IN THE COURT OF APPEAL OF NEW ZEALAND CA158/00

	BETWEEN	HOUSING NEW ZEALAND LIMITED
		Appellant
	AND	WAITAKERE CITY COUNCIL
		First Respondent
	AND	PALMERSTON NORTH CITY COUNCIL
		Second Respondent

Hearing:	11 December 2000
Coram:	Richardson P Blanchard J Tipping J
Appearances:	P J Radich and L J Rossiter for Appellant D A Kirkpatrick for First Respondent J W Maassen for Second Respondent
Judgment:	14 December 2000

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

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[1] The applicant, Housing New Zealand Ltd, seeks leave to appeal from a judgment of the High Court dismissing an appeal from certain judgments of the Environment Court. Leave to appeal to this Court was refused by Fisher J on 19 October 2000.

[2] The first decision of the Environment Court concerned an application for declarations under s311 of the Resource Management Act 1991 about the powers of

the Waitakere City Council to impose various conditions on consents to subdivisions of land. The other two decisions of the Environment Court related to appeals under s120 of the Resource Management Act 1991 in respect of conditions imposed on the applicant by the Waitakere City Council in relation to a subdivision consent concerning properties in New Lynn and Te Atatu. Both cases were heard together, with a judgment being delivered in each case, and then a further supplementary judgment which has no bearing on the issues now sought to be appealed.

[3] The two properties in New Lynn and Te Atatu were held as single parcels of land, but had multiple housing units developed on them. The applicant sought to subdivide the land to provide separate legal titles for the individual units. The Waitakere City Council imposed conditions on the subdivisions requiring, *inter alia*, payment of reserves contributions under transitional provisions in the Resource Management Act. No further development was proposed in relation to either site. The Palmerston North City Council appeared, and its counsel made submissions in support of the Waitakere City Council's application for declarations in the Environment Court, because it takes a similar position on reserves contributions. (Although certain other conditions were in issue before the Environment Court, we are not now concerned with them.)

[4] The essential issue between the parties arises from the fact that the properties to be subdivided have already been developed. The applicant asserted that in those circumstances the act of subdivision does not have any effect on the reserves of the district, and therefore any payment in lieu of provision of public reserves is not justified. The Councils contended that a reserves contribution is payable irrespective of whether or not the subdivision actually places additional demand on reserves.

[5] The case concerns s 407(1) of the Resource Management Act, which states:

> **407 Subdivision consent conditions-**
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> (1) Where an application for a subdivision consent is made in respect of land for which there is no district plan, or where the district plan does not include relevant provisions of the kind contemplated by section 108(2)(a) or 220(1)(a), the territorial authority may impose, as a condition of the subdivision consent, any condition that could have been imposed under

sections 283, 285, 286, 291, 321A, or 322, as the case may be, of the Local Government Act 1974 if those sections had not been repealed by this Act.

[6] The relevant provision under the sections of the Local Government Act which are preserved by s 407 is s 285, which related to reserves contributions in the case of residential subdivisions. That section provided:

285. Reserves contributions in case of residential subdivisions-

(1) Where the council is of the opinion that all or any of the allotments shown on a scheme plan submitted to it for its approval are intended to be used solely or principally for residential purposes, the council may require that provision shall be made to the satisfaction of the council for public reserves under the Reserves Act 1977 within the land on the scheme plan amounting to not more than 130 square metres for each allotment on the scheme plan which in the opinion of the council will be used for such purposes.

(2) Subject to subsections (3) and (4) of this section, where the council is satisfied that the subdivision is adequately served by reserves or it is impracticable to provide such reserves, or where the area of the proposed reserves is less than 1,000 square metres,-

(a) The council may, in lieu thereof, make it a condition of approval of the scheme plan that the owner shall pay to the council, within such time as it may specify, an amount of money specified by the council; or

(b) The council and the owner may agree that instead of making such a payment the owner shall set aside within the subdivision an area of land to be vested in the council; or

(c) The council and the owner may agree that a combination of the provisions of subsection (1) of this section and of paragraphs (a) and (b) of this subsection, or any of those provisions, shall apply.

