BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 032

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s 174(1) of the Act
BETWEEN	TAURANGA CITY COUNCIL (ENV-2018-AKL-007) Appellant
AND	MINISTER OF EDUCATION Respondent

Court:	Principal Environment Judge L J Newhook Environment Judge D A Kirkpatrick
Hearing:	at Auckland on 19 November 2018
Appearances:	P M S McNamara and T R Fischer for appellant J C Campbell and J L Beresford for respondent
Date of Decision:	1 March 2019
Date of Issue:	4 March 2019

DECISION OF THE ENVIRONMENT COURT
ON PRELIMINARY QUESTION OF LAW

A: The preliminary question is answered: Yes.

B: The parties are directed to confer and report to the Court by 29 March 2019 as to the arrangements they seek for an evidence exchange timetable and the hearing of the appeal.

C: There is no order as to costs.

REASONS

Introduction

[1] This decision addresses a preliminary question of law in terms agreed between the parties:

> Do sections 171 or 174 of the RMA allow a Territorial Authority to recommend, and the Environment Court to impose, conditions requiring monetary contributions on designations (in circumstances where the requiring authority has not offered such conditions on an Augier basis)?

[2] The parties have agreed that the Court should first determine whether the Council has the power under s 171 RMA to recommend a condition requiring a monetary contribution on the Minister's designation and, consequentially, whether the Environment Court has power under s 174 RMA to impose such a condition.

[3] The term "monetary contribution" is used by the parties to avoid potential confusion with the terms "financial contribution" and "development contribution" which have particular meanings, as discussed in more detail below.

[4] The parties also agree that no issue of quantum, whether in terms of its calculation or its reasonableness, arises in respect of this jurisdictional issue. Such matters may well arise if this Court answers the question in the affirmative, but do not need to be considered now.

[5] The question is stated in general terms and does not necessarily depend on any particular facts. Nonetheless, in law context is everything[1] and in any event an outline of the context is likely to assist readers in understanding how this issue arises.

Background

[6] On 16 March 2017 the Minister of Education (**the Minister**), in the exercise of the power to establish schools under s 146 of the Education Act 1989, gave a notice of requirement under s 168 of the Resource Management Act 1991 (**RMA** or **the Act**) to the Tauranga City Council (**the Council**) proposing to designate land at Te Okuroa Drive, Wairakei, Papamoa for "education purposes – primary school and early childhood education centre".

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1 *McGuire v Hastings District Council* [2001] NZRMA 557 (PC) at 9 *per* Lord Cooke of Thorndon.

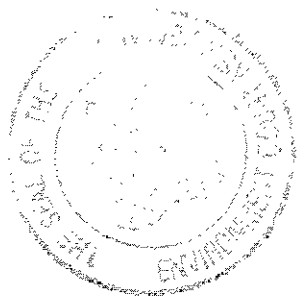
[7] Section 6 of the notice of requirement sets out an assessment of environmental effects as required by s 168(1) RMA and by Form 18 in Schedule 1 to the Resource Management (Forms, Fees, and Procedure) Regulations 2003. This includes, in section 6.3.6, a statement headed "services contributions" as follows:

> As a Requiring Authority the Minister is not required to pay development contributions pursuant to the Local Government Act (the Act). Section 8 of the Act states that except in certain specified circumstances the Act does not bind the Crown. Those exceptions do not include the obligation to pay Development Contributions.
>
> As this Notice of Requirement is not a Resource Consent a condition to pay Financial Contributions under the Resource Management Act is also not able to be applied.
>
> However, it is accepted that the Requiring Authority should mitigate the actual or potential adverse effects on the environment of the development and that one of the way this may be achieved is by contributing towards services that the activity will utilise as has occurred with other recent Notices for Education Purposes in Tauranga. This will be confirmed by way of an agreement between the Requiring Authority and TCC before the school is developed.

[8] On 20 October 2017 the Council recommended to the Minister that he confirm the requirement subject to conditions including, as condition 9, the following:

> 9. Financial Contributions
>
> Immediately prior to the issue of a building consent the Requiring Authority shall pay to the Council, City-Wide and Local Infrastructure Contributions in accordance with the relevant rules (and formulas) of Chapter 11 -Financial Contributions of Tauranga City Plan.
>
> Except where the Council and the Ministry of Education agree to a separate Infrastructure Funding Agreement with respect to any funding of/provision of works or infrastructure in relation to City Wide infrastructure or the Urban Growth Area Structure Plan - Wairakei (SP15).

[9] The part of the report supporting the Council's recommendation in this regard referred to new development (including schools) in the greenfield Wairakei Urban Growth Area adding stress onto the transport network and stormwater, wastewater and water supply infrastructure to serve such development. While the cost of the infrastructure, where not provided by developers, was to be recovered by per hectare of land development contributions under the Local Government Act 2002 at the time of subdivision completion certification, the Crown is exempt from those. Non-payment of development contributions by the Crown in respect of the school would result in a shortfall of nearly $2.4 million in the infrastructure budget for the Wairakei catchment which would need to be transferred to ratepayers. The report further notes that while there would likely be an agreement reached between the Minister and the Council for a contribution to be made by the Minister toward infrastructure provision, no agreement had been reached at the time of the recommendation and so a condition was required. This part of the report concludes by noting some discussion, but no agreement, between the parties regarding the imposition of such a condition and stating that there is a "legitimate effect" which needs to be addressed by the imposition of a condition.



