the Christchurch Racehorse* HC Christchurch AP343/92, 13 September 1994.

21 At 11.

22 At 14. In the context of a racecourse, the Judge observed a prospective purchaser for a racecourse would pay a premium for the land in recognition of its designated use: at 14–15; the hypothetical buyer would be purchasing the land for the sole purpose of a racecourse: at 20.

[16] As to the land's reserve status, the Judge commented:[23]

> Nevertheless full regard must be paid to the fact that the land is a Reserve … The probability is that if the provision for a reserve were revoked it would be on terms that the land returned to the Crown. The possibility of the respondents or their successors obtaining an unqualified right to dispose of the land and retain all or any of the proceeds of sale is not great.

However, the Judge was not prepared to say the revocation of reserve status, and subsequent changes to zoning, was an impossibility. Rather, he took this into account as a total sum to the total figure to "allow for the chances of change",[24] finding the valuers erred in failing to make a reduction on account of the land's limited use.[25]

[17] Similarly, in *Rotorua District Council v Ngāti Whakaue Education Endowment Trust Board*,[26] the Court of Appeal considered if constraints on saleability of reserve land should be taken into account when determining the land's capital value for rating purposes.

[18] With reference to the three crucial features of the Rating Valuations Act 1998 scheme — that valuation is of the owner's estate or interest, not pure fee simple; the valuation is made on the statutory premise the owner will sell its interest in the land; and the value is what a willing but not anxious buyer would be prepared to pay to the willing but not anxious seller[27] — the Court considered if a statutory restriction, such as the restriction on alienation of the land under the Reserves and Other Lands Disposal Act 1995, is an "incident of an owner's estate or interest in the land or merely a limitation that is confined to or 'personal to' the owner and consequently does not affect subsequent owners".[28]

[19] Having regard for s 7 of the Reserves and Other Lands Disposal Act, which sets out the conditions to which the Trust was subject in holding the land, the Court held:[29]

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23 At 16.
24 At 18–19.
25 At 19.
26 *Rotorua District Council v Ngāti Whakaue Education Endowment Trust Board* [2018] NZCA 143, [2018] NZAR 951.
27 At [15], citing *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 (CA) at 649.
28 At [35].
29 At [42]–[44].

> In our view the proper construction of s 7 viewed in its entirety is that the specified land was to be vested in trust, subject to a constraint on its saleability. The consequence is that the estate or interest reposed in the Trust comprises the rights of possession, use and enjoyment but not the right of absolute alienation of the fee simple. The Trust's estate or interest in the land is thereby confined. Hence, contrary to the Valuer-General's submission, the actual estate held by the Trust is a restricted one. Properly construed the restrictions contained in s 7 do not relate merely "to the Trust structure itself".
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> Hence this particular statutory restriction is not of the personal class, as in *Thomas*, where the land is saleable. Rather, properly analysed, the restriction is as described in *Ormsby*, namely a limitation on the Trust's estate or interest in the land.
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> …
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> From our analysis it follows that, in the hypothetical sale which the definition of capital value requires, the estate or interest of the Trust, which is hypothetically conveyed to the willing but not anxious seller, is no more than the estate granted to the Trust by the 1995 Act. The fact of the hypothetical sale does not result in the Trust's restricted estate being miraculously transformed into a broader estate that thereafter incorporates the power to alienate.

[20] Mr Anderson also cites *Valuer-General v Ormsby* for the principle "capital value [of land] has to be ascertained on the basis of the restricted estate or interest".[30]

—for the Council

[21] Conversely, for the Council, Nicky Hall contends in such circumstances the land is to be valued as if it was sold in an open market, with restrictions on sale or disposal disregarded for the purposes of s 62(1)(b). That requires the land to be valued at its highest and best use (that is, without its reserve status) but deducting the regulatory and administrative costs of revoking the reserve status and rezoning.

[22] Ms Hall primarily relied on the decision of the New South Wales Court of Appeal in *Leichhardt Council v Roads and Traffic Authority of NSW*,[31] in which the issue was if the Council's restriction in sale or disposal of the land could be regarded a restriction affecting its value. Focusing on the Land Acquisition (Just Terms

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30 At [47].

