**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA210/04**

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| BETWEEN | ESTATE HOMES LIMITED<br>Appellant |
| AND | WAITAKERE CITY COUNCIL<br>Respondent |

Hearing: 1 September 2005

Court: Chambers, Baragwanath and Goddard JJ

Counsel: D J Neutze and N D Wright for Appellant
M E Casey and R B Enright for Respondent

Judgment: 11 November 2005

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed.**

**B The judgment of the High Court dated 30 June 2004 is set aside (but without restoring the decision of the Environment Court dated 16 September 2003).**

**C The question of the validity of condition 2(o)(vi) as imposed by the respondent is remitted to the Environment Court for its reconsideration. That court, in determining whether the condition is valid, must take into account the terms of the respondent's district plan requiring "a roading pattern which maximises connections within and between local neighbourhoods".**

**D Liberty to either party to apply to the Environment Court for directions and orders with respect to the compensation paid by the respondent to the appellant in accordance with the judgment of the High Court.**

**E The respondent must pay costs to the appellant in the sum of $8,000, plus usual disbursements. We certify for second counsel.**

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## REASONS



**CHAMBERS J**

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### Roading conditions as part of subdivision approval

[1] In February 2000, Estate Homes Limited applied to the Waitakere City Council for a resource consent for a subdivision of a block of land it owned on Ranui Station Road in Ranui, which is part of Waitakere City. Estate Homes' proposal was to subdivide the block into 68 lots, on which it intended to build residential medium density units.

[2] I reproduce a plan of the subdivision as submitted to the council by Estate Homes:


[3] As will be seen from the plan, the major road going through the subdivision was lot 71. Estate Homes intended that road to have a 13 m carriageway. The road reserve width was 23 m. That was wider than was necessary for this particular subdivision, but Estate Homes knew, from discussions with council officers prior to submitting the application, that the council would require a road of those dimensions on the alignment shown. The reason for that was that, back in 1989, the council had decided to designate a district arterial road from Ranui Station Road at the point marked A on the above plan through to Marinich Drive to the north. The council's idea was that, as land covered by the designation was subdivided, subdividers would be required to complete the section of arterial road on their property, until eventually the parts would link up, with the consequence that Marinich Drive would become a district arterial road running from Swanson Road in the north to Ranui Station Road in the south.

[4] Estate Homes was prepared to construct the lot 71 road (which I shall call Marinich Drive), but considered that it should be compensated for the fact that it was constructing a road wider than would otherwise have been necessary for this

subdivision. Estate Homes, in its application for a resource consent, said on this topic:

> 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$^2$)

[5] This request for compensation was based on Estate Homes' view at the time that, but for the designation, it could have developed its subdivision with Marinich Drive having a 17 m width and a carriageway of only 8 m.

[6] Estate Homes asked that its application for subdivision approval be dealt with on a non-notified basis.

[7] The council considered the application. It determined that the application would be dealt with on a non-notified basis. It granted the resource consent. One of the conditions of that consent was condition 2(o), which imposed the following obligation on Estate Homes:

> 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.

[8] "Notes" to that condition imposed requirements as to tree planting, street parking, footpaths, and access ways. The final note read as follows:

> (vi) Compensation for the extra 2 m 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] Estate Homes objected to and appealed against some of the conditions, including condition 2(o)(vi). Notwithstanding the outstanding appeal, the Environment Court permitted work to commence pursuant to the resource consent. We were told that the subdivision has since been completed. By the time the Environment Court heard Estate Homes' appeal, all disputes save for the

condition 2(o)(vi) dispute had been resolved. So the hearing before the Environment Court was concerned exclusively with the validity of condition 2(o)(vi). The court delivered judgment on 16 September 2003: (2004) 3 NZRMA 137. I shall return to the details of that court's decision later. In essence, the court concluded that condition 2(o)(vi) was invalid. The court did not make a final order, but instead made what it termed "a finding in the nature of a declaration": at [21]. That finding was in the following terms:

> Insofar 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.

[10] The council appealed to the High Court. Venning J delivered his decision on 30 July last year: *Waitakere City Council v Estate Homes Ltd* [2005] NZRMA 128. I shall refer to Venning J's reasoning in more detail later. For present purposes, all that matters is his conclusion. He allowed the council's appeal and set aside the Environment Court's decision. He recast note (vi) of condition 2(o) so that it read as follows:

> (vi) Compensation for the extra 2 m width of carriageway will be paid by Council when the arterial road (Lot 71) is vested in Council as legal road. Compensation for the additional cost of construction of Marinich Drive to the extra width (2 m) and the additional cost of construction to the standard of an arterial road will be paid by the Council. Provide an estimate of this cost for approval prior to construction of the road to enable claims to be budgeted.

[11] The council was happy with Venning J's decision and indeed has paid compensation to Estate Homes in accordance with His Honour's recast condition 2(o)(vi). But Estate Homes was not happy. It says it is entitled to more compensation than Venning J allowed. Accordingly, Estate Homes sought and was granted leave to appeal to this court on the grounds that Venning J's decision was wrong in law.

**The principal issues on this appeal**

[12] Leave to appeal was granted with respect to two questions of law. Immediately before the hearing, Estate Homes sought further leave to add a third question. We heard that application for leave at the same time as we heard the substantive appeal. I shall return to the formal questions of law later in these reasons.

[13] On this appeal, both sides accept that it would have been unreasonable for the council to have required Estate Homes to construct a district arterial road without the council paying some compensation. What is in dispute is the legal basis for a condition like condition 2(o)(vi) and whether Venning J's recast condition provides fair and reasonable compensation.

[14] A further issue, which arises if Estate Homes' application to add a further ground of appeal is allowed, is whether Venning J should have recast condition 2(o)(vi) himself or whether he should have remitted the matter to the Environment Court for it to reconsider the condition in light of the High Court's findings of law.

[15] I shall approach my analysis in these terms, namely:

(a) What was the legal basis for condition 2(o), and in particular condition 2(o)(vi)?

(b) Was the condition fair and reasonable?

(c) Should Venning J have remitted the case to the Environment Court rather than recasting the condition himself?

[16] Before embarking on my analysis, however, I shall set out in greater (but not extensive) detail the approach and findings of the Environment Court and the High Court.

**The Environment Court decision**

[17] In the Environment Court's view, condition 2(o)(vi) was not authorised by s 108 of the Resource Management Act 1991: 3 NZRMA 137 at [9]. But the court considered that, in theory, the condition could lawfully have been made under either s 321A or s 322 of the Local Government Act 1974. Those two sections were repealed by s 362 of the Resource Management Act, but it is common ground that they continued in force so far as Waitakere City Council was concerned by virtue of a transitional provision in the Resource Management Act: s 407. Because ss 321A and 322 of the Local Government Act do not appear in the latest reprint of that statute, I set them out for readers' benefit:

> 321A. **Roading contributions as condition of approval of scheme plan**
>
> (1) For the purpose of forming, diverting, or upgrading any existing road or forming any new road because of new or increased traffic owing to the subdivision of any land the council may, as a condition of approval of a scheme plan, require the owner to –
>
> (a) Pay, or enter into a binding contract to pay, to the council a fair and reasonable contribution towards the cost of forming or upgrading roads or parts of roads within or adjacent to the subdivision or any other land vested in the same owner to a state or standard that may be specified by the council, or require him to carry out, or enter into a binding contract to carry out, that work; or
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> (b) Dedicate a strip of land for widening any road; or
>
> (c) Comply with both paragraph (a) and paragraph (b) of this subsection.
>
> (2) No requirement under subsection (1)(a) of this section shall require contributions from or the carrying out of work by an owner-
>
> (a) That exceed the extent to which the road serves or is intended to serve the subdivision; or
>
> (b) In the case of a road that is adjacent to the subdivision or other land vested in the same owner, that exceed half the estimated cost of the work,-
>
> whichever is the lesser.
>
> (3) No requirement under subsection (1)(b) of this section may require the dedication of land having a total value in excess of the maximum contribution that could be required of the owner under subsection (1)(a) of this section.
>
> (4) No requirements under paragraph (c) of subsection (1) of this section may require contributions, works, or dedication of land of a total value in

excess of the maximum value of the contributions, work or land to be dedicated that could be required if the requirements were made under only one of paragraphs (a) and (b) of that subsection.

(5) In determining the contributions or extent of work to be carried out by an owner for the purposes of subsection (2) of this section, the fair market value of any land required to be dedicated by the owner under subsection (1)(b) of this section shall, to the extent that the land is required to serve the subdivision, be counted as a contribution by the owner.

(6) Where an owner is required to dedicate land under sub section (1)(b) of this section, he shall be entitled to be paid by way of compensation from the council the fair market value of so much of the land as is in excess of the land required for any road that serves or is intended to serve the subdivision.

(7) The fair market value of any land required to be determined for the purposes of subsection (1)(b), subsection (3), subsection (4), or subsection (6) of this section shall be determined as at the date when the allotments on the scheme plan are first available for sale or such other date as may be agreed by the owner and the council; and the fair market value shall be fixed by agreement between the owner of the land and the council or, in default of agreement or if the council so decides, by the Valuer General.

(8) The value of any work carried out or required to be carried out by an owner and the estimated cost of any work shall, for the purposes of subsection (1) or subsection (2) of this section, be determined by decision of the council.

322. **Land for road formation or widening**

(1) Notwithstanding anything in section 321A of this Act, the council, instead of requiring the owner to make provision for the construction of roads or to complete the work of making new roads shown on the scheme plan, may agree with the owner that the council will carry out the work of constructing the roads or making the new roads in consideration of the owner transferring to the council part of the land in the subdivision or any other land.

(2) For the purposes of forming any new road or of diverting or upgrading any existing road, the council-

(a) May take, purchase, or otherwise acquire land in accordance with the provisions of this Act; or

(b) May require, as a condition of its approval of any scheme plan, the transfer, pursuant to an agreement with the owner, of any land marked for roading on the plan where the council decides to undertake the formation of the road or roads itself; or

(c) *Repealed*.

(d) May, where-

(i) Any allotment on the scheme plan has a frontage to an existing road of a width less than that specified in section 325 of this Act, which was not laid off or dedicated pursuant to a plan of subdivision previously approved under this Part of this Act or under any former enactment, whether by the council or by any other authority; and

(ii) The council is of the opinion that if that road were a new road to be provided by the owner to give access to that allotment the council would require a road of a greater width,-

the council may, as a condition of its consent to its approval of the scheme plan, require the owner to set back the frontage of that allotment to a distance sufficient to enable that road to be widened to the width that would be required by the council for a new or proposed road of a like nature under section 321 of this Act:

Provided that the council shall not require the owner to set back the frontage of that allotment to a distance from the middle line of the road as it originally existed greater than half the width of the road when widened to the width that would be required by the council as aforesaid.

(3) In any case to which paragraph (d) of subsection (2) of this section applies-

(a) The owner shall dedicate as a road the strip of land between the frontage line as so set back and the frontage line as previously existing, and thereupon the land so dedicated shall form part of the existing road; and

(b) The owner of the land so dedicated shall be entitled to compensation by the council, to be claimed and ascertained under the Public Works Act 1981; and in assessing such compensation the Land Valuation Tribunal shall take into consideration the necessity for or advantage of affording greater road space and the betterment accruing to the whole property affected, and any such betterment shall be a set-off against the compensation claimed.

[18] The court observed, however, that those two sections did not authorise a roading condition unrelated to the proposed subdivision. Any condition had to be "fair and reasonable" in terms of the test laid down in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL). The Environment Court summarised the *Newbury* requirements as follows at [16]:

(a) That the condition imposed must be for a resource management purpose and not for some ulterior purpose.

(b) The condition must fairly and reasonably relate to the development in question.

(c) The condition must not be so unreasonable that no reasonable consenting authority could have imposed it.