[10] On 27 November 2017, under s 172 RMA, the Minister rejected the imposition of condition 9. The Minister's decision stated that the deletion of the financial contribution condition was necessary as it had been imposed on the designation as if it were a resource consent condition under s 108 RMA, and therefore in error.

[11] This appeal by the Council was lodged on 31 January 2018. The reasons for the appeal include:

(a) that the designated works will place additional demand on and adversely affect the existing and future water, wastewater, stormwater and transportation networks;

(b) that these demands and effects are brought about by these works and should be mitigated by requiring a financial / monetary contribution from the requiring authority;

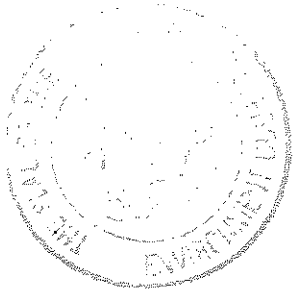
(c) that condition 9 mitigates such effects and will achieve the purpose of the RMA;

(d) that condition 9 is for a resource management purpose, fairly and reasonably relates to the designated works, is not unreasonable, is logically connected to the designated works, is not unrelated to such works and is not relating to external or ulterior concerns;

(e) that ss 171(1)(a)(iv) and 174 RMA require the Council and the Court to have particular regard to relevant provisions of the Tauranga City District Plan (**the District Plan**), which includes Chapter 11 – Financial Contributions and which support the imposition of condition 9; and

(f) that the Minister's decision to exclude condition 9 will not achieve the purpose of the RMA or avoid remedy or mitigate adverse effects on the environment, is contrary to the relevant provisions of the District Plan, is not reasonably necessary for achieving the Minister's objectives and is otherwise contrary to the RMA including s 171.

[12] In its relief, the Council seeks that its recommended condition 9 be included in the requirement to form part of the designation to be included in the District Plan, together with any consequential, further or alternative relief to address the Council's concerns.



[13] After direct discussions, the parties agreed that there would be numerous benefits in having the Court address, as a preliminary issue, whether monetary

contributions on designations are authorised by the RMA. While there are good reasons for caution on the part of a court in determining a preliminary issue without the benefit of hearing relevant evidence,[2] we accept the basis for the parties' agreement in this case, consider that we have a sufficient factual foundation for judicial consideration of the issue and accordingly will decide the agreed question as a preliminary issue.

Relevant statutory provisions

[14] As the Minister's notice of requirement for a designation was lodged in March 2017 before the commencement of the Resource Legislation Amendment Act 2017 (**RLAA**) on 18 April 2017, the applicable provisions of the RMA are those as amended by the Resource Management Amendment Act 2013 and not as now amended by the RLAA.[3]

[15] There was some discussion with counsel about the extent to which the Court should take into account changes to be made to the RMA by the RLAA or proposals for further legislative changes. In particular, s 175 RLAA will repeal s 108(2)(a), (9) and (10) RMA on 18 April 2022, but statements have been made by the current Minister for the Environment proposing the repeal of various provisions in the RLAA, which may include s 175 RLAA.

[16] We indicated that we would proceed to address the question before us in accordance with the relevant law as it applies to this case and without regard to amendments that will not take effect for several years or to potential further amendments. We think that this approach accords with our duty to decide cases according to the relevant law as it stands and also with the recent decision of the Supreme Court in *Ngāti Whātua Ōrākei Trust v Attorney-General*[4] in respect of the principle of non-interference.

RMA provisions - designations

[17] The provisions in the RMA dealing with requirements and designations are in Part 8. Section 171 RMA provides:

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2 "Preliminary points of law are too often treacherous short cuts. Their price can be . . . delay, anxiety, and expense." *per* Lord Scarman in *Tilling v Whiteman* [1979] UKHL 10; [1980] AC 1; [1979] 1 All ER 737.

3 Resource Legislation Amendment Act 2017, s 122, amending Schedule 12 RMA by inserting, among other things, clause 12(2)(e).

4 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84.

171 Recommendation by territorial authority

(1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

(2) The territorial authority may recommend to the requiring authority that it—

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement.

(3) The territorial authority must give reasons for its recommendation under subsection (2).

[18] The specific power of a territorial authority to recommend the imposition of conditions is conferred by s 171(2)(c). It is then a matter for the requiring authority, under s 172, to decide whether to accept or reject the recommendation in whole or in part. It is the decision of the requiring authority, rather than the recommendation of the territorial authority, which may be the subject of an appeal.

[19] On appeal, s 174 provides:

174 Appeals

(1) Any 1 or more of the following persons may appeal to the Environment Court in accordance with this section against the whole or any part of a decision of a requiring authority under section 172:

(a) the territorial authority concerned:

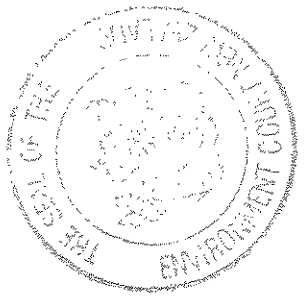
(b) any person who made a submission on the requirement.

(2) Notice of an appeal under this section shall—

(a) state the reasons for the appeal and the relief sought; and

(b) state any matters required to be stated by regulations; and

(c) be lodged with the Environment Court and be served on the requiring authority



whose decision is appealed against, within 15 working days of the date on which notice of the decision is given in accordance with section 173.