31 *Leichhardt Council v Roads and Traffic Authority of NSW* [2006] NSWCA 353, (2006) 149 LGERA 439.

Compensation) Act 1991 (NSW) as providing the relevant statutory scheme,[32] the Court held application of *Corrie*'s principles was excluded.[33]

[23] Spigelman CJ explained *Corrie* was based on the concept of 'value to the owner', whereas determination of the amount of compensation to which a person was entitled under the 1991 Act was to be made having regard only to stipulated criteria:[34]

> It was a unifying concept which encompassed "market value", "special value", "disturbance" and "severance". "Value to the owner" was not a concept which, at least in its origins, operated as an addition to market value. Rather, market value was, in most cases, the way of computing "value to the owner".
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> …
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> *Corrie v MacDermott* should be understood as an application of the concept of "value to the owner". This unifying concept was most commonly applied to increase the amount of compensation over market value when the land had a positive special value to the owner. In *Corrie v MacDermott* the concept was applied to reduce the compensation when the land had what could be described as a negative special value to the owner.
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> … [T]he reasoning in *Corrie v MacDermott* is not directly applicable to s 55. That section requires that separate consideration be given to each of its sub-paragraphs and to each of the definitions in ss 56–60. The word "value", let alone "value to the owner", has no operative function. "Value" only appears in conjunction with another word – "market value", "special value" – and the conjoined words are precisely defined.

[24] Accordingly, Spigelman CJ held: [35]

> …. once the idea of "value to the owner" is taken away as a unifying concept, as it has been, the foundation of the reasoning in *Corrie v MacDermott* has also been removed. There are, of course, restrictions on use, e.g. zoning, which affect all vendors and purchasers in the hypothetical sale. Where, however, a restriction affects *only* the person whose land has been acquired, in my opinion, the restriction is not a matter that must be applied when determining the market value.

[25] Turning to s 56 of the Land Acquisition (Just Terms Compensation) Act, which defined market value, Spigelman CJ concluded, "the statutory prohibition on sale of community land is a consideration which affects the land by reason only of the identity

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32 At [14]; see also [35]–[36].
33 At [27] and [32].
34 At [24] and [26]–[27].
35 At [32].

of the person who happens to own it" and so a characteristic of the land "capable of constituting an element of the hypothetical sale for which s 56(1) provides".[36]

[26] Bryson JA commented s 56 only can be applied if it is assumed that the land could be sold, so it must be assumed that the restriction on the power of sale did not exist.[37] His Honour observed the purpose of the restriction on sale of community land:[38]

> … certainly did not include making it cheaper for resuming authorities to acquire community land than other land, and did not include offering them temptations to resume community land rather than other land. There could be no good policy in leaving a Local Government authority whose community land had been resumed with less money than the market value of that land with which to address the acquisition of other land for the same purpose.

[27] Ms Hall also found support for the Council's approach by analogy from Māori land valuation cases. In *Re Putiki Rifle Range*,[39] the Court assessed compensation for Māori land taken for the purpose of a rifle range. The land was subject to a Crown grant, which restricted alienation except with the consent of the Governor or by lease for a longer period than 21 years.[40] In considering if the land was taken as fee simple or subject to the Crown grant restrictions, Cooper J held:[41]

> … in other words, that the Native owner has only such a property in the land as is measured by his power to let it on lease for twenty-one years, and that out of the compensation to be assessed as the value of that interest he must pay the evicted lessees. I cannot accept this view. In my opinion the Crown must pay compensation for what it gets. It gets the fee-simple of the land in question discharged from the restrictions on the title, and this is the measure of the "value of the land taken".

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36 At [43].
37 At [87], referring to s 45 of the Local Government Act 1993 (NSW).
38 At [89].
39 *Re Putiki Rifle Range* (1905) 26 NZLR 33 (SC).
40 At 34.
41 At 37. This was approved in *Re Johnsonville Town Board* (1907) 27 NZLR 36 (SC).