(3) The value of the total contribution that the owner may be required to make under subsection (2) of this section (whether in money or land or both) shall not exceed 7.5 percent of the value of the allotments shown on the scheme plan that in the opinion of the council are intended to be used solely or principally for residential purposes.

(4) Where the subdividing owner undertakes, pursuant to a requirement of the council, earthworks, tree planting, or other

> work on the land to be set aside as reserves under this section (not being work done for ensuring the stability of the land or necessary land drainage), and the work is done to the satisfaction of the council, the value of that work shall be taken into account in assessing the area to be set aside under subsection (1) of this section or, as the case may be, the contribution to be made under subsection (2) of this section (whether in money or land or both).
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> (5) Where the subdividing owner makes provision for the setting aside within the land on the scheme plan of open space for the use only of persons to live within that land, the council may take into account the whole or part of the areas to be set aside when assessing the area to be set aside as reserves under this section or, as the case may be, the contribution to be made under subsection (2) of this section (whether in money or land or both).
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> (6) The area of land to be set aside as reserves, or work to be done, or the sum to be paid by the owner to the council, under this section shall be ascertained having regard only to the number of allotments shown on the scheme plan in excess of the number of allotments comprised in the land before the subdivision that could have been used for residential purposes.

[7] In its judgment dated 9 February 2000, the Environment Court granted the Waitakere City Council's application for declarations, holding that there were no words in s407 suggesting that the preserved Local Government Act provisions are a guide only and saying that the power conferred by s407 is not fettered by the other provisions of the Resource Management Act or Local Government Act. The Environment Court held that where a proposed subdivision would not place any additional demand upon network infrastructure or upon reserves in the neighbourhood, a territorial authority may nevertheless lawfully impose conditions of subdivision consent requiring payment of a reserves contribution. The Court further held that the common law requirements for the exercise of power to impose planning conditions do not prevail where they are inconsistent with express statutory powers to impose conditions. The parties had agreed that the absence of any effects in terms of any additional demand upon reserves is a relevant factor in the exercise of a consent authority's discretion as to the quantum of any contribution, but is not a matter going to the power to require any contribution. The Court concluded that the Waitakere City Council's imposition of conditions requiring reserves contributions on the applicant on its consent to the proposed subdivision was lawful.

[8] In a further decision dated 28 February 2000, the Environment Court considered the merits of the particular conditions imposed by the Waitakere City Council. The Court held that there was no general exemption for subdivisions of an existing development, and that the fact that Housing New Zealand provides housing for low-income families is not relevant to the exercise of the discretion to impose reserves contribution requirements. It concluded that, even though the subdivision would not itself result in additional use of public reserves, it was fair and reasonable that the subdivider be required to pay a contribution towards the cost of providing public reserves to meet past shortfalls.

[9] Housing New Zealand appealed to the High Court. In a judgment delivered by Glazebrook J on 17 July 2000, a Full Court, consisting of Fisher and Glazebrook JJ, dismissed the appeal. The Court held that the Environment Court had not applied a wrong legal test in deciding that the contribution could be imposed. The Court considered that there does not need to be additional demand created by the subdivision for there to be the legal power to impose a reserves contribution. It expressed the opinion that the test of whether the contribution was "so unreasonable that no reasonable authority could have imposed it" was perhaps not appropriate, except as a "final check", because it provided no real guidance, but concluded that it was not the only basis of the decision and therefore did not invalidate the Environment Court's findings. The Court concluded that the Environment Court had not made an error of law in assessing whether or not the contributions should have been made in respect of the New Lynn and Te Atatu properties, and in assessing the level of those contributions.

[10] Leave to appeal to this court was refused by Fisher J on 19 October 2000. The Judge accepted that the subject could fairly be described as a matter of general or public importance, as it affects many territorial authorities and many Housing New Zealand parcels of land. However, Fisher J found that there was no readily identifiable question of law, and the only potential question of law had been well traversed.