(3) The appellant shall ensure that a copy of the notice of appeal is served on every person referred to in subsection (1) (other than the appellant), within 5 working days after the notice is lodged with the court.

(4) In determining an appeal, the Environment Court must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority, and may—

(a) cancel a requirement; or

(b) confirm a requirement; or

(c) confirm a requirement, but modify it or impose conditions on it as the court thinks fit.

[20] The specific power of the Court to impose conditions on the requirement "as the court thinks fit" is conferred by s 174(4)(c).

RMA provisions – resource consents

[21] The question in this case also involves comparison of ss 171 and 174 RMA with those relating to resource consents, which are in Part 6 of the RMA. The most relevant power to impose conditions on resource consents is conferred by s 108 RMA, which relevantly provides:

108 Conditions of resource consents

(1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(2) A resource consent may include any 1 or more of the following conditions:

(a) subject to subsection (10), a condition requiring that a financial contribution be made:

(b) a condition requiring provision of a bond (and describing the terms of that bond) in accordance with section 108A:

(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:

(d) in respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into, in favour of the consent authority, in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates):

(e) subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:

(f) in respect of a subdivision consent, any condition described in section 220 (notwithstanding any limitation on the imposition of conditions provided for by section 87A(2)(b) or (3)(a)):

(g) in respect of any resource consent for reclamation granted by the relevant consent authority, a condition requiring an esplanade reserve or esplanade strip of any specified width to be set aside or created under Part 10:

(h) in respect of any coastal permit to occupy any part of the common marine and coastal area, a condition—

(i) detailing the extent of the exclusion of other persons:

(ii) specifying any coastal occupation charge.

...

(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 Maori land within the meaning of Te Ture Whenua Maori 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.

[22] In relation to particular elements in s 108 RMA, this case is focussed on subsections 108(1), (2)(a), (9) and (10). Also of particular relevance is s 108(2)(c) which provides for conditions requiring that services or works be provided.

[23] The general power to impose conditions on a resource consent is in s 108(1) RMA. It extends to "any condition that the consent authority considers appropriate". It may be noted that the power of the Court under s 174(4)(c) is to impose conditions "as the court thinks fit". At least for present purposes there is no material difference between "considers appropriate" and "thinks fit". There is no corresponding qualification in relation to the conditions that a territorial authority may recommend in s 171: the power in s 171(2)(c) is simply to recommend to the requiring authority that it "impose conditions".

[24] The word "conditions" is defined inclusively in s 2 RMA, unless the context otherwise requires, as follows:

> *conditions*, in relation to plans and resource consents, includes terms, standards, restrictions, and prohibitions

Notwithstanding the absence of any reference to requirements or designations in this definition, there is no basis on which to conclude that "conditions" bears any different meaning in relation to those planning methods to that which applies in relation to plans and resource consents.

[25] In terms of the agreed question before the Court, it may be noted that the

definition of "financial contribution" in subs (9) includes "a contribution of money" and is accordingly synonymous with "monetary contribution". The opening words of that subsection appear to limit the extent to which the definition is applicable. In relation to contributions of land or a combination of money and land which might ordinarily be regarded as an extension to the meaning of "financial", that limitation serves a clear purpose. In this case there is no proposal to require the Minister to contribute land and so we doubt that the limitation has any effect here. While it may seem desirable to use different phrases for analytical purposes, one must be on guard against setting up a distinction without any real difference.

Operative district plan provisions

[26] In terms of ss 108(10) and 171(1)(a)(iv) RMA, it is necessary to have particular regard to the relevant provisions of the operative district plan. In relation to financial contributions, these are contained in Chapter 11 of the Tauranga district plan. Section 11A is headed "Purpose of the Financial Contributions Chapter." It commences with the statement that the purpose of the chapter "is to provide for the taking of money and/or land to mitigate the effects of development within the City." It notes that most contributions towards the cost of infrastructure are taken as development contributions under the Local Government Act 2002 (**LGA02**), but says that there are four circumstances in which the plan provides for the taking of financial contributions to augment those. The first such circumstance is relevant in this case:

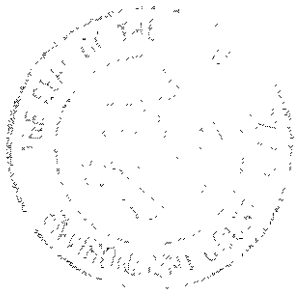
> (a) To address the statutory exemption of the Crown from the provisions of the Local Government Act 2002 and so the Development Contribution system, by taking financial contributions for subdivision, land use and development undertaken by the Crown.

[27] The objectives and policies for financial contributions are set out in section 11A.1. The single objective is:

> The total costs of providing infrastructure to accommodate growth are mitigated through new development

The most relevant policy to the question in this case is Policy 11A.1.1.3:

> To mitigate the adverse economic effects of the funding of infrastructure through the taking of development contributions under the provisions of the Local Government Act 2002, and the taking of financial contributions where:
>
> a) Subdivision, use or development in established urban growth areas by a non-exempted party generates a demand for local reserves, local community infrastructure or otherwise creates an effect that can be mitigated by a financial contribution;
>
> b) Subdivision, use or development by an exempted party generates a demand for reserves, community infrastructure or network infrastructure or otherwise creates an effect that can be mitigated by a financial contribution.