"Full compensation" in principle

[28] In any society in which private ownership of land is permitted, community welfare requires there be power to take land for public purposes,[42] for which justice requires compensation should be paid.[43]

[29] There is longstanding acceptance in law "compulsory acquisition of land [is] a serious interference in individual rights demanding special attention".[44] The Supreme Court explained:[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". 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.

[30] The power of the Crown to acquire land compulsorily for public works, and its attendant obligation to pay fair compensation, is set out in the Public Works Act. In terms of the Act, 'fair compensation' means "full compensation".[46]

[31] In law, 'compensation' is an award of the monetary equivalent of what is lost.[47] 'Full compensation':[48]

> … has the added purpose of emphasising that a claimant is entitled to receive the complete equivalent of that which has been taken away from him. It

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42 *Pascoe v Minister for Land Information* [2024] NZCA 557 at [18].

43 *West Midland Baptist (Trust) Association (Inc) v Birmingham Corp* 16 [1969] 3 WLR 389 (HL) at 408.

44 *Ace Developments Ltd v Attorney-General* [2017] NZCA 409, [2017] 3 NZLR 728 at [61], citing William Blackstone *Commentaries on the Laws of England* (15th ed, T Cadell and W Davies, London, 1809; reprint Professional Books, Abingdon (Oxfordshire), 1982) vol 1 at 139.

45 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149at [45] (footnote omitted).

46 *Riddiford v Attorney-General* [2009] NZCA 603 at [24].

47 *Te Marua Ltd v Wellington Regional Water Board* [1983] NZLR 694 (CA) at 697.

48 *Drower v Minister of Works and Development* [1984] 1 NZLR 26 (CA) at 29; see also *Te Marua Ltd v Wellington Regional Water Board*, above n 47, at 697; and Squire Speedy *Land Valuation Compensation* (New Zealand Institute of Valuers, Wellington, 1985) at 6–7.

> implies a direction that the entitlement must not be whittled down in any respect.

Further, any evidential doubt may be resolved by a more liberal estimate in favour of the dispossessed.[49] These are the principles of equivalence and liberality to be adopted by the valuers.[50]

[32] Thus 'full compensation' means the sum of money, so far as money can do it,[51] as will put the dispossessed owner "in a position as nearly similar as possible" to that it was in when the land was acquired or taken;[52] "a full money equivalent of [the] loss".[53]

[33] Because the assessment is to disregard the fact of the land's compulsory acquisition or taking,[54] determination of the sum of compensation depends on a counterfactual. Subject to exceptions, which I address at [36] below, the primary rule for quantification of that sum of money is it be assessed by reference to the value the acquired or taken land might have been expected to realise "if sold in the open market by a willing seller to a willing buyer on the specified date";[55] its 'market value' on that date.[56] Such market value is to take into account any potentialities at that time, including realisation expenses.[57]

[34] Given the statutory direction for assessment of value as if sold in an open market between hypothetical willing parties, any prohibition on sale necessarily must be disregarded.[58] Assessment of that value of land then must be founded in any

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49 *Tawharanui Farm Ltd v Auckland Regional Authority* [1976] 2 NZLR 230 (SC) at 234, citing *Commissioner of Succession Duties (South Australia) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 373–374.

50 At [7] above, paras 18.3–18.4.

51 *Robinson v Harman* (1848) 1 Exch 850 at 855.

52 *Russell v Minister of Lands* (1898) 17 NZLR 241 (SC) at 253; and see Peter Salmon *The Compulsory Acquisition of Land in New Zealand* (Butterworths, Wellington, 1982) at [11.1].

53 *Commissioner of Succession Duties (South Australia) v Executors Trustee & Agency Co of South Australia Ltd*, above n 49, at 373.

54 Public Works Act, s 62(1)(a).

55 Section 62(1)(b).

56 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) at 83.

57 *Re Whareroa 2E Block, Maori Trustee v Ministry of Works* [1959] NZLR 7 (PC) at 10.

