ORIGINAL

Decision No. C 134 /2006

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of a reference pursuant to clause 14 of the First Schedule to the Act
BETWEEN	REMARKABLES PARK LIMITED
	(ENV-2006-CHC-000028 previously RMA 1427/98)
AND	CLARK FORTUNE McDONALD
	(ENV-2006-CHC-000023)
	Referrers
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (presiding)
Environment Commissioner J R Mills

Hearing at Christchurch on 25 September 2006

Appearances: Andrew Green for Remarkables Park Limited and Clark Fortune McDonald
Neville Marquet for Queenstown Lakes District Council

THIRD PROCEDURAL DECISION

Introduction

The issues

[1] Remarkables Park Limited ("RPL") and Clark Fortune McDonald ("CFM") have, in effect, applied to strike out some relief sought by the Queenstown Lakes District Council in an application under section 293 of the Resource Management Act

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1991 ("the Act" or "the RMA") which seeks to notify changed rules about financial contributions. The application has not yet been notified, nor has complete consultation with affected parties occurred.

[2] What RPL and CFM actually applied for was an order that neither the Court nor the Queenstown Lakes District Council has jurisdiction to amend proposed rules for the Queenstown Lakes District Plan to include a reference to a 'supplementary information document' which does not form part of the partly operative District Plan. While that wording is more apt for a declaration, that has not been applied for. Mr Green accepts that the interlocutory application should be treated as a request that the Court strike out the relief sought by the Council as an abuse of process, under section 279(4)(c) of the Act.

[3] There are two general questions for us to decide:

(1) Can financial contributions be determined under a document outside the District Plan?

(2) Should the Council's version of the section 293 application be struck out as an abuse of process?

Financial contributions in the RMA

[4] The RMA provides for local authorities to recover 'financial contributions' from consent holders under conditions imposed when granting resource consent. The power is given in section 108 of the RMA, as amended by the Resource Management Amendment Act 2005, which states (relevantly):

> **108 Conditions of resource consents**
>
> (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).
>
> (2) A resource consent may include any one or more of the following conditions:
>
> (a) Subject to subsection (10), a condition requiring that a financial contribution be made:
>
> ...
>
> (9) In this section, **financial contribution** means a contribution of –

(a) Money; or

(b) Land, including an esplanade reserve or esplanade strip (other than in relation to a subdivision consent), but excluding Māori land within the meaning of the Māori Land Act 1993 unless that Act provides otherwise; 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.

Part 15 (Financial Contributions) of the District Plan

[5] In reliance on an earlier version of section 108 of the RMA, the Council, when it notified its proposed district plan in 1995 included, as Part 15 of the plan, provisions for imposing conditions requiring financial contributions from subdividers. After the Council issued its decision in 1998, various parties including the current appellants, referred Part 15 to the Environment Court.

[6] Subsequent attempts were made to resolve the financial contributions part of the now partly operative district plan by agreement. They were unsuccessful and the proceedings wet set down for hearing. The Environment Court decided in its (First) Procedural Decision[1] on 5 December 2003 that[2]:

> ... on the evidence we have read (and counsel agreed to us considering this although it is not yet formally on the record) there is a reasonable case for amending the proposed district plan along the lines contemplated by the Council but with some changes to make the proposed rules sufficiently clear as to be within jurisdiction.
>
> We invite an application under section 293 of the Act by the Council. [A]t the least this should remedy the jurisdictional problems we have identified: notification will automatically resolve the problem of other persons not knowing what the Council is proposing; and specification of a maximum contribution in the district plan itself, without reference to another protean document, will remedy the other.

[1] Decision C161/2003. A Second Procedural Decision – C127/2006 – is irrelevant to this decision.
[2] Decision C161/2003 at paragraphs [29] and [30].

[7] On 24 March 2006, the Council together with RPL and CFM lodged a joint application under section 293 of the Act. Under the joint application rule 15.2.5.4 is proposed to state:

15.2.5.4 Financial Contributions – Level of Contribution

(i) Dwelling Equivalent Funding Model

The Dwelling Equivalent Funding Model defines a standard financial contribution for a specific unit of demand. The unit of demand is a Dwelling Equivalent. The model calculates a Dwelling Equivalent Financial Contribution.