[28] The definitions in chapter 3 of the district plan include a definition of "exempted party" which relevantly includes "persons or organisations either exempt from the provisions of the Local Government Act 2002 under section 8 of that Act."

[29] The rules in section 11A set out the method of calculating contributions, including the types of and thresholds for development that may be subject to the rules and the formulas by which the level of contributions will be determined. There is no need, for the purposes of this preliminary determination, to examine those provisions of the plan in detail: it is sufficient to note that business activities are covered by the rules and that "business activity" in relation to Chapter 11 is defined in the plan in a manner that includes schools and other educational facilities.

LGA02 provisions – development contributions

[30] We also refer to the provisions relating to development contributions which may be required under the LGA02, in accordance with the provisions of Part 8, Sub-part 5 (ss 197AA – 211).

[31] The purpose of development contributions is set out in s 197AA LGA02 as being:

> to enable territorial authorities to recover from those persons undertaking development a fair, equitable, and proportionate portion of the total cost of capital expenditure necessary to service growth over the long term.

[32] A development contribution is defined in s 197(2) as:

> **development contribution** means a contribution—
>
> (a) provided for in a development contribution policy of a territorial authority; and
>
> (b) calculated in accordance with the methodology; and
>
> (c) comprising—
>
> (i) money; or
>
> (ii) land, including a reserve or esplanade reserve (other than in relation to a subdivision consent), but excluding Māori land within the meaning of Te Ture Whenua Maori Act 1993, unless that Act provides otherwise; or
>
> (iii) both

[33] It can be seen that this definition is closely related to the provisions for financial contributions in subs 108(9) and (10) RMA. Where a development contribution consists solely of money, it might be seen as practically the same as a financial contribution or a monetary contribution. Notwithstanding that, there are important jurisdictional differences:

i. Development contributions are imposed on the basis of policies made under

the LGA02, while financial contributions are imposed on the basis of plans made under the RMA. While the co-ordination and integration of such policies and plans are desirable management outcomes for local authorities, one must note and take account of their different statutory contexts;

ii. A financial contribution condition on a resource consent can be the subject of an appeal under s 120 RMA to this Court on any relevant resource management ground, while a requirement for a development contribution can be the subject of an objection only on one of the grounds listed in s199D LGA02 and made to a commissioner who must consider the particular matters listed in s 199J LGA02; and

iii. Section 8(1) LGA02 states that except as provided in subsections (2) and (3) (neither of which refers to Part 8, Sub-part 5), that Act does not bind the Crown, whereas s 4 RMA provides that the Crown is bound by the RMA except in certain circumstances which are not relevant in this case.

The competing positions

[34] The competing views of the Council and the Minister are, in broad terms:

(a) For the Council, that the general power it has to recommend conditions under s 171 RMA includes the power to recommend a condition requiring the payment of money similar to the power to require financial contributions under s 108 RMA and, consequentially, that the power of the Court under s 174(4)(c) RMA includes the power to impose such a condition; and

(b) For the Minister, that the inclusion of a specific power in s 108 to impose a financial contribution condition on a resource consent, and the absence of any corresponding specific power in ss 171 or 174, excludes any such condition from being recommended by the Council or imposed by the Court.

[35] There is no existing authority of the Court or of any higher Court on this specific issue.

The case for the Council

[36] Mr McNamara, for the Council, relied on the reasoning in the *Final Report and Decision of the Board of Inquiry into the New Zealand Transport Agency Waterview*

Connection Proposal produced under Section 149R RMA in June 2011 (the **Waterview Report**) as set out in Section 7.5.14.1.[5] Counsel submitted that this was the only proceeding in which the question of the jurisdiction to impose a financial contribution on a designation had been considered in detail.[6]

[37] Although that Board of Inquiry was not a Court, its five members included the Principal Environment Judge as its chairperson and an Environment Commissioner as one of its members. Its jurisdiction under Part 6AA, sub-part 1, of the RMA in relation to any requirement for a designation before it was broadly analogous to that of the Environment Court under Part 8 RMA. In particular, the Board's powers included in s 149P(4)(b)(iii) essentially the same power as the Court has under s 174(4)(c) to impose conditions on a requirement "as it thinks fit". In light of those matters, we will, with respect, treat the Waterview Report as a persuasive authority, but we note that we are not bound by it just as this Court is not bound by its own decisions.[7]

[38] The Waterview Report addresses a proposal by the New Zealand Transport Agency (**NZTA**) to extend State Highway 20 from Mount Roskill, including by a tunnel under Waterview, to connect to State Highway 16 at Pt Chevalier. The land use activities were the subject of notices of requirement and a range of resource consents were also required under the Auckland Regional Plan.

[39] The proposal was assessed as having adverse effects on, among other things, a number of reserves and areas of open space. It included mitigation measures to address those effects. NZTA also proposed conditions to make certain payments as an alternative to undertaking immediate physical mitigation. The Board considered the legal as well as the substantive basis for any condition in respect of such payments, including whether they ought to be made according to the *Augier* principle,[8] that is, that an applicant for consent who undertakes to abide by a condition of consent cannot later challenge the validity or reasonableness of that condition.[9]

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5 At pp 116 – 127 (paragraphs [416] – [453]).