[19] The court then went on to apply that test. It concluded that what the council had done was not lawful. The essence of the court's reasoning is contained in the following three paragraphs of its decision:

> [18] It is plain that the Council, since at least 1989, has wanted a road along this route. That it is perfectly entitled to have, and such a road may well prove a substantial benefit to the community. But of itself, that does not enable the Council to make others pay for "its" project. It cannot lawfully require any contribution at all unless the subdivision is at least a cause for requiring the road.
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> [19] Plainly it is not. This road was "required" 11 years before the subdivision was proposed and would have continued to be "required" if it had never been proposed and the land had remained as an orchard.
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> [20] For those reasons we hold that the council did not have lawful authority to require any contribution to the cost of construction of the road (in terms of s 321A) nor to require vesting, at least without compensation, of the land on which it was constructed (in terms of s 322).

[20] The court considered it had no satisfactory evidence before it on which to form a view of what the construction costs actually were or of the value of the land. Indeed, the court doubted whether it even had jurisdiction to give appropriate relief. It therefore determined that it would simply make the declaration which I have set out above at [9]. The net effect of that declaration would be that the council would have had to pay by way of compensation the full value of lot 71 and the full cost of constructing Marinich Drive.

**The High Court decision**

[21] Venning J's conclusion was quite different from the Environment Court's. So was the reasoning.

[22] The first matter Venning J analysed was "the basis for vesting the land in the council". He noted that the council had acknowledged that it had required Estate Homes to provide land, at least to the extent of the additional 2 m in width, required for the purpose of providing Marinich Drive as an arterial road: [2005] NZRMA 128 at [19]. That additional land would vest in the council, upon deposit of the survey plan, by virtue of s 238 of the Resource Management Act. In Venning J's view, the council had "taken, purchased, or otherwise acquired" the additional 2 m of land in

accordance with s 322(2)(a) of the Local Government Act, which provides for compensation: at [28]-[29]. So far as the land was concerned, therefore, Venning J concluded that the council was bound to pay compensation pursuant to s 322(2)(a) of the Local Government Act, but only in respect of the additional 2 m of land. Compensation was not required, he said, for the balance of the land required for Marinich Drive "as that land vests in the council in the usual way that roads shown on subdivision plans vest without the need for any condition to that effect": at [29].

[23] Venning J rejected the Environment Court's view that s 321A of the Local Government Act had relevance: at [25].

[24] Venning J then turned to "the requirement to form Marinich Drive to arterial road standard". He held that "the requirement to construct the new roads shown in the plan, including Marinich Drive, is a condition requiring services or works in accordance with s 108(2)(c)" of the Resource Management Act: at [31]. He accordingly rejected the Environment Court's conclusion that s 108 did not provide a legal basis for the roading condition. Notwithstanding that difference of view, Venning J nonetheless agreed with the Environment Court that a *Newbury* analysis had to be undertaken, in order to ascertain whether the condition was fair and reasonable. His Honour summarised his view in the following passage of his reasons for judgment:

> [54] … Further, in my view the Environment Court fell into error in concluding that as the road was "required", i.e. designated for 11 years before the subdivision was proposed, then conditions requiring its effective vesting and construction could not fairly and reasonably relate to the subdivision, even when the subdivision application presented by Estate Homes to the council depicted Marinich Drive in the position of the designated road. Estate Homes planned its subdivision about Marinich Drive. It is particularly significant that Estate Homes sought approval of a subdivision proposal that provided for Marinich Drive.
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> [55] Accepting the reality of the designation for an arterial road under s 176 of the Act, Estate Homes had at least four options. It could have:
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> - planned its subdivision around that designation;
> - sought to have the designation lifted;
> - promoted a subdivision which did not make provision for the designation; or

- developed the land in some other way leaving the designation intact but without incorporating the road into the subdivision.

> [56] Estate Homes chose the first option. It accepted the designation and planned its subdivision about the designation. It incorporated a road, Marinich Drive, into the subdivision application that it presented to the council. On that basis it cannot be said that a condition requiring a road (as opposed to an arterial road) to be constructed as depicted on the subdivision plan with its consequent vesting in the Council could not fairly and reasonable relate to the subdivision application submitted by Estate Homes to the Council.
>
> [57] The Environment Court fell into error by failing to consider the provision of the road (which became Marinich Drive) separately from the additional requirement of the Council that the road be constructed to an arterial standard and that Estate Homes, the developer, provide an additional two m of land to enable its construction.
>
> [58] The factual findings do not prevent this Court from identifying that error. Indeed there is an acknowledgement, in the course of the Environment Court decision, that Marinich Drive will be used for the purposes of the subdivision. The Environment Court was wrong, however, to take into account that in a hypothetical way, the subdivision could have been designated to operate in a roading sense perfectly well without Marinich Drive. This was not the application presented to the Council.

[25] His Honour concluded that condition 2(o)(vi) required the council to provide compensation for the additional cost of construction required to construct Marinich Drive to the standard of an arterial road, the condition was fair and reasonable, and met the *Newbury* test: at [61].

[26] His Honour considered whether it was necessary to refer the matter back to the Environment Court. He concluded that was not necessary for the following reason:

> [62] … Given the findings of the Environment Court, I consider the Environment Court should only have departed from the decision of the Council in granting the consent to the extent necessary to clarify that compensation was due, not only for the extra two m of land but also for the additional cost of constructing the road on Marinich Drive to the width (and standard) of an arterial road. This Court can make that determination in dealing with this appeal: r 718A(1) and s 290.

**The authority for condition 2(o)**

*My legal analysis*

[27] My legal analysis is somewhat different from the analyses of both lower courts – although much closer to Venning J's than to the Environment Court's.

[28] According to the Environment Court's judgment, the designation of a district arterial road has been in place since 1989, as a result of a variation to the then Proposed District Plan. The designation affected many more pieces of land than the one immediately in issue: at [3]. The then owner of the land with which we are concerned would have had rights to challenge the designation at that time: Town and Country Planning Act 1977, ss 45 and 47. So far as I am aware, there was no challenge to the designation at that time. The designation continued in force after the enactment of the Resource Management Act 1991 pursuant to a transitional provision (s 420).

[29] We have not been told exactly what has happened with respect to the council's planning documents between 1989 and the present time. It is accepted, however, that the designation originally imposed in 1989 continued to be a designation under the relevant plan or plans, both at the time of Estate Homes' purchase of its land in September 1999 and at the time of its application to subdivide. Michael O'Halloran, a director of Estate Homes, gave evidence that he knew about the designation at the time of his company's purchase of the land.

[30] Estate Homes, having bought the land, had, as Venning J rightly observed, "at least four options", which His Honour set out at [55] of his reasons for judgment: see [24] above. There was in fact a fifth option, although it is one which Estate Homes never considered. That was resale of the land. If the land had proved impossible to sell because of the designation, Estate Homes could have applied to the Environment Court under s 185 of the Resource Management Act for an order obliging the council to acquire the land under the Public Works Act 1981. If the requirements of that section were made out, Estate Homes would have received appropriate compensation. Estate Homes never sought to exercise this option.

[31] Like Venning J, I consider that the starting point is that Estate Homes chose to plan its subdivision around the designation. It chose to put the main road of its subdivision along the designation route. It proposed a road 23 m wide with a carriageway 13 m wide. This is a fundamental point in this case and one which Estate Homes' submissions both here and in the High Court overlooked. It is also a point which the Environment Court's analysis disregarded. The Environment Court considered that this subdivision could have been configured in a quite different way and did not need a road along the Marinich Drive alignment at all. It was that thinking that led the Environment Court to conclude that the council was bound to compensate Estate Homes for all the land under Marinich Drive and all the construction costs. That was, as Venning J said, a quite wrong approach. One starts with what the applicant has itself proposed.

[32] If Estate Homes had presented a subdivision plan along the lines envisaged by the Environment Court, one can safely assume that the application would not have been dealt with on a non-notified basis and almost certainly would not have been approved by the council. In this regard, s 176 of the Resource Management Act is relevant. That section provided at the relevant time that "the requiring authority (here, the council) may do anything that is in accordance with the designation". The section further provided that no one could subdivide the land so as to "prevent or hinder the public work or project or work to which the designation relates", without the prior written consent of the council. If the council had not consented to the overriding of its designation (as we can assume), Estate Homes would have had either to buckle under and put forward a subdivision proposal which recognised the designation or to appeal to the Environment Court under s 179(1) of the Resource Management Act. In considering an appeal under that section, the Environment Court would have had to have regard to the matters specified in s 179(3). There is no evidence on the matters referred to in that subsection as Estate Homes did not, as a matter of fact, present a subdivision plan of the kind envisaged by the Environment Court.

[33] This demonstrates the inappropriateness of the Environment Court's approach of effectively judging the scheme plan approval and the conditions attached to it by reference to some other hypothetical subdivision which had never

been applied for and, indeed, which could not have been applied for because of s 176.

[34] No doubt Estate Homes made the application it did because, balancing all considerations, including financial and time considerations, it thought this plan had a good chance of getting approval and a good chance of being dealt with on a non-notified basis. In that regard, Estate Homes and its advisors proved to be correct. The council was happy with the route of the lot 71 road and with its dimensions as shown on the plan of subdivision Estate Homes submitted.

[35] The council approved the submitted scheme plan, subject to conditions. That approval meant that, if Estate Homes chose to proceed with the subdivision, a road (Marinich Drive) would have to be constructed in accordance with the survey plan, and, upon deposit of that plan, lot 71 would vest in the council as a road. The vesting of the road (lot 71) in the council would arise, by operation of law, from approval of the scheme plan, not from condition 2(o).

[36] Condition 2(o) did not involve in any way a "taking, purchase, or other acquisition of land by the council", as defined in s 322(2)(a) of the Local Government Act. Condition 2(o) was concerned solely with the quality of the road to be constructed. It was intended to ensure that the road itself was properly designed, formed, and constructed. It provided for tree planting, parking spaces, footpaths, and access ways. Condition 2(o) and its accompanying notes (i)-(v) were without doubt imposed pursuant to s 108(2)(c) of the Resource Management Act.

[37] Baragwanath J, in his reasons, is of the view that condition 2(o) could not be imposed under s 108(2)(c) because it required the provision of roading in excess of what was required for this subdivision. I do not, with respect, agree with that reasoning. The fundamental point is that Estate Homes proposed to construct a number of roads, including a road along the designated path and of arterial road width. The proposed roading network was acceptable to the council. It was entitled, pursuant to s 108(2)(c), to specify how the roads were to be constructed and to what standard. Of course, if the council had not offered any compensation for the fact that Estate Homes was being required to construct a wider road on lot 71 than would

normally have been required, the condition might have been unreasonable in *Newbury* terms. A failure to compensate at all would have meant that the exercise of the power conferred by s 108(2)(c) had been abused.

[38] But there can be no question of abuse here, as the council has always recognised that it would be unfair to require Estate Homes to pay the entire cost of an arterial road through this subdivision. The council has always accepted that, but for its long-term plan to have an arterial road running between Swanson Road and Ranui Station Road, a narrower road would have sufficed for this particular subdivision. Accordingly, the council has been prepared to qualify the roading obligation which it was imposing on Estate Homes. Philip Brown, a council officer who gave evidence before the Environment Court, put the matter in this way:

> The Council accepts that it would be unreasonable for the appellant [Estate Homes] to bear the entire costs associated with the formation of the proposed arterial road (Marinich Drive). The Council's position is that the appellant should only pay for the costs of the roading that would have otherwise been required to serve its subdivision, in the absence of the designation.

[39] The qualification to the roading obligation appears in condition 2(o)(vi). The effect of the qualification was this: if you (Estate Homes) build us an arterial road in lot 71, we (the council) will compensate you for the extra 2 m width of carriageway which we acknowledge is required as a result of our arterial road designation. That qualification of obligation was imposed, in my view, pursuant to s 108(1) and (2)(c): it was part and parcel of the condition requiring works to be done. The council was acknowledging that it was requiring greater works than could fairly be ascribed to this subdivision, and it was offering to pay for the extra work. Whether the proposed compensation was sufficient goes to the reasonableness and fairness of condition 2(o) as a whole. That is a matter I discuss in the next section of these reasons.