This can be represented by the following formula:

$$\text{Dwelling Equivalent Financial Contribution} = \frac{\text{Sum of CAPEX for Growth Consumed in Analysis Period}}{\text{Sum of New Dwelling Equivalents in Analysis Period}}$$

Supplementary Information on the matters contained below can be found in the Council's document "Policy on Development and Financial Contributions. Detailed Supporting Document" as amended in accordance with section 83A [sic] of the Local Government Act 2002 and clause 31 of the First Schedule of the Resource Management Act 1991

The method can be described simplistically as follows:

Step 1: Assess capital expenditure for growth on an asset by asset basis using financial reports (past expenditure) and projected expenditure.

Step 2: Apportion capital expenditure for growth by the growth population (dwelling equivalents) over the Design Life of the asset, to assess the $(dollar)/unit of demand for each asset.

Step 3: For each year in the Analysis Period determine the total consumption of asset capacity for each asset identified, namely - $(dollar)/unit of demand x the number of units of demand.

Step 4: Sum of all assets in each year in the Analysis Period, namely total capacity consumed in that year, measured in $(dollars).

Step 5: Sum each year in the ten year Analysis Period and divide by the growth population (new Dwelling Equivalents) projected over the analysis period to determine the Dwelling Equivalent Financial Contribution.

> Graphical representation and formulae of the model is shown below using three figures and five equations. Figure 1 describes how assets with Surplus Capacity are treated. Figure 2 describes how assets constructed during the analysis period are treated and Figure 3 demonstrates how the combination of Figures 1 and 23 are used to calculate financial contributions.
> [Italics added]

[8] To understand that dense language, the new proposed Part 15 of the District Plan includes a set of definitions which includes[3]:

> **15.2.5.2 Definitions for Financial Contributions**
>
> In this section of the Plan, **unless** the context otherwise requires:
>
> ...
>
> (c) "*Capital Expenditure ("CAPEX")*" means expenditure used to create new assets or to increase the capacity of existing assets beyond their original design capacity or service potential. CAPEX increases the value of asset stock. (Source: *NAMs Manual*)
>
> (d) "*Capital Expenditure for Growth ("CAPEX")*" means the proportion of capital expenditure required to meet the demands of growth.
>
> (e) "*Contributing Area*" means a defined geographic area where financial contributions are to be calculated by the method described herein and delivering a standard financial contribution in terms of dollars per Dwelling Equivalent. Contributing areas take an integrated approach to the effects of land subdivision/development and associated physical resources and assess the overall requirements of an identified geographic area. Contributing areas should enable standard financial contributions to be determined efficiently and equitably.
>
> (f) "*Deferred Works*" means CAPEX that should have been undertaken at the appropriate time, however has been delayed to a later date.
>
> ...
>
> (dd) *"Supplementary Information"* means the Council's document "Policy on Development and Financial Contributions: Detailed Supporting Document" as amended in accordance with section 83A of the Local Government Act 2002 and clause 31 of the First Schedule to the Resource Management Act 1991.

[3] District Plan p 5/15 et ff.

[9] After the joint application was lodged it appears the Council had second thoughts. It does not wish the supplementary information to be 'fixed' in the district plan under clause 31 of the First Schedule to the Act. (We do not understand the relevance of section 83A in this context.) That is because it wants flexibility[4] to change that supplementary information.

[10] Consequently, on 1 May 2006 the Council filed a memorandum which sought to amend draft rules forming part of the joint section 293 application. The amendments that are relevant to this application are as follows:

(1) deletion of part of the definition of Supplementary Information in Rule 15.2.5.2 (deletions shown as strike-through):

> Supplementary Information means the Council's document "Policy on Development and Financial Contributions: Detailed Supporting Document" ~~as amended in accordance with section 83A of the Local Government Act 2002 and clause 31 of the First Schedule to the Resource Management Act 1991.~~

(2) deletion of the following part of Rule 15.2.5.4 (deletion shown as strike-through):

> ~~Supplementary information on the matters contained below can be found in the Council's relevant document "Policy on Development and Financial Contributions: Detailed Supporting Document" as amended in accordance with section 82A of the Local Government Act 2002 and clause 31 of the First Schedule of the Resource Management Act 1991.~~

(3) Insertion of the following Notes after Note 1 in Rule 15.2.5.4:

> (2) Supplementary information on matters contained below can be found in the Council's document "Policy on Development and Financial Contributions: Detailed Supporting Document".

[4] Mr E A Guy, affidavit dated 28 August 2006.