6 Reference was also made to the Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project produced under section 149 RMA in September 2009 where the issue is raised in the section on effects on local roads at pp 226 – 228 but the jurisdictional question is not analysed.

7 *Raceway Motors Limited v Canterbury Regional Planning Authority* [1976] 2 NZLR 605.

8 *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD).

9 See *Frasers Papamoa Ltd v Tauranga CC* [2010] 2 NZLR 202; [2010] NZRMA 29; (2009) 15 ELRNZ 279, for a full discussion of the application of this principle in the context of the RMA.

[40] The Board accordingly considered whether such conditions were within its power to impose under s 149P(4)(b)(iii) RMA. It noted that resource consents are granted in the context of the relevant plan, while a designation, by s 176(2) RMA, removes the area of the works from the control of the district plan. It also noted that the specific power to impose a financial contribution as a condition of a resource consent under s 108(2)(a) RMA was not stated in either s 171 or s 174 RMA in relation to designations and referred to the maxim of interpretation that the expression of one thing is the exclusion of other things. It then noted that such an approach would also exclude the power to impose services and works conditions, as provided for in s 108(2)(c) RMA, on a designation when clearly a condition of that sort must be available.

[41] The Board observed that in many instances a designation will be for works that provide public benefits and do not impose demands on community resources so that there would be little rationale for imposing a financial contribution. It went on to say that will not always be the case and the nature or extent of the adverse effects may mean that a financial contribution would be the best way to avoid, remedy or mitigate them.

[42] The Board referred to the decisions in *Carter Holt Harvey & anor v North Shore City Council*[10] and *Neil Construction Ltd v North Shore City Council.*[11] These cases address the limits of a council's powers to impose charges under bylaws or as development contributions. The Board also referred to the decision of the Supreme Court in *Waitakere City Council v Estate Homes Ltd*[12] in relation to the power to impose financial contributions. It considered that the *Estate Homes* case provided support for the view that a condition requiring a financial contribution was not an expropriation or tax, rather it was a regulatory method. These three cases are discussed in more detail below.

[43] The Board concluded that while s 149P(4) RMA does not expressly provide that a condition on a designation may require payment of a financial contribution, this is a necessary implication from the words of the RMA and in particular the purpose of the Act including the mitigation of adverse effects on the environment and from the unambiguous logic that necessarily follows from the express provisions.

[44] Mr McNamara's submissions for the Council, setting out the basis for the

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10 *Carter Holt Harvey & anor v North Shore City Council & anor* [2006] 2 NZLR 787 (HC).

11 *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC).

12 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149; [2007] NZRMA 137; see the discussion at [43] – [54].

Council's view that it could impose a condition requiring a monetary contribution on the Minister's requirement, were supported by six reasons which, he submitted, substantially overlapped (once necessary changes in the statutory context are taken into account) with the reasoning in the Waterview Report:

(a) The power of the Court under s 174(4)(c) RMA to impose conditions "as it thinks fit" is broad enough to encompass a condition requiring a monetary contribution, there being no express prohibition or express authorisation of it.

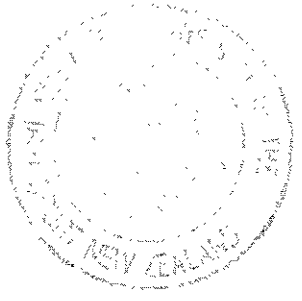
(b) The statutory purpose of the power to impose conditions is to provide means of avoiding, remedying or mitigating any adverse effect of the requirement on the environment, and a monetary contribution may be the best or most effective way of doing so.

(c) The context of ss 171 and 174 RMA supports that approach, given the requirement in s 171(1) to consider the effects on the environment of allowing the requirement having particular regard to, among other things, any relevant provisions of the district plan.

(d) This approach is consistent with the purpose of promoting the sustainable management of natural and physical resources set out in s 5 RMA when that purpose is interpreted in accordance with the "deliberate openness" and "necessarily general and flexible" language of Part 2 RMA.[13]

(e) The absence of a specific power to impose a monetary contribution on a requirement is of no consequence because there is no specific power in ss 171 or 174 to impose any of the types of condition listed in s 108(2) RMA. Such types of condition include in s 108(2)(c) a condition requiring services and works to be provided by the requiring authority, yet conditions of this type are routinely imposed on requirements.

(f) The common law prohibition on taxes that are not authorised by Parliament does not preclude conditions requiring monetary contributions as these are not a tax. This is primarily because the requiring authority is not compelled to pay the contribution and can choose whether to exercise the requirement. Even if a tax, conditions requiring such contributions are authorised by ss 171 and 174 RMA by necessary implication.



13 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at 85 - 86.

[45] Mr McNamara submitted that the general power to impose conditions on a resource consent under s 108(1) included the powers to impose conditions of the kind specified in s 108(2), so that the latter were a subset of the former. On the basis that the general powers to recommend and impose conditions on designations in ss 171 and 174 corresponded to the general power in s 108(1), he argued that the power to impose a condition requiring a financial contribution on a designation was within those general powers also. He noted that if the Minister were to seek a resource consent for the activity of the school, then the Crown would be subject to s 108(2)(a) and submitted that there should be no difference where the Minister proceeded by way of a designation. Further, if the powers in ss 171 and 174 were interpreted as not extending to include the types of conditions specified in s 108(2), then they would be substantially reduced in their effectiveness, pointing to s 108(2)(c) and the power to impose a condition requiring services and works in particular.