58 *Rotorua District Council v Ngāti Whakaue Education Endowment Trust Board*, above n 26, at [31], referring to *Gollan v Randwick Municipal Council* [1961] AC 82 (PC) at 94. Similarly, *Leichardt Council v Roads and Traffic Authority of NSW*, above n 31, at [87].

knowledge or information those hypothetical parties are likely to have taken into account in coming to their compromise on price.[59]

[35] Valuation practice may be to assume the hypothetical parties will seek to afford the land its highest and best use, "but to speak in terms of such a principle can be misleading":[60] rather, despite "an apparently endemic trend in New Zealand for valuers, accountants and lawyers to seek to replace the willing seller-willing buyer test by more specific and detailed tests applicable to particular categories of cases",[61] the statutory test must prevail.

[36] The exceptions to assessing compensation on the basis of the value of land if sold in the open market between hypothetical willing parties are:

(a) if any right to compensation relates to any matter "which is not directly based on the value of land";[62] and

(b) if only part of an owner's land is taken or acquired, and is "of a size, shape, or nature for which there is no general demand or market".[63]

In the latter circumstance, compensation may instead be assessed by determining "the market value of the whole of the owner's land and deducting from it the market value of the balance of the owner's land after the taking or acquisition", such being described as a "before and after" approach, basis or concept.[64] The valuers may have ascribed that description with a more expansive meaning, as springing from s 62 overall.[65]

Discussion

[37] I consider the approach taken in *Leichhardt Council v Roads and Traffic Authority of NSW*, informed by that Court's particular interpretation of the material provisions of the Land Acquisition (Just Terms Compensation) Act, to be inapposite in construing the Public Works Act's relevant provisions here.

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59 *Green & McCahill Holdings Ltd v Auckland Council* [2013] NZHC 507 at [62].
60 *Gus Properties Ltd v Tower Corporation* [1992] 2 NZLR 678 (CA) at 687.
61 At 687.
62 Public Works Act, s 62(1)(b)(i).
63 Section 62(1)(b)(ii).
64 *Auckland Council v Green & McCahill Holdings Ltd* [2015] NZCA 20, [2015] NZAR 849 at [31]-[32] and [40].
65 At [7] above, para 17.

[38] As I have explained, the latter Act directs attention to "full compensation", assessed by reference to factors including "the value of land" as "that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise".[66] But the Australian legislation provides for "just compensation" in an amount to be established "only" by regard to the statute's specified matters, which the NSW Court of Appeal construed as a single "unifying factor" distinct from land value.

[39] Neither do I find the parties' analogies helpful. They are each to discrete statutory compensatory regimes, and there is no good reason to require their synthesis with that established by the Public Works Act.

[40] As always, the starting point is the statutory text in light of its purpose and context.[67] The test in general terms is well-established: "what a willing but not anxious seller and a willing but not anxious buyer, acting freely and adequately informed, would agree should be the price" of the land,[68] "with all its existing advantages, possibilities and potentialities",[69] only the latter to incorporate the land's prospective 'highest and best use'.[70]

[41] Fundamentally, I do not see the statutory test — of what amount might be realised if the land at issue was sold on the open market by a willing seller to a willing buyer — to require removal of any limitations to achievement of the land's optimum value as the Council argues.

[42] "[O]pen market" does not carry that implication: the reference to "open market" is "to the notional market for the sale of the land between the hypothetical willing seller and willing buyer", [71] compared to "the absence of any actual market for

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66 Public Works Act, s 62(1)(b).

67 Legislation Act 2019, s 10; *Whai Rawa Railway Lands LP v Body Corporate 201036* [2024] NZCA 207 at [54]–[55], referring to *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

68 *Palmerston North City Council v Hardiway Enterprises Ltd* [2015] NZCA 114, [2017] NZRMA 1 at [19].

69 *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 (CA) at 327.

70 *Hall v Chief Executive of Land Information New Zealand* [2014] NZAR 749 (HC) at [34]–[35]. Similarly, *Chief Executive of Land Information New Zealand v Luke* [2008] NZCA 43 at [25]; *Gus Properties Ltd v Tower Corporation*, above n 60, at 687.