[40] Mr Casey, for the council, submitted that note (vi) could be analysed in several ways. His preferred analysis – which accords with the way in which the council obviously considered the matter when imposing condition 2(o) – was that it was:

> An example of the correct application of the *Newbury* test. While a requirement to provide Marinich Drive as a collector road was fairly and reasonably related to the subdivision, the requirement to form it to an arterial standard went beyond what was "fair and reasonable" unless accompanied by a commitment by the council to compensate for the additional cost.

[41] I agree with that analysis, with one caveat. Whether, but for the designation, Marinich Drive would have had to be a collector road as opposed to a local road is a matter which the Environment Court will have to determine: see below at [59].

*Section 321A of the Local Government Act*

[42] I agree with Venning J that s 321A of the Local Government Act has no relevance to this case and that the Environment Court was wrong to find that it did. Indeed, even Mr Neutze, for Estate Homes, felt unable to support the Environment Court's reasoning on this point. The council clearly did not require Estate Homes to pay it anything: s 321A(1)(a). Nor did the council impose, "as a condition of approval", a requirement that the owner "dedicate a strip of land for widening any road": s 321A(1)(b). Estate Homes put forward a scheme plan of subdivision, which included a roading network which was satisfactory to the council. The council did not need to impose a condition requiring the applicant to "dedicate a strip of land". All the council had to do was impose conditions as to the quality and other physical requirements of the proposed roading network. Such a condition would be found in virtually every subdivision resource consent. The council did not utilise s 321A and it has no relevance.

*Section 322 of the Local Government Act*

[43] I disagree with Venning J, however, and with Baragwanath J, as to the relevance of s 322 of the Local Government Act. Section 322 has no application in the present case: it applies in situations where the council determines, with the owner's agreement, that it itself will carry out the work of constructing the roads required for the subdivision. If the council does decide to do the work itself, then subs (2) empowers the council to take, purchase, or otherwise acquire the land *in accordance with the provisions of the Local Government Act*. The relevant

provisions of the Local Government Act are ss 247F and 247G. They provide for a taking "in the manner provided in the Public Works Act 1981" and they provide for compensation, which is to be claimed and determined in the manner provided by the Public Works Act.

[44] There was no such taking in this case. The council did not consider it was acquiring the land under s 247F. Had the council intended to exercise that power, it would have had to comply with the detailed taking provisions of the Public Works Act. It is clear that Estate Homes never considered that section to have relevance, as it has never sought compensation in the manner provided by the Public Works Act. If Estate Homes had thought that some of its land had been taken under s 322, it would no doubt have insisted that the council carry out the taking procedure in that Act, for only if those steps were taken would the entitlement to compensation arise. Estate Homes would have had two years from "the date of the Proclamation or declaration taking the land" in which to make its claim for compensation: Public Works Act, s 78. A particular claim form would have had to be submitted: s 82. That claim form would have had to be served on the council: s 83. If the council disputed the claim, then it would have been determined by the Land Valuation Tribunal: ss 84-89.

[45] Although this is not a case where there has been a taking of land, the council has always been prepared to compensate Estate Homes for the benefit it (the council) derived from Estate Homes' subdivision scheme. The council has not had an inflexible attitude as to how that compensation should be calculated. It had adopted a more liberal stance by the time of the Environment Court decision. It did not challenge the net effect of Venning J's compensation formula (even though it did respectfully challenge the legal basis upon which Venning J determined the matter).

*The second question of law*

[46] Before leaving this topic, I should refer to the second question of law in respect of which leave was granted. That question is this:

> Did the High Court err in law by concluding that the requirement to vest the width of Marinich Drive (save as to 2 m of Marinich Drive) was not a financial contribution under s 108(2)(a) of the Resource Management Act 1991?

[47] This question shows a misunderstanding of what the High Court held. Neither the council nor the High Court "required" the vesting of Marinich Drive. Mr Neutze was not correct when he said that note (vi) "required [Estate Homes] to vest the entire 23 m width of Marinich Drive" in the council. Estate Homes put up a proposal, which included a lot (lot 71) which it proposed would be a road. The council accepted that the scheme plan was in order and accepted the proposed roading layout. Roads vest in local authorities by operation of law, not (except indirectly) by scheme plan approvals and certainly not by way of a roading condition like condition 2(o). The provision of roads within a subdivision never constitutes a "financial contribution" as defined in s 108(2)(a) of the Resource Management Act, still less a "taking of land" under s 322 of the Local Government Act. I can do no better in this regard than quote from the submissions of Mr Casey:

> The intended roading layout is an integral part of a subdivision, not a matter of "conditions". In the case of subdivision consents, the roading provision is determined by the application and the plan forming part of the consent, not by any conditions.
>
> It would make a nonsense of subdivisions if land could be subdivided without the need to provide any roads, and the provision of roads to be treated as a "contribution", requiring to qualify as a condition of the consent. The provision of the road (including the underlying land) is an integral part of the subdivision itself and is not a "contribution" to be imposed as a condition of consent.

[48] I agree with those submissions. The provision of Marinich Drive (and its underlying land) was not a financial contribution, whether under s 108(1) and (2)(c) of the Resource Management Act or s 322 of the Local Government Act.

[49] In short, therefore, condition 2(o) is authorised, if at all, under s 108(1) and (2)(c) of the Resource Management Act. Condition 2(o) is a condition requiring works to be provided. But was it a fair and reasonable condition, in *Newbury* terms? To that issue I now turn.

**Fairness and reasonableness of condition 2(o)**

[50] There is no dispute that a condition imposed under s 108(2)(c) must be fair and reasonable in the *Newbury* sense. There is also no dispute that, were condition 2(o) to stand without its qualifier (as I refer to note (vi)), that condition would fail the *Newbury* test. The question is whether the council's compensation package goes far enough.

[51] The Environment Court has never properly considered that question, because of its erroneous view of the law, as I have explained. As I have also noted, even Mr Neutze felt unable to support that court's conclusions as to the form the package should take.

[52] Venning J considered this question. It is clear from the answer he gave that he considered condition 2(o) in its original form unreasonable. He altered the council's obligation in two respects.

[53] First, he required the council to pay compensation for the additional 2 m of land which he found payable as a consequence of a taking, purchase or acquisition under s 322(2)(a): at [29]. Originally the council had proposed that it would pay for only the additional *construction* costs, as that is all Estate Homes had asked for. (There was, of course, a dispute as to how much of the road was *extra*, but that is a different point.) Mr Casey informed us, however, that, by the time of the Environment Court hearing, the council had changed its stance and had indicated that it was prepared to pay compensation for the land component of the additional road width as well. Accordingly, Venning J's change in this regard was acceptable to the council and reflected its stance before him – even though the council did not accept the *legal basis* upon which Venning J imposed this part of the revamped compensation package.

[54] Secondly, Venning J changed the road construction compensation by adding to it compensation for "the additional cost of construction to the standard of an arterial road". The council originally had provided compensation only for the additional 2 m. But it was common ground that an arterial road generally costs more

than a normal city street to construct. What Venning J was trying to capture was the additional cost associated with construction to an arterial road standard, quite apart from the cost of having to construct the road 2 m wider.

[55] The question arises as to whether it was appropriate for Venning J to attempt the recasting himself or whether the more appropriate course was to remit the matter for reconsideration. That is the subject of the third question of law which Estate Homes seeks to raise. Venning J was in error in the course he took, given his findings of law. Having found (erroneously, in my view) that there had been a taking of land under s 322(2), compensation should have been fixed, not by him, not by the Environment Court, but rather in the manner prescribed under the Public Works Act. The majority in this court have agreed with Venning J that there was a taking of land in terms of s 322(2), but have nonetheless remitted the matter to the Environment Court. In my view, that court has no jurisdiction to fix compensation under that section.

[56] I have, however, rejected Venning J's reliance on s 322(2). I have found that condition 2(o) is a package authorised by s 108(1) and (2)(c) of the Resource Management Act. The reasonableness of condition 2(o) has never been properly determined by either the Environment Court or the High Court. In those circumstances, I have no doubt that the appropriate course for us is to remit the matter to the Environment Court for its reconsideration.

[57] Had my views commanded a majority, I would have said that the Environment Court needed to re-evaluate the qualification in light of the legal analysis in these reasons for judgment. In particular, the court would have needed to consider the following matters.

[58] First, the court would have needed to determine whether, but for the arterial road designation, the council could have legitimately demanded that the lot 71 road meet collector road standards as opposed to local road standards. Estate Homes, when it applied for the resource consent, sought compensation for extra construction costs based on Marinich Drive being 5 m wider than it would otherwise have needed to be. That suggestion was based on an assumption that, but for the designation, a

local road would have sufficed. Local roads need have carriageways of only 8 m. The proposed road had a carriageway 13 m wide. That accounts for the 5 m referred to in the compensation suggestion set out at [4] above.

[59] The council has always disputed that. The council's view has always been that, but for the designation, this subdivision would have required for its main road a road of collector road status. Collector roads must have carriageways of at least 11 m. That is why the council has always asserted that its designation has led to a road only 2 m wider than it would otherwise have had to be. If my views had prevailed, the Environment Court would have needed to make a decision on that question, because it has a significant bearing on whether the council's compensation package is appropriate in *Newbury* terms.

[60] Venning J appears to have decided this issue in the council's favour, but I am not certain of the basis for that. It may be that Mr Casey made the same submission to Venning J that he made to us and that Venning J was prepared to accept it. That submission was that there could no longer be any dispute about the fact that, absent the arterial road designation, a collector road would have been required. Mr Casey before us relied for that proposition on the fact that, at the hearing before the Environment Court, Estate Homes' traffic engineering expert agreed in evidence that a collector road would otherwise have been the appropriate standard. It may be that that is the effect of that witness's evidence, but it is not for any party's witness, whether expert or not, to bind that party. Estate Homes should have the opportunity to try to persuade the Environment Court that, but for the designation, a local road would have been appropriate.

[61] If the Environment Court were to conclude that Estate Homes' position is correct on that point, then almost certainly it would find that the qualification to condition 2(o) was unfair and unreasonable. It would have been based on a false premise. In that event, the court itself would have to recalculate the appropriate compensation or direct the parties to try to reach agreement on the footing that, but for the designation, only a local road would have been required.

[62] Secondly, the Environment Court would have needed to consider whether, to meet *Newbury* principles, the compensation package should include compensation for the extra cost associated with meeting an arterial road standard across the entire width of the road. Venning J considered that that was reasonable, even though the council had not originally offered it. The council has not cross-appealed against Venning J's judgment, so it may well be that this is no longer a point in contention.

[63] Thirdly, the court would have needed to consider whether the compensation should include compensation for the underlying land Estate Homes gave up in order to make a wider road. As earlier explained, the council had changed its stance on this point by the time the case reached the Environment Court. This presumably would not be an issue. Venning J found that compensation for land value should be paid pursuant to s 322(2)(a) of the Local Government Act. Notwithstanding the fact that I have found that section not to be applicable, it would still be possible for the note (vi) qualification (compensation) to contain an element for loss of land, as the council itself recognised when it was before the Environment Court. The council, in making that offer, did not make it on the basis of s 322(2)(a), but rather on the basis that the roading condition would have been unreasonable without the council's agreeing to provide compensation for the extra land it wanted as road *for district purposes*.

[64] Even though my views do not command a majority, I have thought it useful to set out how the Environment Court would have approached the matter on my reasoning. That court's remit in fact, however, will be as set forth by Baragwanath J.

**Questions of law**

[65] This court and the High Court between them granted leave to appeal on two questions of law.

[66] The first reads:

> Does the application of the consideration settled by *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 require there to be a causal link between the effects of a proposal and the conditions

> that may be imposed with respect to that proposal and, specifically in the present case, does it require a causal nexus between the effects of the proposed subdivision and the conditions imposed by the council in relation to the construction and consequent vesting of Marinich Drive where Marinich Drive was provided for in the application for subdivision consent?