(3) The Long-term Council Community Plan is not incorporated or intended to be incorporated in this District Plan by reference or otherwise under Part 3 of the Schedule of Schedule 1 to the Resource Management Act 1991.

The effect of the amendments sought by the Council is that there will be a technical document that sits outside the District Plan; that will determine the level of financial contributions required under the Act; and which can be amended without any public participation under the RMA (but consultation under the Local Government Act 2002 will have occurred).

[11] For RPL and CFM, Mr Green submitted that the Council's amendments of 1 May 2006 sought to re-introduce an extraneous document in precisely the way the Court had ruled out in the (First) Procedural Decision (C161/2003) three years ago. He took us carefully through the provisions of the new proposed Part 15; a 'Detailed Supporting Document' which is the intended Supplementary Document referred to in proposed Part 15; the relevant provisions of the Local Government Act 2002 ("LGA 2002"); and the Council's Long Term Council Community Plan ("LTCCP") under that Act. Finally he submitted that the RMA required certainty of financial contribution provisions, and that would not be achieved by the Council's proposals, which are effectively made under the LGA 2002.

[12] For the Council Mr Marquet submitted that the proposed Part 15 provided certainty because the formulae by which financial contributions are to be set are included in Part 15; and it is only the information which has to be plugged into those formulae which can change. He also submitted that how financial contribution levels generally are set is a matter now for the Council. That is because they are now set as development contributions under the LGA 2002 and that is a policy matter for the council over which the Environment Court has no jurisdiction. Finally, he submitted that any developer always has a right of appeal under section 120 of the Act if they are disgruntled about the amount of a financial contribution.

Strike-out application

[13] The general principles applicable to strike-out applications are similar to those in civil proceedings in New Zealand. In particular the jurisdiction is one to be exercised

sparingly, and only in a clear case where the Court is satisfied it has the requisite material; and all facts alleged by the respondent to the strike-out are deemed to be favourable: *Attorney-General v Prince and Gardner*[5].

[14] In addition the High Court has identified at least three other RMA-specific considerations which may be relevant. In *Hauraki Māori Trust Board v Waikato Regional Council*[6] Randerson J pointed out that:

> (i) The RMA encourages public participation in the resource management process, which should not be bound by undue formality;
> (ii) Where there is a reference on appeal to the Environment Court, the appellant is not in a position to start again due to statutory time limits; and
> (iii) There are restrictions upon the power to amend. In particular, an amendment which would breach the scope of a reference or appeal is not ordinarily permitted.

The last point does not apply here because this case is about proceedings under section 293 to extend the Court's jurisdiction. Relief which is otherwise *ultra vires* may be allowed.

[15] The short answer to the first question stated in paragraph [3] of this Decision:

> (1) Can financial contributions be determined, under a document outside the District Plan?

– is 'it depends'.

[16] What it depends on is, at least partly, the answer to several difficult questions of law, including:

- whether policy set by a local authority for development contributions under its LTCCP can be applied to financial contributions under the RMA?

5 [1998] 1 NZLR 262 at 267.
6 HC, Auckland CIV-2003-485-999, Randerson J, 4 March 2004.

- whether and how those financial contributions can be challenged under the RMA by developers?
- whether financial contributions are a tax, or a form of environmental compensation?

[17] The existence of difficult questions of law does not mean that the Court cannot resolve those and, if appropriate, still strike out a proceeding: *A-G v Prince*[7]. However, in this case the questions of law may depend on what the High Court decides in two outstanding appeals in other proceedings. First there is an appeal on the Environment Court's decision in *F J Investments Limited v Queenstown Lakes District Council*[8] about 'environmental compensation'. In other words the legal status of that end of the spectrum of financial contributions is at present unclear. Secondly Mr Green informed us from the bar[9] that:

> ... in the recent judicial review proceedings of North Shore City's development contributions policy, it was argued for North Shore City Council that the LGA regime was in the nature of a taxing power for the council and Her Honour, Justice Potter, in the court of the hearing, has made it clear that she doesn't accept that approach. She's going to issue an interim decision sometime within the next month or so, but she hasn't accepted that it gives the council that wide ranging taxing power.

Until both the High Court decisions are issued we do not consider this Court will be in a position to resolve the legal issues. That is because if financial contributions are not a tax (which should be calculable in advance, or at least tax rates identified in advance) but a contribution towards environmental effects then it may be fair that it is not calculable in advance.