[46] In terms of the policy for requiring money to be paid rather than services or works to be undertaken, counsel submitted that all such methods are for the purpose of ensuring that those who generate adverse effects on the environment avoid, remedy or mitigate those effects. Where such effects are best addressed by infrastructure and it is not efficient, feasible or fair to require the consent holder to provide the necessary infrastructure themselves, then the funding of public infrastructure by contributions of money from each development may be more efficient and fairer. In some cases such public infrastructure may need to be provided before development occurs, so that monetary contributions will be the only way to ensure that the person generating the effects appropriately addresses them.

[47] Counsel acknowledged that public works undertaken by the Crown would have positive effects, but submitted that such benefits did not confer an exemption from the general duty under the RMA to address adverse effects. Because addressing adverse effects of activities on the environment forms part of the purpose of the RMA, ss 171 and 174 should be interpreted in a way that promotes that purpose.

[48] Counsel submitted that the contributions sought should not be characterised as an unauthorised tax.

The case for the Minister

[49] For the Minister, Ms Campbell submitted that the Minister's purpose in providing

schools such as this one is to respond to growth in communities rather than causing it. She likened a school to other kinds of infrastructure. She noted that schools are exempt from development contributions under the LGA02. She submitted that whatever it may be called, the payment of money as a condition of consent is a financial contribution.[14]

[50] In her submissions, Ms Campbell stressed the context of ss 171 and 174 RMA compared to that of s 108. She submitted that rather than being a subset of the broad power in s 108(1), as Mr McNamara submitted, the list in s 108(2) should be treated as an extension to that power, that is, a set of powers that did not come within the general ambit of s 108(1) and so, without express provision for them, would not otherwise be exercisable by a consent authority. On that basis she submitted that the absence of such a list in relation to either s 171 or s 174 meant that no such extended power as that in s 108(2)(a) to impose a financial contribution was available in respect of a requirement.

[51] In support of that submission she said that the matters listed in s 108(2) were indirect matters that might not otherwise satisfy the requirements for validity of conditions as identified in the well-known *Newbury*[15] decision. She could not offer any authority for that proposition.

[52] Ms Campbell noted that requirements for designations are different to resource consents, observing that the origins of a notice of requirement for a designation lie in the special provisions for public works that have long existed and now continue to be provided for in the RMA and in other legislation, including the Public Works Act 1981. She noted that these special provisions offer some advantages for public works, principally those in s 176 RMA, being exemption from the restrictions in s 9(3) RMA and protection from other persons doing anything that would hinder the work.

[53] Ms Campbell stressed the caselaw, and in particular the *Carter Holt Harvey* and *Neil Construction* cases which discuss the restrictions on using local government powers to require money to be paid. She characterised financial contributions as a compulsory exaction of money that required express statutory power and submitted that the Court should not rely on the broad purpose of the RMA as supporting a necessary implication of such a power in ss 171 and 174 RMA.

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14 *Re Carrus Corporation* Decision A1/99; [1999] NZEnvC 11; (1999) 5 ELRNZ 19 at para. 31.

15 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1979] 1 All ER 243.

[54] Referring to the financial contribution provisions in Chapter 11 of the operative Tauranga district plan, counsel submitted that while there might be some control on the imposition of a financial contribution condition by the application of the *Newbury* tests, there would be no constraint on how such funds were used by the Council.

Consideration of issues

Overall approach

[55] In our overall approach to the interpretation of provisions in the RMA, we must adhere to the principal rule in s 5 Interpretation Act 1999, that the meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the text appears plain in isolation, its meaning should be cross-checked against the purpose including both the immediate and the general legislative context and, where relevant, the social, commercial or other objective of the enactment.[16]

[56] In considering the purpose of the RMA, we observe that Part 2 is to be interpreted as High Court said in *New Zealand Rail v Marlborough District Council*:[17]

> This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

[57] It is important to be clear that this passage is expressly concerned with the interpretation of Part 2 and is not a general approach that is always applicable to other provisions of the RMA or to policy statements and plans made under it, which may be more detailed and prescriptive.[18] We respectfully do not think that in the Waterview Report the Board of Inquiry adopted any broader approach in its reasoning in support of imposing financial contributions on NZTA in relation to the Waterview Connection. For that reason, we do not accept Mr McNamara's fourth point (see [44](d) above) to the extent that he may have intended it to apply to the interpretation of s 108.

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16 *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767 at [22].

17 *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC) at 85 - 86.

18 *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 48 at [150] – [151].

Basis for conditions generally

[58] There is no dispute between the parties as to the basic legal framework within which conditions can be imposed under the RMA, but it is useful to set those out as part of the relevant context for financial contributions under the RMA.

[59] The essential requirements are usually referred to by citing the decision of the House of Lords in *Newbury District Council v Secretary of State for the Environment.*[19] As identified in that decision, and approved in the context of the RMA by the Supreme Court in *Waitakere City Council v Estate Homes Limited,*[20] the requirements are that, to be within the jurisdiction of the planning authority and valid, conditions of planning consent:

(a) must be imposed for a planning purpose, rather than one outside of the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest;

(b) must fairly and reasonably relate to the permitted development; and

(c) must not be so unreasonable that no reasonable planning authority could have imposed them.