[67] The question does not permit of a "yes" or "no" answer. My answer is provided in the foregoing reasons. *Newbury* principles do apply. As Venning J observed, "their application does not incorporate a causal nexus test as such": at [46]. The so-called "causal nexus" test has arisen because of the approach of the Environment Court and its belief that the statutory basis of this roading condition was not s 108 of the Resource Management Act but rather ss 321A and 322 of the Local Government Act. In my view, it was wrong so to hold.

[68] The second question is this:

> Did the High Court err in law by concluding that the requirement to vest the width of Marinich Drive (save as to 2 m of Marinich Drive) was not a financial contribution under s 108(2)(a) of the Resource Management Act 1991?

[69] The answer is "no". The explanation is provided earlier in these reasons.

[70] As I earlier observed, Estate Homes, on the day before the hearing of the appeal, sought leave to add a third ground of appeal. This question reads as follows:

> If the High Court was correct in finding the condition 2(o)(vi) was legally valid, did the High Court subsequently err in failing to refer the condition back to the Environment Court to determine whether it should be upheld and/or modified on the merits of the case before it?

[71] We are prepared to grant leave with respect to that question. The question has an erroneous protasis. The High Court did not find that "condition 2(o)(vi) was legally valid". That is why the High Court recast condition 2(o)(vi). Nonetheless, for the reasons earlier given, the High Court was wrong, in my view, to recast condition 2(o)(vi) itself.

**The result I would have given**

[72] I would have allowed the appeal. I would have set aside the decision of the High Court, dated 30 June 2004. I would have remitted to the Environment Court for reconsideration Estate Homes' appeal to it. I would have directed the Environment Court to reconsider the quantum of compensation payable to Estate Homes in light of this judgment.

**BARAGWANATH AND GODDARD JJ**

(Given by Baragwanath J)

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## Introduction

[73] Estate Homes Limited bought an undivided block of land in Waitakere City with a view to subdividing and developing it. The Council's resource consent under s 104 of the Resource Management Act 1991 ("RMA") was subject to the condition that Estate would give effect to a long standing designation for a district arterial road affecting a strip of land bisecting the property from north to south. The purpose of the designation was to extend Marinich Drive, already formed as part of the arterial road approaching Estate's property from the north, to meet Ranui Station Road which forms the southern boundary of the property. The Council's intention is that Marinich Drive as an arterial road should ultimately be extended further to the south, carrying on across the railway line to enter Metcalfe Road which leads to the south.

[74] Estate's application for the consent had included the survey plan reproduced in the judgment of Chambers J. It showed an internal roading layout which included the arterial road lot 71 designated as "Western Arterial Route". The application stated:

> Lot 71–76 [the roads] will vest in the Waitakere City Council upon deposit of the land transfer plan.

[75] The application also included a proposed Condition 2(o)(vi) which referred to the difference between the 13 m carriageway required for the arterial road and the 11 m that would have been required for an internal local collector road and stated:

> 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 roads to enable funds to be budgeted.

[76] The Council on 26 June 2000 determined that the application did not require notification and on the same day granted consent subject to the conditions which Estate had proposed. But on 18 July 2000 Estate made objection under s 357 in relation to Condition 2(o)(vi), asserting that the condition limiting compensation to

the extra 2 m width of carriageway was invalid as not fairly and reasonably relating to the subdivision, and appealed to the Environment Court against it. While the appeal was pending Estate sought and obtained from the Environment Court an order under s 116 that the resource consent should commence prior to the Court's decision on the terms and conditions imposed in it including (inter alia) Condition 2(o)(vi).

[77] Estate's appeal to the Environment Court was successful**.** It held ((2004) 3 NZRMA 137 at [22]) that insofar as the Council's decision required Estate to form and construct the arterial road without compensation for the whole cost of formation and construction, and for the value of the land on which it was constructed, it acted unlawfully. But that Court's decision was reversed on the Council's further appeal to the High Court ([2005] NZRMA 128). Each side has, or seeks, leave to bring a third tier appeal to this Court.

[78] Estate has now complied with the Council's conditions of subdivision. The deposit of its plan for subdivision has both created some 68 sections and had the legal effect of vesting the strip of land in the Council (s 238). Estate has also formed and sealed it to the standard necessary for the arterial road which is therefore complete for a distance of about half a mile, terminating at the southern boundary of Estate's block where it joins Ranui Station Road.

**The dispute**

[79] The dispute concerns the basis on which compensation should be paid. Estate claims that it should be compensated for the whole value of the vested land and the cost of formation; the Council says that, having paid Estate for the value of additional road reserve width and the cost of forming two strips of additional carriageway beyond what an internal local collector road would require, it is under no further obligation.

[80] Estate claims that the extension to the arterial road has nothing to do with the legitimate requirements of its subdivision. It says that the needs of its property and those of the neighbouring area are now and will for the future be met by access to existing roads. Ranui Station Road runs east-west to form the property's southern

boundary; from there it runs first north-west and then north into Swanson Road. Metcalfe Road runs from Ranui Station Road, at a point to the east of the property, not only south but also in a north-easterly direction; it too ends up running north into Swanson Road. As now formed, Marinich Drive extends north from Estate's block, entering Swanson Road between the Ranui Station Road and Metcalfe Road intersections. After the Swanson Road intersection it becomes Waitemata Road which is an existing portion of the regional road running north. So access to and from the subdivided sections within Estate's property can be achieved in all directions via Ranui Station Road and Metcalfe Road, albeit somewhat less directly than by the extension of Marinich Drive.

[81] Estate's submission is that the only real purpose of the southern extension of Marinich Drive through Estate's block is to form part of the Waitemata Drive – Marinich Drive proposed arterial road which will eventually continue to the south. Estate submits that to require it to contribute to the cost of meeting what is a regional purpose is illegitimate, as the Environment Court has held.

[82] Waitakere City supports the judgment of the High Court that, given it has met the difference in cost between the establishment of the road to regional standards and that of a conventional local collector road running north-south through the property, it has acted lawfully in requiring the road as a condition of Estate's resource consent for the subdivision. It adds a further argument, which was unsuccessful in the Environment Court and did not require decision in the High Court, that Estate's application to the Council for resource consent claimed no more than it has been paid by the Council and it is not entitled to recover more than it claimed.

**The questions**

[83] There are four questions. In logical sequence the first is that advanced by the Council in the following terms:

> [1] As a matter of jurisdiction, can an applicant for subdivision consent be granted approval to a form of subdivision that has not been applied for, and [2] can a resource consent be made subject to conditions that are more

> favourable to the consent holder and which fall outside the scope of the application?

[84] We have divided it into two parts which we have numbered. While no order was made pre-hearing giving the Council leave to rely on this ground it was notified on 25 July 2005 and fully argued. Since it goes to jurisdiction and there is no prejudice to Estate there should be leave for its inclusion in the appeal. But it may be noted at once that the first part does not arise on the present facts: the challenged condition does not relate to the form of the subdivision and it is only the second part that is material.

[85] The second is the question of law for which the High Court gave Estate leave to appeal. It is:

> Does the application of the considerations settled by *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 require there to be a causal link between the effects of a proposal and the conditions that may be imposed with respect to that proposal and, specifically in the present case, does it require a causal nexus between the effects of the proposed subdivision and the conditions imposed by the Council in relation to the construction and consequent vesting of Marinich Drive where Marinich Drive was provided for in the application for subdivision consent?

[86] We have recast that question ([126] below).

[87] The third question ([163] below) is one for which this Court gave leave on 15 November 2004:

> Did the High Court err in law by concluding that the requirement to vest the width of Marinich Drive (save as two metres of Marinich Drive) was not a [requirement of a] financial contribution under s 108(2)(a) of the Resource Management Act 1991?

[88] The fourth question ([196] below) was the subject of an application by Estate dated 31 August 2005 opposed by the Council:

> If the High Court was correct in finding that Condition 2(o)(vi) was legally valid, did the High Court subsequently err in failing to refer the condition back to the Environment Court to determine whether it should be upheld and/or modified on the merits of the case before it?

[89] Its fate must depend on the result of the earlier questions.

**The first question**

[90] We repeat the first question:

> [1] As a matter of jurisdiction, can an applicant for subdivision consent be granted approval to a form of subdivision that has not been applied for, and [2] can a resource consent be made subject to conditions that are more favourable to the consent holder and which fall outside the scope of the application?

[91] The Council submits that as a matter of jurisdiction neither the Council nor the Environment Court on appeal could grant approval to a form of subdivision materially different from that for which Estate had applied. It argues that it is not open to the Court to invalidate the requirement for Marinich Drive as a through road nor to require the Council to pay compensation for the whole road when the application sought only the marginal cost of an additional 2 m width and that cost has been paid. It contends that such amendments lie outside the scope of Estate's application and would result in adverse effects beyond the envelope of effects contemplated by the Council when granting non-notified consent to the application.

[92] As explained by this Court in *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 at 525, in considering the law relating to resource consent applications substance is to be preferred to form. The scheme of the legislation is to require an applicant to provide enough information to allow the Council as consent authority properly to perform its functions, including notification where that is appropriate, and in that event to facilitate the rights of objectors including their entitlement to appeal.

[93] We have said that the first part does not require decision. We take it that the Council's argument upon it was advanced out of caution to deal with the possibility that the objection to Condition 2(o)(vi) sought to challenge the inclusion of the arterial road strip rather than simply the terms of compensation for it. That would raise the improbable question whether the Council or the Environment Court on appeal could grant approval to a form of subdivision not only materially different from that for which Estate had applied but such as to block the path of a designated regional road.

[94] But neither party actually contemplates such a result. The reality of the case, which gives rise to the second part of the question, is that the regional road has been formed over the subject property and the dispute is limited to compensation. It arises from Estate's change of position: having filed its application containing the draft Condition providing only for "[c]ompensation for the extra 2m width of carriageway" and proposing "an estimate of this cost [to the Council] for approval… to enable funds to be budgeted" and having secured both consent to non-notification of the application and resource consent in terms of that Condition, Estate then objected – successfully before the Environment Court – to the adequacy of the compensation it proposed.

[95] It is nevertheless convenient to trace the legal sequence that answers the first part, on the way to answering the second.

[96] There is no specific provision in the text of the RMA that deals with the scope and limits of what existing authority recognises as a necessary implied power to amend a planning application. So as s 5 of the Interpretation Act 1999 requires, the question turns on what inference the Court is to draw from the text and purpose of the legislation.

[97] In the present case the only parties potentially affected were Estate and the Council. It was not suggested by Mr Casey for the Council that it lacked full opportunity to make its case to the Environment Court both on the s 357 application after Estate had signalled its claim to amend the terms of its objection and at the subsequent substantive hearing. There is therefore no natural justice or other fairness difficulty. We turn to the legislation.

[98] Section 88 provides simply:

> **88 Making an application**
>
> (1) A person may apply to the relevant local authority for a resource consent.
>
> (2) *An application must—*
>
> (a) be made in the prescribed form and manner; and

(b) *include, in accordance with Schedule 4, an assessment of environmental effects* in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

Emphasis is added in this and later citations.