[11] Leave to appeal to this Court is governed by s 308 of the Resource Management Act which provides that s 144 of the Summary Proceedings Act 1957

applies in respect of a decision of the High Court on appeal from the Environment Court. Section 144 in turn provides that the applicant may apply to this Court for special leave to appeal in the event that leave to appeal is refused by the High Court. But the appeal must raise a question of law which, "by reason of its general or public importance or for any other reason," ought to be submitted to this Court for its decision.

[12] It is apparent that the argument which counsel for the applicant, Mr Radich, who did not appear in the Environment Court or upon the substantive hearing in the High Court, now would wish to present to this Court is in a significant respect put differently from the argument on Housing New Zealand's behalf below. Counsel also recognised that he was facing the problem that leave is being sought in relation to a question of law concerning a transitional provision. Acknowledging this, Mr Radich emphasised that it might be 18 months or even longer before transitional plans are replaced throughout the country by new district plans which will, almost certainly, have self-contained provisions taking the place of s285. It has been necessary to preserve s285 only because schemes drawn up under the predecessor of the Resource Management Act do not have such provisions. Counsel said that large sums of money are at stake in the meantime for his client if it continues to pursue its policy of obtaining separate titles to its units.

[13] There are two arguments sought to be advanced. The first is that s285 is not to be read in isolation and applied as it would have been when the Town and Country Planning Act 1977 was in force. Now it must be applied in the context of the Resource Management Act whose policies and principles, it is said, require the decision-maker to concentrate upon the effects of the particular resource consent which is being sought – here, subdivisions which are "on paper only", involving no change or prospective change to the physical environment and no effects upon existing Council reserves.

[14] Secondly, it is submitted that the High Court erred in law in declining to receive guidance from the well-known decision of the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 in

which it was said that conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them, which was a reference to *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223.

[15] A second appeal on a transitional provision will not usually give rise to a question of law of general or public importance. Here, in one respect, it can arguably be said to do so but, unfortunately, because of the way the matter has been argued below, this Court is being asked to consider embarking upon a potentially major review of the basic principles and policies of the Resource Management Act, which the applicant's argument before us would require, without the very substantial benefit of having the views of the specialist body, the Environment Court, expressed upon them in the context of this case, and without also having the advantage of a first review of the matter on that basis by the High Court. The concentration in the Environment Court appears to have been upon the circumstances of the particular case, rather than being directed to any more general questions. The High Court recorded that the view expressed for the appellant in that Court was "that there was the jurisdiction to impose a contribution but that the contribution should not be imposed in such circumstances [which is the way it is now put] or alternatively that it should always be imposed at 0%." The latter formulation appears to have been predominant.

[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 still 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 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.

[17] As to the High Court's treatment of *Newbury*, we think that the applicant may be giving too much importance to what appears to us to be a remark which was no doubt influenced by the case as it was argued before the Full Court and which was

directed to the particular statutory provision. The High Court commented that *Newbury* was a case dealing with different legislation in a different jurisdiction, and with general rather than specific legislation. It said that conceivably *Newbury* had been over-used in this context, although the Court proceeded to refer to the third part of the *Newbury* test in a later portion of the judgment.

[18] We take the view that the *Newbury* test remains of general application and that New Zealand Courts should continue to apply it in relation to the provisions of the Resource Management Act. We note that the Environment Court, in a passage not criticised by the High Court, did in fact deal with the common law requirements upon the Council in terms which clearly were drawn from *Newbury*. It said that it found that the acquisition and improvement of public reserves is a resource management purpose and asked itself whether the purpose related to the activity authorised by the consent, that is, the subdivision, and whether the condition for a reserve contribution was so unreasonable that a reasonable consent authority could not have imposed it.

[19] When the High Court's observation is read in the setting of its judgment as a whole and with particular reference to the transitional provision we see no danger that the Court will be interpreted as indicating that *Newbury* is not to be followed in resource management cases. Hence the applicant's second point is not of public or general importance. It is also subsidiary to the first argument.

[20] The application for leave to appeal is declined with costs of $2,500 to each of the respondents together with their reasonable disbursements, including travel and accommodation costs, to be fixed if necessary by the Registrar.

Solicitors
Bell Gully, Wellington for Appellant
Simpson Grierson, Auckland for First Respondent
Cooper Rapley, Palmerston North for Second Respondent