[60] As the authorities make clear, these requirements are of general application in administrative law in relation to the exercise of any discretionary public power to impose conditions on a decision.

[61] This Court's decision in *McNally v Manukau City Council*[21] helpfully gathers these requirements together with the particular requirements for financial contribution conditions, setting out a four-step process:

i. Whether the contribution has been imposed for a purpose specified in the plan;

ii. Whether the level of contribution has been determined in a manner described in the plan;

iii. Whether the *Newbury* tests (as set out above) are satisfied; and

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19 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1979] 1 All ER 243 (UKHL).

20 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112; [2007] 2NZLR149; [2007] NZRMA 137 at [61].

21 *McNally v Manukau City Council* Decision W 019/2007; [2007] NZEnvC 76; [2008] NZRMA 523 at [5].

iv. Whether the condition is fair and reasonable on its merits, that is, fair or proportionate to both the consent holder and the community and the result of a process of reason rather than arbitrary whim.

[62] The Court in *McNally* also observed that the Supreme Court in *Estate Homes* had explained the nature of the fair and reasonable relationship between the condition of consent and the consented development. The Supreme Court rejected any need for a direct causal link and confirmed that it is sufficient for the two to be logically connected, that is, that they not be unrelated. We note that the nature of the connection between a condition and an activity is to be subject to s 108AA(1)(b) RMA, which requires a condition of consent to be directly connected to either an adverse effect of the activity or an applicable rule or standard, but this requirement does not apply to this appeal.[22]

Purpose of s 108(2) RMA

[63] Ms Campbell on behalf of the Minister submitted that the list of particular types of condition in s 108(2) RMA is included to overcome any possible invalidity arising from the requirements identified in *Newbury*. She did not elaborate on this or refer to any authority for it.

[64] Examining the list of specific types of conditions in s 108(2) RMA, it is not apparent that any item in it is necessarily contrary to any of the requirements in *Newbury*. Those requirements are general administrative law considerations and so are principally concerned with the scope of jurisdiction as distinct from substantive considerations within it. They are accordingly difficult to apply in the abstract: the purpose of any condition, its relationship to the subject matter of the decision and its reasonableness will depend largely, if not entirely, on how its content is connected, or not, with the substance of the proposal and the reasons for the particular decision.

[65] Further, it appears to us that the list in s 108(2) provides particulars of ways in which the general power in s 108(1) may be exercised, rather than extending that power or conferring any wholly new power to impose a condition. Taken in turn, and leaving the first item (financial contributions) to one side for the moment, we analyse the items in the list as follows:

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22 Section 108AA RMA was inserted on 18 October 2017 by s 147 RLAA. Under clause 12 of Schedule 12 to the RMA, that amendment does not apply to this proceeding which concerns a notice of requirement lodged before that date but may still be the subject of a further appeal.

i. Bonds (item (b)) and covenants (item (d)) assist in ensuring compliance with other conditions by enabling the consent authority to pay for anything in respect of which the consent holder defaults or by providing an express promise which may then be a basis for enforcement;

ii. Services and works (item (c)) can involve a multitude of things, but generally reflect any need for a consent holder to do something associated with the consented activity, usually to address particular adverse effects;

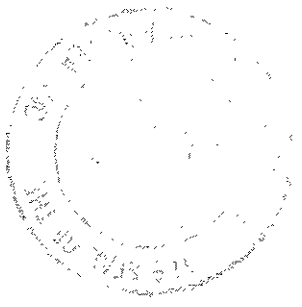
iii. A requirement to adopt the best practicable option (BPO) in relation to a discharge consent or coastal permit (item (e)) reflects the statutory basis for the BPO as methodology for such consents (see ss 70, 128, 131, 138A and 316 RMA);

iv. Item (f) is a cross-reference to s 220 RMA, which is the particular list applicable to subdivision consents under Part 10 RMA;

v. The provision of an esplanade reserve or esplanade strip on a consent for a reclamation (item (g)) is also a cross-reference to Part 10 RMA where, in s 245 RMA, the same issue is addressed; and

vi. Item (h), dealing with conditions on coastal permits to occupy any part of the common marine and coastal area, is also covered by s 122(5) RMA in relation to the exclusion of other persons from the coastal marine area and s 64A RMA in relation to the imposition of coastal occupation charges.

[66] That review confirms that the list in s 108(2) (excepting for the moment the imposition of financial contributions) does not create new or extended powers for consent authorities in relation to the imposition of conditions. It appears to us that the list serves the purpose of being a convenient reminder to readers of the RMA, including consent authorities, of certain specific matters that ought to be considered in relation to the imposition of conditions, both generally to assist in making the conditions effective (bonds, covenants, services and works) and specifically to address other provisions of the RMA (in relation to discharge permits, reclamations and costal occupation permits). We accordingly do not accept the submission that the list is intended to address or somehow override the *Newbury* requirements or to extend the general power to impose conditions.



Services and works conditions

[67] It is pertinent to note that as first enacted in 1991, the RMA included services and works as part of the definition of "financial contribution" in s 108(10) RMA. This definition was amended to delete services and works from that defintion, and s 108(2)(c) was enacted to enable such conditions still to be imposed, by the Resource Management Amendment Act 1997. Speaking to the introduction of the Resource Management Amendment Bill (No. 3) on 14 December 1995, the Hon Simon Upton, then the Minister for the Environment, told the House that this was a technical amendment to address an overly broad definition that could be interpreted to mean that any condition that required something to be done – even landscaping – had to be specified in advance in a plan, which would be unworkable and contrary to the original intention.[23] As far as one can tell from Hansard, this was an uncontroversial amendment.