[99] The Resource Management (Forms) Regulations 1991 which were in force at the time of the application provided by regulation 8 that an application for resource consent should be in form 5 or to like effect. That form required:

*a) an assessment of effects that the proposed activity might have on the environment in accordance with the Fourth Schedule to the Act;*

b) any information required by the district plan, the regional plan, or any regulations to be included in the application;

c) in the case of an application for subdivision consent, information defining the positions of new boundaries, the areas of new allotments, the locations and areas of new reserves;

and:

*(e) the location and areas of land to be set aside as new roads.*

[100] Form 5 echoed the Fourth Schedule to the RMA which required that, subject to the provisions of any policy statement or plan, an assessment of effects on the environment should include an assessment of the actual or potential effect on the environment of the proposed activity. A person preparing such assessment was required by clause 2 to consider:

(a) *Any effect on the neighbourhood and, where relevant, the wider community including any socio-economic* and cultural effects:

*(b) Any physical effect on the locality…:*

*(d) Any effect on natural and physical resources having…special value for present or future generations:*

…

[101] Section 3 provides:

> ***3 Meaning of "effect"***
>
> *In this Act, unless the context otherwise requires, the term effect includes—*
>
> *(a) Any positive or adverse effect; and*
>
> *(b) Any temporary or permanent effect; and*
>
> *(c) Any past, present, or future effect; and*
>
> *(d) Any cumulative effect which arises over time or in combination with other effects—*
>
> *regardless of the scale, intensity, duration, or frequency of the effect, and also includes—*
>
> *(e) Any potential effect of high probability; and*
>
> *(f) Any potential effect of low probability which has a high potential impact.*

[102] Section 5(2)(c) provides:

> **5. Purpose**
>
> …
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while–
>
> > …
> >
> > (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[103] So the first general theme of the legislation concerns the effects of the proposal. A second theme, discussed by the Supreme Court in *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZRMA 337 and in *Progressive Enterprises Ltd v North Shore City Council* HC AK CIV 2004-404-7139 15 June 2005 [61], is that of public participation by those actually or potentially affected: see ss 93 and 94C (as to notification), 96 (as to the right to make submissions), 100-101 (as to hearing) and 120 (as to the right of appeal).

[104] The issue of "jurisdiction" to amend has arisen primarily in respect of local authority powers in processing proposed plans, plan changes and variations. For reasons of natural justice the scope of the amendment has been limited to the scope of the documents before the local authority or consent authority. In *Local Government Law in New Zealand* (1993) Associate Professor K A Palmer states at 610:

> The legal principles of fair procedures and natural justice apply to the hearing process. An applicant may seek approval to amend the building plans or uses proposed, provided that the size of the structure or character of the use is not expanded or changed to the extent that other persons could be affected. In the latter situation, a fresh application could be necessary.

[105] The statement of principle conforms with decisions of the High Court and the Environment Court in relation to plan changes: *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, 146 (Full Court of the High Court), *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408, 409, 413 (HC); *Re an Application by Vivid Holdings Ltd* [1999] NZRMA 467 (Env C); *Healthlink South Ltd v Christchurch International Airport* [2000] NZRMA 375, 379 (HC); *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556, 574 (HC); *Christchurch City Council v McVicar* [2005] NZRMA 221 (HC) at [3]; and the authorities cited in *Mills v Queenstown Lakes District Council* [2005] NZRMA 227, 236-7 and 237-8. In respect of a proposed plan change where there is inappropriate constraint there is jurisdiction under s 293(2) to widen the potential outcome provided natural justice is complied with: see *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508 (HC); *Hamilton City Council v New Zealand Historic Places Trust/Pouhere Taonga* [2005] NZRMA 145, 154 (HC); *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2005] NZRMA 441, 444 (Env C). (The discretion under s 293 has been altered by the 2005 amendment). But there is no provision equivalent to s 293 applying to a resource consent application.

[106] We have concluded that the question is in fact always one of natural justice, which responds to the themes both of the effects of the change and that of the opportunity for those affected to participate: *Mills v Queenstown Lakes District*

*Council* [2005] NZRMA 227; compare *Shell New Zealand Limited v Porirua City Council* HC WN CIV-2003-485-1476 21 December 2004 (Goddard J).

[107] The first part of the first question is:

> As a matter of jurisdiction: can an applicant for subdivision consent be granted approval to a form of subdivision that has not been applied for?

[108] We answer that question "yes", an applicant for subdivision consent can be granted approval to a form of subdivision that has not been applied for, but only to the extent that no prejudice arose to the applicant, other parties or the public in altering the terms of the application.

[109] The second part is:

> Can a resource consent be made subject to conditions that are more favourable to the consent holder which fall outside the scope of the application?

[110] The answer turns on the affirmative answer to the first part: that absence of prejudice is the key consideration. There is no stipulation in the RMA or the regulations about compensation for the provision of roads provided by the developer which the consent authority considers are beyond the proper ambit of conditions. That topic is to be dealt with under the Public Works Act 1981. But, apart from the Council's pleading point, it was not suggested that the issue could not be dealt with in a practical way by objection under s 357 and appeal as to the validity of the condition.

[111] The practical effect of the amendment sought by Estate would be to impose materially heavier compensation costs on the Council than it had contemplated when it gave resource consent. On the face of its application Estate had been prepared to accept what it asserted the Council had led it to understand, namely the inevitability of having to give effect to the designation by vesting the land and creating the road. It secured non-notified consent by leading the Council to believe that the only compensation sought was in respect of the difference between the cost of an arterial road and that of a local collector road. Unsurprisingly the Council was aggrieved that, having secured its consent on the basis of Estate's providing the regional road

for modest compensation, Estate then sought to increase the compensation significantly by challenging the very conditions it had proposed.

[112] But Estate made its position clear to the Council by its s 357 objection, its notice of appeal to the Environment Court under s 120 and, importantly, its application under s 116 ([76] above). It was open to the Council at that stage to complain to the Environment Court that the consent had been obtained on a false premise and to challenge the consent. Instead, the Council agreed to an order made by the Environment Court under s 116 on 30 April 2002 that the consent should commence from that date, with the exception of Condition 2(o)(vi) and other conditions relating to financial contributions. It was after that consent that the subdivision and vesting of the roads in the Council occurred.

[113] Here there was no jurisdictional impediment to the change of the consent condition (as was the case in *Body Corporate 97010* where the consent had expired). Nor was the Council led into a position where it could allege actual or virtual estoppel by being led unfairly to act irretrievably to its detriment: it had every opportunity to consider its position and to oppose both the s 116 order and Estate's appeal before consenting to the former.

[114] In the present circumstances it is unnecessary to consider the question of the possible operation in this context of estoppel and analogous concepts. These were discussed by the House of Lords in *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58, by Sir Anthony Mason in *The Place of Estoppel in Public Law* in Chapter 8 of Groves (ed) *Law and Government in Australia* (The Federation Press, 2005) and by the High Court in *Challis v Destination Marlborough Trust Board Limited* [2003] 2 NZLR 107, 129-133 at [103]-[107] per Wild J and in *Springs Promotions Limited v Auckland City Council* HC AK CIV-2005-485-85 7 October 2005 [64]-[82] per Randerson J.

[115] We answer the second part of the first question:

> A resource consent can be made subject to conditions which are more favourable to the consent holder and which fall outside the scope of the application provided that there is no prejudice to the applicant, other parties

> or the public and that the conditions comply with the limitations declared in the *Newbury* principles
>
> ([157] ff below]).

**Summary of differences from judgment of Chambers J**

[116] It is convenient at this point to signal the reasons for our respectful disagreement with the judgment of Chambers J which may be summarised as follows.

[117] The issues of fact and evaluation are a matter for the Environment Court on which no appeal lies to the High Court or to this Court.

[118] The evaluation at [37]:

> The fundamental point is that Estate Homes proposed…a road along the designated path and of arterial road width

Imports a factual judgment on a primary issue of causation. So too does the first sentence in [35] as to the reason for the form of Estate's application. The Environment Court found that the cause of the inclusion of the arterial road on Estate's claim of subdivision was the advice of the Council to Estate that if it were not included there would be no consent.

[119] No complaint could be made of such council policy, which accords with the public interest of extending further to the south the existing part-formed arterial road; but as effecting a taking of private land for public purposes it is presumed to carry with it an obligation of compensation to the extent that the burden on Estate exceeded the costs that would have been entailed without catering for the public purpose. The Environment Court's decision on that point of causation was in our opinion open to it. Indeed, in *Wednesbury* terms a contrary decision could have been challenged as irrational.

[120] Public law looks at substance. That is of particular importance in matters of compensation. Its constitutional element is the subject of Lord Cooke's "The liberation of the English public law" in his Hamlyn essays "Turning points of the

common law" at 63ff. What he calls the "landmark decision…" in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, with which the essay begins, turned on compensation which is a constitutional element of especial importance. A body subject to principles of public law may not do indirectly what it is forbidden from doing directly and a council may not cause land to be taken for an arterial road without full compensation.

[121] Implicit in [39]-[43] is that the Council was entitled to compel the location of a north-south road through the property for subdivisional reasons even if not in order to create an arterial road and is liable only for the difference between the two. But it is, with respect, for the Environment Court to determine not only:

> Whether but for the designation Marinich Drive would have had to be a collector road as opposed to a local road.

but whether Marinich Drive would have existed at all.

[122] Again at [59] the judgment is premised on a council entitlement to insist on some road on the line of Marinich Road. But that, with respect, provides the answer to a question of fact which was for the Environment Court alone.

[123] The facts are for the Environment Court, not for this Court; that fact finding function extends to the basic question of whether the compelled vesting constituted an acquisition under s 322(2).

[124] In each instance it is the unexpressed premise, with which we respectfully disagree, that this Court has authority to pronounce on that question of fact.

[125] Finally at [44] it is not in our view the case that the only way a council can acquire land is via "the detailed taking provisions of the Public Works Act". On the contrary, if the land is taken in another manner, as by vesting under s 238 that is compelled for public purposes rather than volunteered for the purposes of a private subdivision, the Council is unable to escape the obligation to compensate.

**The second question: compensation for taking for public purpose**

[126] The second question was posed by the High Court in an abstract form. To identify the point at issue specifically we recast the question as:

> Was the High Court right to hold that the Council could not be legally required to compensate Estate for more than the difference between (1) the value of additional road reserve width and the cost of forming two strips of additional carriageway and (2) what an internal local collector road would require?

[127] That question requires reconciling two important competing principles of law and raises the further issue, which bears on question 4, of the respective roles of the High Court and the Environment Court. It is convenient to begin with the former.

*The principle of compensation for public taking*

[128] One principle is that, 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. Public sector requirements imposing a disproportionate burden on individual persons are constitutionally improper. That compensation is normally paid in such cases was pointed out by Lord Donovan in *Birmingham Corporation v West Midland Baptist (Trust) Association* Inc [1970] AC 874 at 908-9:

> My Lords, in any developing community there must be power to take land from private owners for public purposes; and in a society where private ownership of land is permitted, justice requires that compensation should be paid for such taking.

[129] The presumption in favour of compensation was stated by Sir Baliol Brett MR in *A-G v Horner* (1884) 14 QBD 245 at 257:

> It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged so to construe it.

[130] The principle is well-settled and is reflected in ch 29 of Magna Carta which is still part of our statute law (Vol 30 Reprinted Statutes of New Zealand at 26):

> No freeman shall… be disseised of his freehold or liberties or free customs… or any otherwise destroyed.

[131] See *Cooper v Attorney-General* [1996] 3 NZLR 480, 483; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA).

[132] The implicit requirement of compensation is as old as the repealed chapter 28 of Magna Carta:

> Compensation for taking a private property
>
> No constable or other of our bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment.

[133] The principle is not to be applied narrowly. In *Gardner v Village of Newburgh* 2 Johns. Ch 162 (1816), 165-7 Chancellor Kent held that a landowner whose natural supply of water had been removed under a statute that allowed a village to take it for public purposes must be compensated:

> A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which no man can be disseised "but by lawful judgment of his peers, or by due process of law.

[134] Chancellor Kent relied not only on the Magna Carta but:

> …also cited Grotius, Pufendorf, Bynkershoek,, several state constitutions, European constitutions , and the United States constitution, all to support [his] conclusion that the requirement of just compensation "is adopted by all temperate and civilised governments, from a deep and universal sense of its justice"
>
> A E Dick Howard "The Road from Runnymede" Virginia University Press (1968) 337

[135] In the USA the principle is stated in the Takings Clause of the Fifth Amendment of the US Constitution: "nor shall private property be taken for public use, without just compensation".

*The general law that developers must conform with a district scheme; s 85*

[136] The competing principle is Parliament's acceptance that the privilege of land development requires, without compensation, more principled, systematic and

sensitive controls than those of the law of tort: *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601, 608-9 and *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 771G per Lord Hoffmann.

[137] In *Penn Central Transportation Co v New York City* 438 US 104, 133-4 (1978) Vernon J observed:

> Legislation designed to promote the general welfare commonly burdens some more than others… Zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account.