[18] As to the 'certainty' of the Council's formulae the appellants lodged affidavits by Mr D F Sergeant, a resource manager, and by Mr A F Porter, a principal of RPL. Mr Sergeant wrote[10] about how in his view the parameters in the Supplementary Information (i.e. outside the proposed district plan)

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7 [1998] 1 NZLR 262 at 267.
8 C48/2006.
9 Transcript p. 42, line 27 et ff.
10 D F Serjeant, affidavit dated 21 July 2006 at para 2.191 et ff.

> ... are determined by changes in Council policy, not external indices such as the [CPI] or Construction Cost Index.

That evidence is challenged. Mr E A Guy, an infrastructural engineer contracted to the Council, stated in his affidavit[11] that:

> ... There is nothing in the assessment variables considered subjective either. Many of the variables are developed by government agencies, assessed using demand models ....

Since there is disagreement on the facts we must not – for the purposes of this strike-out application only – put any weight on Mr Serjeant's affidavit.

[19] However, there are some aspects of the Detailed Supporting Document which cause us distinct unease. It contains, for example, a schedule[12] of the 'Type of Contributions Required by Geographic Areas – within Rural Areas'. The areas are identified as 'Rural General and other rural zonings'. The types of contributions are identified in eight categories:

Water Supply
Wastewater
Stormwater
Roading
Reserve Land
Reserve Improvements
Community Facilities
Other/Miscellaneous.

While we can see that the calculation of the 'Capex'[13] in the first seven categories may be made relatively simply, we cannot see that is the case for the eighth column for

11 E A Guy, affidavit dated 28 August 2006 at para 22.
12 At p. 9.
13 See paras[7] and [8] above.

'Other/Miscellaneous'. That looks uncertain and unfair to us, if it is to be outside the plan, and changeable as a matter of political policy.

[20] Another disconcerting point is that the Council's LTCCP contains a policy[14] reserving a discretion to the Council to postpone or remit financial contributions under the LGA 2002. It states:

> Postponement or Remission
> Council may allow for postponement or remission of contributions in the following circumstances:
>
> (a) Council may accept or require a contribution to the equivalent value in the form of land or infrastructure. It may be appropriate, for example, to allow reserve assets to vest in Council through the subdivision consent process, where they meet Council's reserve requirements, and credit them against the contributions required. Any such proposals will need to be the subject of an agreement with Council before the consent is issued, and will be dealt with on a case by case basis.
>
> (b) Where an applicant can demonstrate that a development creates a significantly different demand on infrastructure than could usually be expected under the relevant land use category, Council will individually assess any such development taking into account the unusual demand characteristics.
>
> All applications for Postponement or Remission must be made in writing to the Chief Executive Officer of the Council.

An equivalent policy is not proposed for Part 15 of the proposed District Plan by either the joint application under section 293 or by the Council's amendments to it.

Outcome

[21] Despite our concerns of the previous two paragraphs we do not consider the Council's proposed changes to Part 15 can be seen as an abuse of process, at least until all the evidence has been read and (cross) examined. Consequently we should not strike out the Council's proposed changes to Part 15. The section 293 applications should be allowed to proceed, probably on the bases that:

[14] QLDC's LTCC Plan June 2006, Volume 3, p. 103.

(1) the Council's proposed 'LGA' system is notified (if that is required) after being consulted about[15];

(2) the consultation and public notices should include:

  (a) the alternatives proposed by RPL and CFM;

  (b) the discretionary relief provision referred to above[16];

(3) the notice should make it clear that the section 293 proceedings are the consequence of the Council's desire to have alternate systems for recovery of development contributions under the LGA 2002 and financial contributions under the RMA;

– although we will need to hear further from the parties about that under our directions in the Second Procedural Decision[17].

[22] Finally in order to save the parties' time and expense we direct that the affidavits on this interlocutory application should be brought over so they may be evidence in the main proceedings.

[23] Costs are reserved, to be costs in the substantive proceedings.

DATED at CHRISTCHURCH 4 October 2006

J R Jackson
Environment Judge

Issued[18]: - 4 OCT 2006

15 Section 293(1)(b) of the RMA.
16 In para [22].
17 C127/2006.
18 Jacksoj/Jud_Rule/D/2006-CHC-028 3rd Proc dec doc