71 *Palmerston North City Council v Hardiway Enterprises Ltd*, above n 68, at [61].

the land".[72] By 'open' only is meant "an intention to include every possible purchaser", distinctly from any more limited class.[73] That includes the surrendering owner.[74] Potentiality is "a recognised component of the value of land",[75] rather than the determinant of that value.

[43] The question accordingly turns to if the land's reserve status or consequent zoning either prohibits sale,[76] or excludes any potential purchaser.[77] Neither prohibition nor exclusion can stand in light of s 62's direction for the value of land to be taken as "if sold in the open market".

[44] The Council contends "reserves cannot be sold as reserves". That is wrong. Effect may be given to any dealing with a reserve (the person in whom the reserve is vested holding the land "subject to any trust to which the land is subject"),[78] but only "in conformity with the trusts upon which the reserve is held for the time being".[79]

[45] Here — the respective reserves each being vested in one of the Council's predecessors as a recreation reserve in terms of s 17 of the Reserves Act[80] — those are trusts simply "for the purpose for which the land was reserved".[81] They neither prohibit sale nor exclude any potential purchaser. That the land's reserve status or zoning may be off-putting to potential purchasers is not prohibitive or exclusionary, but a quality of the land in the hands of whoever it may be vested.[82]

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72 At [63]. Section 65 alternatively provides for compensation "assessed on the basis of the reasonable cost of equivalent reinstatement" where there is no general demand or market for land with the purpose for which it was used.

73 *Inland Revenue Commissioner v Clay* [1914] 3 KB 466 (CA) at 475, referred to in *Jacobsen Holdings Ltd v Drexel*, above n 69, at 334.

74 *Valuer-General v Wellington City Corp* [1933] NZLR 855 at 859.

75 *Casata v Minister for Land Information* [2024] NZCA 592 at [103], citing *Re Whareroa 2E Block, Maori Trustee v Ministry of Works*, above n 57, at 10 and 13–14 (applied in *Wellington City Corp v Berger Paints NZ Ltd* [1975] 1 NZLR 184 (CA)).

76 See [33] above.

77 See [41] above.

78 Land Transfer Act 2017, s 154(1).

79 Reserves Act, s 112, which "operates in conjunction with" s 154 of the Land Transfer Act: *Green Growth No. 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [33], n 25.

80 See [6] above at paras 9 and 18.

81 *Napier Public Health Action Group Inc v Minister of Conservation* [2007] 3 NZLR 559 (HC) at [54]; similarly, in *Wellington Harness Racing Club Inc v Hutt City Council* [2004] 1 NZLR 82 (HC) at [67], "a very distinct form of statutory trust of a public character, on the terms contained in the legislation".

82 *Napier Public Health Action Group Inc v Minister of Conservation*, above n 81, at [71].

[46] The Public Works Act's relevant purpose is to assess full compensation for compulsorily acquired land in accordance with the value of the land comprehended in the counterfactual of hypothetical parties' compromise price for its sale and purchase. That compromise necessarily will take into account both limitations to and prospects for achieving the land's potential.

[47] I will make a declaration accordingly. In terms of the Declaratory Judgments Act, as binding on the parties only, I will limit my declaration to that which the parties here wish to do. I hesitate to declare more widely as sought, given the potential relevance of the terms of any more specific trust on which reserve land may be vested.

Result

[48] I **declare** — when valuing the parts of Constellation and Rook Reserves subject to the Reserves Act acquired under the Public Works Act — for the purpose of the latter Act's s 62(1)(b), the land is to be valued:

(a) with all restrictions associated with it being a reserve, including those under the Reserves Act and any local planning documents; and

(b) taking into account the chance (if any) those restrictions may be removed and the land is able to be used for its highest and best use.

Costs

[49] If costs are in issue, they are reserved for determination on short memoranda each of no more than five pages — annexing a single-page table setting out any contended allowable steps, time allocation and daily recovery rate — to be filed and served by the Crown within 10 working days of the date of this judgment, with any response or reply to be filed within five working day intervals after service.

—Jagose J