[138] Likewise s 85 provides:

> **85. Compensation not payable in respect of controls on land**
>
> (1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act…

[139] Section 85(5) expressly excludes any designation for a road and the possible remedy of applying to the Environment Court for relief on the grounds that the land is rendered incapable of reasonable use and an unfair and unreasonable burden is placed on the owner. In lieu the owner of land affected by a designation may seek a compulsory purchase order under s 185 and receive full compensation: *Aero Vista Holdings Ltd v Transit New Zealand* [2004] NZRMA 458 where land was partly affected by works and an order made that the whole property be taken.

[140] The context within which the competing principles are to be reconciled in this case includes the general regime established through the statutory processes for creation of regional and district plans. A district plan once established contains a framework for specific rules and criteria for judgments as to resource consent applications made under s 87. Insofar as the planning decision simply requires an application to conform with the district plan there can be no claim of expropriation by reason of requirement to conform. That is made plain by s 85: see *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 631-632, and *Auckland Acclimatisation Society Inc v Sutton Holdings Limited* [1985] 2 NZLR 94 (CA),

where Cooke J in considering the principle that a statute should not be held to take away private rights without compensation stated at 99:

> The farmers have the ordinary rights of landowners to use their land in its natural state… The scheme of the [Water and Soil Compensation Act 1967] means that to refuse the water rights applied for would not be to deprive the land owners of anything. Rather it would be to deny them privileges. There can be no moral claim to or expectation of compensation in the event of refusal.

[141] It may be noted that even in the USA, where the Fifth Amendment protects against expropriation without compensation, down-zoning of land is treated as such a normal incident of social life as not to attract its operation: *Lucas v South Carolina Coastal Council* 120 L Ed 798 (1992).

[142] General restraints or delay caused by zoning or processing under the RMA will not give rise to compensation liability: *Superior Lands Limited v Wellington City Corporation* [1974] 2 NZLR 251 (CA), although the case is different where land use is affected by a formal notice to acquire which is later withdrawn: *Cockburn v Minister of Works and Development* [1984] 2 NZLR 466 (CA).

[143] Where an actual interest in property is taken (either by compulsion or agreement), s 60 of the Public Works Act 1981 makes specific provision for the payment of compensation. Likewise, similar provision is made under RMA, ss 86 and 186. Also, compensation liability can arise under the Local Government Act 2002, ss 189, 190 (and the former Local Government Act 1974, ss 247F, 247G). See *Bennion New Zealand Land Law* Brookers 2005 especially at 15.5.02.

*Reconciling the principles*

[144] In *Belfast Corporation v O D Cars Limited* [1960] AC 490, 524-5 Lord Radcliffe said:

> What is important… is to recognise that though interference with rights of development and user had come to be a recognised element of the regulation and planning of towns in the interest of public health and amenity, the consequent control, impairment or diminution of those rights was not treated as a "taking" of property nor, when compensation was provided, was it

> provided on the basis that property or property rights had been "taken," but on the basis that property, itself retained, had been injuriously affected.

[145] In *Pennsylvania Coal Co v Mahon* 260 US 393, 415 (1922) Holmes J stated:

> The general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking.

[146] A recent practical application of the competing principles is *Dolan v City of Tigard* 512 US 374 (1994) where the City Planning Commission of the respondent city imposed as a condition of approval of the appellant's application to expand her store and pave her parking lot that she dedicate land for a public greenway along a creek. Its purpose was to minimise flooding that would be aggravated by the increases in impervious surfaces associated with her development and to provide a pedestrian/cycle pathway intended to relieve traffic congestion in the central business district. Applying the takings provision of the US Constitution the Supreme Court held that the dedication requirements constituted an unlawful uncompensated taking of property.

[147] The question is how, lacking a takings provision but subject to the presumption of compensation for public taking, this Court should construe the RMA in its application to this case.

*This case*

[148] Section 84 provides:

> **84 Local authorities to observe their own policy statements and plans**
>
> (1) While a policy statement if a plan is operative, the …territorial authority concerned, and every consent authority, shall observe and, to the extent of its authority, enforce the observance of the policy statement or plan.

*The District Plan requires connectivity*

[149] In the present case the District Plan provided (emphasis added):

> Roads should be designed and constructed in a way which minimises the adverse effects of motor vehicle emissions on air. *This means* producing motor vehicle trip lengths and numbers, and *alleviating congestion*:
>
> - through appropriate traffic control; and,
>
> - *by creating a roading pattern which maximises connections within and between local neighbourhoods*, shops, schools, community facilities, recreation areas and town centres, taking into account natural topographic features; and
>
> ...

[150] The expropriation principle could have no application to a condition in terms of the district plan for the creation of roads that conform with normal subdivisional requirements for what Mr Casey usefully termed "connectivity".

*The Environment Court – no part of the cost to fall on Estate*

[151] Here the Environment Court considered in effect that the Council erred in deciding that any part of the cost of the regional road should fall upon Estate.

*The High Court – the Environment Court erred*

[152] The High Court on appeal reached a contrary conclusion. In answering no to what is now the second question ([126] above), on which it later gave leave to appeal, it held:

> [46]… while the *Newbury* principles apply, their application does not incorporate a causal nexus test as such…

[153] Venning J reasoned that:

> (d) the *Newbury* principles endorsed by this Court in *Housing New Zealand* [2001] NZRMA 202 do not require a causal nexus between the effects of the proposed subdivision and the conditions imposed by the Council in relation to the construction and consequent vesting of Marinich Drive;

(e) those principles, requiring (using the formula of Lord Scarman at 618) that the conditions:

- fairly and reasonably relate to the provisions of the development plan and to planning considerations affecting the land;
- fairly and reasonably relate to the permitted development (the subdivision);
- are ones that a reasonable council duly appreciating its statutory duties could have imposed,

were satisfied.

*Housing New Zealand v Waitakere City Council*

[154] Venning J sought to follow the decision of the full Court of the High Court in *Housing New Zealand Limited v Waitakere City Council* [2001] 2 NZLR 340, stating:

> [49]… the High Court in *Housing New Zealand* implicitly rejected a causal nexus test without, in the view of the Court of Appeal, overruling or declining to follow *Newbury*.

[155] *Housing New Zealand* is not however to be read as a decision of general application. It concerned a specific section of the Local Government Act 1974 (s 285) concerning reserves contributions in the case of residential subdivisions. It had been argued for Housing New Zealand Limited first that the text of the section did not confer legal power to impose a reserves contribution in circumstances where a subdivision by itself created no additional demand for reserves; secondly the section was to be read in the light of the *Newbury* principles; and thirdly that it was to be interpreted in the context of the RMA which is effects based. The full Court considered that the language of s 285 contained no requirement for causal nexus between the subdivision and the need for reserves and was to be contrasted with sections dealing with the need for public water, drainage, electricity, gas supply and roading (ss 283 and 321A) which did require such nexus and that the need for nexus should not be inferred. The argument is summarised in the maxim *expressio unius est exclusio alterius*. *Newbury* was distinguished as a case dealing with general rather than specific legislation and indeed different legislation in a different

jurisdiction. The Full Court did not regard it as of assistance in interpreting the specific language of s 285 and accepted the Council's submission that the relevant context was not the RMA but the Local Government Act.

[156] This Court declined leave to appeal (*Housing New Zealand Limited Waitakere City Council* [2001] NZRMA 201). The Full Court decision did not receive express or implied endorsement; leave was declined because the application did not give rise to a question of law of general or public importance because of the way it had been argued in the courts below. This Court stated:

> [16] If the applicant had chosen to present its case in the Environment Court so as to generate discussion of the principles and policies of the Resource Management Act, a course seemingly open to it in relation to a future subdivision where the issue emerges, we might well have been disposed to grant leave. But in the present circumstances we regard as embarking upon that question as inappropriate, particularly when it would arise on the application of a provision which will fairly soon cease to have practical effect. …
>
> [18] We take the view that the *Newbury* test remains a general application and that New Zealand courts should continue to apply it in relation to the provisions of the Resource Management Act.

*The Newbury principles*

[157] It was unnecessary on the application for leave to appeal in *Housing New Zealand* for this Court to examine the *Newbury* principles closely. It is now our task to do so within the present context.

[158] Those principles were reviewed by the House of Lords in *Tesco Stores*. Lord Hoffmann pointed out (at 779A) that the first and second *Newbury* principles comprise a judicial paraphrase of the planning authority's statutory duty under the former English legislation. It required that the authority "shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations" and provided that it "may grant planning permission, either unconditionally of subject to such conditions as they think fit". Such duty applied as much to the decision to grant a planning permission as to the decision to impose conditions. The third *Newbury* test is a general principle of administrative

law. It had been stated by Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572:

> Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are to at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

[159] Lord Hoffmann cautioned against the substitution of the *Newbury* paraphrase for the words of the statute.

[160] At the time of Estate's application for consent s 104 of the RMA provided:

> **104. Matters to be considered**
>
> (1) Subject to Part II, *when considering an application for a resource consent* and any submissions received, *the consent authority shall have regard to –*
>
> (a) *Any actual and potential effects on the environment of allowing the activity*; and
>
> (b) Any relevant regulations; and
>
> (c) …
>
> (d) *Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan*; and
>
> …
>
> (e) Any relevant regional plan or proposed regional plan, where the application is made in accordance with a district plan; and
>
> …
>
> (h) *Any relevant designations* or heritage orders or relevant requirements for designation or heritage orders; and
>
> (i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.
>
> …

Section 108 provided:

> (1) Except as expressly provided in this section… 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*:
>
> > (a) *Subject to subsection (10), a condition requiring that a financial contribution be made*:
> >
> > …
> >
> > (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*:
> >
> > …
>
> (9) *In this section, 'financial contribution' means a contribution of–*
>
> > (a) *Money*; or
> >
> > (b) *Land*…; or
> >
> > (c) *A combination of money and land*.
>
> (10) *A consent authority must not include a condition in a resource consent requiring a financial contribution unless–*
>
> > (a) *The condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect)*; and
> >
> > (b) *The level of contribution is determined in the manner described in the plan or proposed plan.*

[161] With respect to the decision of the Full Court in *Housing New Zealand* and the High Court in this case, these provisions do not permit a construction of s 108 that "causation" or "nexus" between the effects of the proposed subdivision and the conditions imposed by the Council is immaterial. Section 108, empowering the imposition of conditions on a consent granted under s 104, must be read consistently with that section. It mandates that in considering whether to allow a permitted activity the consent authority "must have regard to any actual and potential effects on the environment": failure to do so would entail appealable error of law. Likewise the term "effects" must be read in terms of its definition in s 3 and in the light of the

Fourth Schedule. Read in this way the concept of "effects" is wide and consideration of it is essential not only under s 104 but also under s 108: power to impose conditions on a consent cannot permit the decision-maker to cut loose from the restrictions attending the consent itself. As foreshadowed by this Court in *Housing New Zealand*, the so-called "*Newbury* principles" are not to be disregarded; rather in their light the Environment Court on appeal is to take a broad view of how Estate's proposed subdivision would have effects on the environment. To the extent that it imposed what in England are called "external costs", that is, consequences involving loss or expenditure by other persons or the community at large (see *Tesco Stores* at p771 F-G), the developer might lawfully be required by conditions to bear or at least contribute to such costs within the limits of s 108(9)-(10), when those provisions apply. But the parties agreed that those provisions have no direct application in this case.

[162] As will appear, the answer to the second question as restated ([126]) must be no. But it is convenient first to consider the third question.

**The third question**

[163] The third question is:

> Did the High Court err in law by concluding that the requirement to vest the width of Marinich Drive (save as two metres of Marinich Drive) was not a [requirement of a] financial contribution under s 108(2)(a) of the Resource Management Act 1991?

[164] The Judge treated the requirement as relating to a contribution not of land (s 108(9)(b)), which is defined by s (9) as a "financial contribution", but of "services or works" (s 108(2)(c)) which is not so defined. He reasoned:

> [30] Condition [2](o) note (vi) expressly requires Estate Homes to design, form and construct Marinich Drive on the basis that the Council will pay compensation for the additional two metres required to bring it to arterial standard. Again the first step to determine whether that condition can be sustained is to determine the basis for the condition in the first instance.
>
> [31] The requirement to construct the new roads shown in the plan, including Marinich Drive is a condition requiring "services or works" in accordance with s 108 (2)(c). There is no need to apply s 407 or to incorporate the provisions of s 321A LGA in relation to the works. The

> Environment Court does not seem to have considered s 108 (2)(c), but rather to have assumed s 321A LGA was the basis for the condition requiring the construction of the road. To that extent the Environment Court fell into error. There was no need for it to consider s 407 as the roading condition clearly falls within "works" under s 108 (2)(c).
>
> [32] The Council can require "works" under s 108 (2)(c) on terms and conditions. In this case, one of the terms is that the Council will provide compensation for the additional work required for the additional two metres to make the road to an arterial standard.

[165] The Council's powers to impose conditions are to be found in ss 108 RMA and ss 321A and 322(2)(b) Local Government Act.

*Section 108 RMA*

[166] The italicised passage of s 108(1) RMA is broadly expressed:

> Except as expressly provided in this section… *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).

[167] But it must be read in context. In the case of "financial contributions" Parliament has taken care to circumscribe the terms on which they may be imposed as conditions by stipulating the limitation:

> *Except as expressly provided in this section….*

[168] They are carefully defined:

> *(9) In this section, 'financial contribution' means a contribution of–*
>
> *(a) Money; or*
>
> *(b) Land…; or*
>
> *(c) A combination of money and land.*

[169] The section further states when a condition requiring a financial condition may be made:

> *(2) A resource consent may include any one or more of the following conditions:*

> *(a) Subject to subsection (10), a condition requiring that a financial contribution be made:*
>
> …
>
> *(10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless–*
>
> *(a) The condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and*
>
> *(b) The level of contribution is determined in the manner described in the plan or proposed plan.*

[170] Counsel agreed that the district plan in this case contained no provisions of the kind contemplated in s 108(2)(a). It follows that the general power under s 108(1) may not be exercised to include a condition requiring provision of land or money. Instead s 407(1) imports ss 321A and 322 Local Government Act.

[171] Venning J considered that provision of the land required to give effect to the designation (apart from the additional 2 m strips) was to be characterised not as "requiring a financial condition" but as:

> (108)(2)(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:*

for which compensation is not payable: s 85(1); so there was no need for resort to s 407 and s 322 ([173] and [179] below).

[172] We respectfully disagree that such characterisation is necessarily correct in this case. "Works" can have many meanings. In *London County Council v Marks and Spencer Ltd* [1952] Ch 549; [1953] AC 535 it meant the totality of what had to be done to demolish old buildings and erect new ones. Certainly the creation of a roading system could be interpreted as the provision of "works"; not least in the case of roads required to service a new subdivision which vest in the Council on deposit of a plan. In that case their function is like that of water and gas mains, which fall squarely within the concept of "works and services". There may be contrasted the

expression "network infrastructure" defined in relation to development contributions under Local Government Act 2002 s 197 to mean:

> the provision of roads and other transport, or water, or waste water and stormwater collection of management.

[173] But in the context of roading which is not reasonably required as a consequence of the subdivision, but is needed to serve regional purposes, the concept of "services or works" is inapt. Such roading falls rather within the concept of "contribution of land" which is a financial contribution under s 108(2)(a) and is either controlled by subs (10) or dealt with under s 407(1).

[174] The cross-references under s 407 RMA to incorporate as necessary the residual provisions relating to roading in Part 20 of the Local Government Act 1974 indicate an intention that roading should be dealt with as a specific area of regulation, either in an operative plan or under the default provision. Section 407 may be construed as a discrete provision (like s 220) empowering on a subdivision consent a condition of the type described independently of the main powers under s 108.

[175] The present case, where the district plan does not include relevant provisions of the kind contemplated by s 108(2)(a), falls within s 407(1):

> **407. Subdivision consent conditions–**
>
> (1) Where an application for a subdivision consent is made in respect of land... where the district plan does not include relevant provisions of the kind contemplated by section 108(2)(a)... the territorial authority may impose, as a condition of the subdivision consent, any condition that could have been imposed under sections... 321A, or 322, as the case may be, of the Local Government Act 1974 if those sections had not been repealed by this Act.

[176] Section 321A provided:

> **321A. Roading contributions as condition of approval of scheme plan–**
>
> (1) For the purpose of forming, diverting, or upgrading any existing road or forming any new road because of new or increased traffic owing to the subdivision of any land the council may, as a condition of approval of a scheme plan, require the owner to-

> (a) Pay, or enter into a binding contract to pay, to the council a fair and reasonable contribution towards the cost of forming or upgrading roads or parts of roads within or adjacent to the subdivision or any other land vested in the same owner to a state or standard that may be specified by the council, or require him to carry out, or enter into a binding contract to carry out, that work; or
>
> (b) Dedicate a strip of land for widening any road; or
>
> (c) Comply with both paragraph (a) and paragraph (b) of this subsection.

[177] Venning J considered that s 321A could be of no relevance. We respectfully agree that it did not apply directly. It nevertheless provides some support for Estate's argument. The section authorised the Council:

> …for the purpose of… forming a [...] new road because of new or increased traffic owing to the subdivision… as a condition of approval of a scheme plan [to] require the owner to –
>
> Pay… to the Council a fair and reasonable contribution towards the cost of forming… roads within… the subdivision… to a standard that may be specified by the council, or require him to carry out… that work. This provides authority for the Council, when itself creating a new road, to require financial contribution from the developer. That is not this case, where it was the developer which created the road. But the importance of the provision is that it limits the contribution to no more than is required "because of new or increased traffic owing to the subdivision".

[178] By s 321A Parliament has made clear that if the Council is forming or upgrading roads because of new or increased traffic due to the subdivision it may require by way of roading contribution only "a fair and reasonable contribution towards the cost". It is only where road widening is needed for that reason that the owner can be called on to dedicate a strip of land. This is a statutory expression of the *Newbury* principles.

[179] In *World TV Ltd v Best TV Ltd* (2005) 11 TCLR 247, 255 it was suggested:

> [55] The twin principles that statutes may influence the development of the common law and that the common law may influence the construction of statutes are discussed by Professor Burrows in *Statute Law in New Zealand* (3rd ed) pp368-383. He concludes with the observation that
>
> > Everything depends on the construction of the Act in question [and] the ability of the common law and statutory provisions to "live together" without too much difficulty…

[56] That principle must apply *a fortiori* to two statutes.

[180] It must apply even more strongly to two sections within a single statute. It would be odd, as well as contrary to the principle of compensation for land taken for a public purpose, that where the subdivision generates new or increased traffic roading contributions are confined by s 321A(1)(a) to what is fair and reasonable; and yet roading contributions required under the same Act for regional purposes were not compensable in accordance with the common law presumption.

[181] Section 322 provided:

> **322. Land for road formation or widening**
>
> (1) Notwithstanding anything in section 321A of this Act, the council, instead of requiring the owner to make provision for the construction of roads or to complete the work of making new roads shown on the scheme plan, may agree with the owner that the council will carry out the work of constructing the roads or making the new roads in consideration of the owner transferring to the council part of the land in the subdivision or any other land.
>
> (2) For the purposes of forming any new road or of diverting or upgrading any existing road, the council-
>
> (a) May take, purchase, or otherwise acquire land in accordance with the provisions of this Act; or
>
> (b) May require, as a condition of its approval of any scheme plan, the transfer, pursuant to an agreement with the owner, of any land marked for roading on the plan where the council decides to undertake the formation of the road or roads itself; or
>
> (c) *Repealed*.
>
> (d) May, where-
>
> (i) Any allotment on the scheme plan has a frontage to an existing road of a width less than that specified in section 325 of this Act, which was not laid off or dedicated pursuant to a plan of subdivision previously approved under this Part of this Act or under any former enactment, whether by the council or by any other authority; and
>
> (ii) The council is of the opinion that if that road were a new road to be provided by the owner to give access to that allotment the council would require a road of a greater width,-
>
> the council may, as a condition of its consent to its approval of the scheme plan, require the owner to set

> back the frontage of that allotment to a distance sufficient to enable that road to be widened to the width that would be required by the council for a new or proposed road of a like nature under section 321 of this Act:
>
> Provided that the council shall not require the owner to set back the frontage of that allotment to a distance from the middle line of the road as it originally existed greater than half the width of the road when widened to the width that would be required by the council as aforesaid.
>
> (3) In any case to which paragraph (d) of subsection (2) of this section applies-
>
> (a) The owner shall dedicate as a road the strip of land between the frontage line as so set back and the frontage line as previously existing, and thereupon the land so dedicated shall form part of the existing road; and
>
> (b) The owner of the land so dedicated shall be entitled to compensation by the council, to be claimed and ascertained under the Public Works Act 1981; and in assessing such compensation the Land Valuation Tribunal shall take into consideration the necessity for or advantage of affording greater road space and the betterment accruing to the whole property affected, and any such betterment shall be a set-off against the compensation claimed.

[182] Venning J reasoned:

> [28] Section 322 (2)(a) is … relevant and applicable to the situation in the present case. The Council has effectively taken, purchased or acquired Estate Homes' land, namely the additional two metres required for the arterial road. The additional two metres has been taken "in accordance with the provision of [the] Act" - the LGA which provides for compensation. That reflects the agreement by the Council to pay compensation for the additional two metres required for the purposes of the arterial road.
>
> [29] In conclusion on this point the land that Marinich Drive lies on vests in the Council by operation of s 238. The Council has required Estate Homes to provide an additional two metres (over and above the width of road otherwise required for the subdivision as set out on the plan submitted to the Council). Insofar as the additional two metres are concerned, the Council has taken, purchased or acquired that additional two metres of land as a condition of the consent: s 322 (2) (a) LGA. The Council is required to provide compensation for it. Compensation is not required for the balance of the land required for Marinich Drive as that land vests in the Council in the usual way that roads shown on subdivision plans vest without the need for any condition to that effect.

[183] We agree with the Judge both that subsection (1) has no application to this case where the Council did not itself construct the road and that subsection (2)(a)

empowered it to acquire the designated strip for the purpose of forming the arterial road. But we respectfully disagree with Chambers J that s 322(2) has no application. He reasons that s 322 applies only where the Council itself is to perform the work of constructing the roads required for the subdivision.

[184] Certainly that is so in the case of subsection (1) of s 322. But subsection (2) is expressed more broadly. We prefer the construction that subsection (2) is not parasitic upon subsection (1) but an independent source of plenary authority. Subsection (1) simply empowers the council itself to construct or complete new roads shown in a scheme plan. Subsection (2) covers a wider field, extending beyond formation of new roads to diverting or upgrading any existing road. We agree with the Judge that, on the footing that the Council required Estate to include Condition 2(o)(vi) in its application and the arterial road in the plan that was deposited, thus causing it to be vested in the Council, in terms of s 322(2)(a) the Council did "acquire [the] land". Since the practical effect of the formula in the Condition was to limit the compensation recoverable, the inclusion of that condition is presumed to be a taking that is compensable: *A-G v Horner* ([129] above).

[185] Sections 247F and 247G of the Local Government Act, alluded to in s 322(2)(a), provided:

> **247F. Power to acquire land**
>
> (1) Every local authority may purchase, take in the manner provided in the Public Works Act 1981, or otherwise acquire and hold, any land or interest in land, whether within or outside the district, which may be necessary or convenient–
>
> > (a) For the purposes of or in connection with any public work that the local authority is empowered to undertake, construct, or provide; or
> >
> > (b) For carrying out any of the functions, duties, or powers of the local authority under this Act or any other Act.
>
> (2) All land taken, purchased, or acquired under the Public Works Act 1981 shall be vested in the local authority for the purpose for which it was acquired and shall be subject to the provisions of that Act as to a change of that purpose or its disposal.
>
> **247G. Compensation payable by local authority for land taken or injuriously affected**

> (1) Every person having any estate or interest in any land–
>
> (a) Taken under the authority of this Act for any public work; or
>
> (b) Injuriously affected by any public work; or
>
> (c) Suffering any damage from the exercise of any of the powers given by this Act,–
>
> shall be entitled to full compensation for the same from the local authority to the extent provided in the Public Works Act 1981.

[186] With respect to the view of Chambers J, we consider that the Council cannot extort the creation of a public work without compensation by demanding it as the price of consent to subdivision. Certainly, as Chambers J argues, Estate was not bound to proceed with its subdivision. But if it chose to exercise its right to do so in accordance with the law it was not liable to be taxed for the privilege. As Professor Joseph observes in his discussion of the principles (*Constitutional and Administrative Law in New Zealand* (2nd ed) 909):

> The Local Government Act 1974 [s 690A] codifies the common law against extra-parliamentary taxation.

[187] That is an expression of the principle now stated in s 22 of the Constitution Act 1986, that:

> It shall not be lawful for the Crown, except by or under an Act of Parliament
>
> (a) To levy a tax…

which must apply a fortiori to a local council.

*The Council may not avoid compensation by choice of an alternative method of taking*

[188] Conferment of authority to acquire the strip says nothing about whether compensation must be paid. And where a statutory procedure exists for taking away rights with compensation, the court will resist the argument that some other procedure is available for doing the same thing without compensation: *Minister of Housing and Local Government v Hartnell* [1965] AC 1134; *Hall v Shoreham-by-Sea UDC* [1964] 1 WLR 240.

[189] The Judge has reasoned that the Council has agreed to acquire and pay for the additional 2 m strip which the Council claims is all that it could not have demanded as of right from Estate as a condition of the subdivision; it could have insisted on Estate's provision at its cost of a narrower internal road along the same route. But that assertion is one of fact and evaluation that was not open to the High Court.

[190] The Environment Court considered that the contribution can be justified as within the powers concerned through s 407(1) and the applicable provisions of the Local Government Act 1974.

[191] Given that the developer formed the road which was then transferred to the Council on dedication by virtue of s 238, such form of application may be considered an agreement to take the land which was principally required to satisfy the long-standing arterial road requirement rather than any frontage or connectivity requirement under the District Plan for the allotments in the subdivision.

*Answer to Question 2*

[192] It follows that the answer to the second question as recast ([126] above) is that the High Court did not err in concluding that the vesting of the 11 m centre part of the drive (internal local collector road) was not a financial condition under s 108(2)(a). That is because it was prohibited by s 108(10). But the High Court did err in determining that the acquisition of the centre part of the road came under s 108(2)(c) and was not a taking or agreed acquisition in terms of Local Government Act 1974 s 322(2)(a).

[193] The facts may alternatively be analysed in terms of s 322(2)(b) on the basis that Estate agreed with the Council to the transfer of the land marked "the arterial road" and the Council, although prima facie obliged to undertake the formation of the road, has by agreement delegated or contracted back to the subdivider as a matter of practical convenience and efficiency the task of formation of the road.

*Answer to Question 3*

[194] We repeat the third question:

> Did the High Court err in law by concluding that the requirement to vest the width of Marinich Drive (save as two metres of Marinich Drive) was not a [requirement of a] financial contribution under s 108(2)(a) of the Resource Management Act 1991?

[195] The answer to the question is no: the requirement was not a requirement for a financial contribution under s 108(2)(a); but the High Court erred in determining that the acquisition of the centre part of the road came under s 108(2)(c) and was not a taking or agreed acquisition in terms of Local Government Act 1974 s 322(2)(a).

**The fourth question**

[196] The fourth question is:

> If the High Court was correct in finding that Condition 2(o)(vi) was legally valid, did the High Court subsequently err in failing to refer the condition back to the Environment Court to determine whether it should be upheld and/or modified on the merits of the case before it?

[197] Without further factual findings of the Environment Court neither the High Court nor this Court can determine whether or not the condition was legally valid.

*The roles of the Council, the High Court and the Environment Court*

[198] The scheme of the RMA is to confer fact-finding and policy-making power on a consent authority which is either, in the case of the Council, an elected body or, in the case of the Environment Court, a specialist tribunal. The initial decision is that of the Council. But at the de novo hearing on appeal the Council decision has no greater status than is accorded it by the Environment Court which has plenary authority to find facts and make policy evaluations within the scheme of the RMA and the district plan. The role of the Courts of general jurisdiction – the High Court and this Court – is confined to correction of legal error on the statutory appeal on

points of law under ss 299 and 308. As the Supreme Court has recently emphasised (*Bryson v Three Foot Six Limited* [2005] NZSC 34), an appellate court whose jurisdiction is limited to matters of law is not authorised under that guise to make factual findings.

[199] It is accordingly the Council, at first instance, and on appeal the Environment Court that is authorised by Parliament to exercise the statutory powers under ss 104 and 108. Each must ask itself the right questions and there must be some evidence to support its conclusion. It must also act reasonably, in the sense stated in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. If those constraints, which may be loosely expressed in terms of nexus or causation, are not maintained the consent authority would err in law. But if they are they are unchallengeable.

[200] While *Tesco Stores* must be viewed with caution as a decision on a different statute in another society, where the Secretary of State exercises a jurisdiction absent from the RMA, it gives a valuable warning against applying the *Newbury* principles too narrowly to the local legislation. While the power under s 104 to grant consent is expressed widely, that under s 108 to impose conditions is tightly controlled and is not available in this case unless in point of factual evaluation the arterial road can be characterised as "works". Section 322 of the Local Government Act is available but has not yet been considered by a consent authority. While recourse may be had to that section, which is broadly expressed, its authority to "take, purchase or otherwise acquire land" evokes the principle *noscitur a sociis*: that all three will carry compensation.

[201] The decision in *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014 shows that in a particular context it may be open to a reasonable council properly directing itself to reach one conclusion and for the Environment Court properly directing itself to reach an opposite conclusion, with neither of which the Courts of general jurisdiction could interfere. (While Lord Hoffmann made similar remarks in *Tesco Stores*, it is unhelpful to press beyond the level of principle the guidance to be derived from a very different legislative scheme.) But care must be taken to give full effect to the carefully drawn language of the present authorising provisions.

*Application of the principles*

[202] Here the High Court considered it unnecessary to refer the case back to the Environment Court, considering that it should have departed from the decision of the Council in granting the consent only to the extent necessary to clarify the compensation is due not only for the extra two metres of land but also for the additional cost of constructing the road on Marinich Drive to the width and standard of an arterial road.

[203] We have held that Estate was right to submit that the High Court erred in giving a negative answer to the question it posed (at [85] above) and that the re-stated question 2 (at [126]) must be answered no.

[204] The High Court also erred in posing as a question of fact whether the Council could have insisted on Estate's provision at its cost of a narrower internal road along the same route. It further erred in assuming the answer to such question. So long as it directed itself correctly in law, how it should pose and answer questions of fact and its appraisal bearing on whether the Condition of uncompensated vesting of the road was justifiable, were matters` for the Environment Court.

[205] The fourth question should be amended to read:

> If the High Court was correct in finding that Condition 2(o)(vi) *may have been* legally valid *either in whole or in part*, did the High Court subsequently err in failing to refer the condition back to the Environment Court to determine whether it should be upheld and/or modified on the merits of the case before it?

*Answer to question 4*

[206] The answer to question 4 is: the High Court erred in determining the validity of Condition 2(o)(vi). There must be a reference back to the Environment Court to resolve to what extent if any Condition 2(o)(vi) was valid.

**Appeal allowed and case referred back to Environment Court**

[207] It follows that the appeal must be allowed and the case referred back to the Environment Court for it to reconsider in the light of this judgment. We accordingly give leave to Estate to amend its appeal to challenge the failure of the High Court to refer the matter back to the Environment Court and order such reference back.

**Duty of Environment Court on reference back**

[208] It should be recorded that the Environment Court too erred. On the reference back it will be bound to take into account the terms of the district plan requiring "a roading pattern which maximises connections within and between local neighbourhoods": the "connectivity factor". On a fair reading of its judgment it did not do so.

[209] What weight the Environment Court should place on the connectivity factor in reconsidering the case is a matter for its evaluation and decision. No doubt one way for that Court to approach its task would be to consider whether all or part of the uncompensated cost of the arterial road would reasonably have been required had the designation never been imposed; and if not, whether that fact should mitigate, and if so to what extent, the sum it should be ordered to pay.

[210] But it is to be emphasised that that this Court has no role in directing the Environment Court in how it should carry out the factual and evaluative aspects of its important task.

**Costs**

[211] Estate should receive costs of $8000 and usual disbursements. We would certify for second counsel.

Solicitors:
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Kensington Swan, Auckland for Respondent

## Appendix

## The questions and the answers

### Question 1

As a matter of jurisdiction, can an applicant for subdivision consent be granted approval to a form of subdivision that has not been applied for, and [2] can a resource consent be made subject to conditions that are more favourable to the consent holder and which fall outside the scope of the application?

Answer to first part

We answer the first part ([107]) yes, an applicant for subdivision consent can be granted approval to a form of subdivision that has not been applied for but only to the extent that no prejudice arose to the applicant, other parties or the public in altering the terms of the application ([109]).

The second part ([109]) is:

Can a resource consent be made subject to conditions that are more favourable to the consent holder which fall outside the scope of the application?

Answer to the second part

We answer the second part, yes a resource consent can be made subject to conditions which are more favourable to the consent holder and which fall outside the scope of the application provided there is no prejudice to the applicant, other parties or the public and that conditions comply with the limitations declared in the *Newbury* principles ([115]).

**Question 2**

The second question ([126]) is:

Was the High Court right to hold that the Council could not be legally required to compensate Estate for more than the difference between (1) the value of additional road reserve width and the cost of forming two strips of additional carriageway and (2) what an internal local collector road would require?

Answer to question 2:

Our answer is that the High Court did not err in concluding that the vesting of the 11 m centre part of the drive (internal local collector road) was not a financial condition under s 108(2)(a). That is because it was prohibited by s 108(10). But the High Court did err in determining that the acquisition of the centre part of the road came under s 108(2)(c) and was not a taking or agreed acquisition in terms of Local Government Act 1974 s 322(2)(a) ([192]).

The facts may alternatively be analysed in terms of s 322(2)(b) on the basis that Estate agreed with the Council to the transfer of the land marked "the arterial road" and the Council, although prima facie obliged to undertake the formation of the road, has by agreement delegated or contracted back to the subdivider as a matter of practical convenience and efficiency the task of formation of the road ([193]).

**Question 3**

The third question ([163]) is:

Did the High Court err in law by concluding that the requirement to vest the width of Marinich Drive (save as two metres of Marinich Drive) was not a requirement of a financial contribution under s 108(2)(a) of the Resource Management Act 1991?

Answer to question 3

Our answer is no: the requirement was not a requirement for a financial contribution under s 108(2)(a); but the High Court erred in determining that the acquisition of the centre part of the road came under s 108(2)(c) and was not a taking or agreed acquisition in terms of Local Government Act 1974 s 322(2)(a) ([195]).

**Question 4**

The fourth question ([196]) is:

If the High Court was correct in finding that Condition 2(o)(vi) may have been legally valid either in whole or in part, did the High Court subsequently err in failing to refer the condition back to the Environment Court to determine whether it should be upheld and/or modified on the merits of the case before it?

Answer to question 4

Our answer is that the High Court erred in determining the validity of Condition 2(o)(vi). There must be a reference back to the Environment Court to resolve to what extent if any Condition 2(o)(vi) was valid. ([206])

**Directions to Environment Court**

On the reference back the Environment Court will be bound to take into account the terms of the district plan requiring "a roading pattern which maximises connections within and between local neighbourhoods": the "connectivity factor". ([208])

What weight the Environment Court should place on the connectivity factor in reconsidering the case is a matter for its evaluation and decision. ([209]).