[68] The significance of this is that Parliament recognised that conditions requiring services and works to be provided by a consent holder could be a kind of financial contribution. Conceptually, there is not a great deal of difference between requiring a person to undertake particular works to mitigate the adverse effects of exercising a consent and requiring a person to pay the consent authority to undertake the same works. In terms of economic efficiency, paying money may be more efficient than undertaking works, especially in dealing with incremental or cumulative effects.

[69] This is of relevance given the requirement in s 7(b) RMA to have particular regard to the efficient use and development of natural and physical resources. As the full court of the High Court observed in *Machinery Movers v Auckland Regional Council*,[24] the costs of pollution (or any other adverse effect on the environment) need to be brought to account and borne by those who cause them. The Court quoted Principle 16 of the Rio Declaration on Environment and Development:

> National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account that approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The Court also noted that among the functions of the Minister for the Environment in s 24 RMA is:

> (h) the consideration and investigation of the use of economic instruments (including charges,

23 NZ Parliamentary Debates, Vol 552 (28 February 1995 – 19 December 1995), pp 408 – 411.

24 *Machinery Movers v Auckland Regional Council* [1994] 1 NZLR 492; (1993) 2 NZRMA 661; (1993) 1A ELRNZ 411.

levies, other fiscal measures, and incentives) to achieve the purpose of this Act:

The Court observed that s 108(1)(a) RMA authorising conditions requiring a financial contribution (as originally enacted: this is now s 108(2)(a)) seemed to reflect the proposition that users and consumers of environmental resources may be called upon to pay for them, at least if the proposed use is not a permitted activity.

[70] One may also note in this regard the general duty which everyone, including every requiring authority, has under the RMA to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with any existing right or with a national environmental standard, a rule, a resource consent, or a designation.[25]

Nature of financial contributions

[71] In relation to Mr McNamara's sixth point (see [44](f) above), that a financial contribution is not a tax, we agree with Ms Campbell's submissions for the Minister and doubt that the issue in the present case can be resolved simply on the basis of whether it is a tax or not.

[72] As a constitutional matter, it is important to start the consideration of this point by observing that the limit on the power to tax is not a common law prohibition: it is a legislative matter, being the consequence of a statutory regime dating back to the 1688 Revolution in England when Parliament finally wrested full control of public revenue from the royal prerogative. Article 4 of section 1 of the Bill of Rights 1688, which remains part of the laws of New Zealand,[26] provides:

> **Levying money**
>
> That levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time or in other manner then the same is or shall be granted, is illegal:

[73] That position has been confirmed by section 22 of the Constitution Act 1986 which provides:

> **22 Parliamentary control of public finance**
>
> It shall not be lawful for the Crown, except by or under an Act of Parliament,—
>
> (a) to levy a tax; or
>
> (b) to borrow money or to receive money borrowed from any person; or.

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25 Section 17 RMA.

26 Imperial Laws Application Act 1988, Section 3 and Schedule 1 – Constitutional enactments.

(c) to spend any public money.

[74] It is also important in this case to be clear that the Council is not the Crown. As a unit of local government, it may be seen as holding devolved power from central government but it is doubtful whether it may be considered as an agent of the Crown. The Council has such powers as are given to it by statute. These do include some clear powers to tax, such as those conferred under the Local Government (Rating) Act 2002, but none of these are applicable in this case.

[75] The Council has general powers under s 12 LGA02, and in particular:

12 Status and powers

...

(2) For the purposes of performing its role, a local authority has—

(a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and

(b) for the purposes of paragraph (a), full rights, powers, and privileges.

(3) Subsection (2) is subject to this Act, any other enactment, and the general law.

[76] These are essentially the same powers as any legal person has. In this setting, rather than starting from a prohibition (that is, a restriction on something that could otherwise be done) on taxes being levied by the Council, the better basis for analysis is that no person has the right, power or privilege to compel any other person to pay them money (however such payment may be described) except according to law. As Ms Campbell submitted, the question is to be determined as a matter of statutory interpretation in relation to the particular provisions that are applicable to this case.

[77] That is the general context for the three cases which identify and discuss the limits of a council's statutory powers to impose charges or require contributions:

(a) *Carter Holt Harvey & anor v North Shore City Council*;[27]

(b) *Neil Construction Ltd v North Shore City Council*;[28] and

(c) *Waitakere City Council v Estate Homes Ltd*.[29]

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27 *Carter Holt Harvey & anor v North Shore City Council & anor* [2006] 2 NZLR 787 (HC).

28 *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC).

29 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149; [2007] NZRMA 137; see the discussion at [43] – [54].

[78] In *Carter Holt Harvey & anor v North Shore City Council*[30] the High Court considered whether several territorial authorities could, by bylaw under the Local Government Act 1974 (**LGA74**) or the LGA02, impose levies on the collection of municipal waste to fund waste management activities not connected to such collection. Charges for recovery of costs incurred by councils were expressly authorised by both Acts, but charges based on the amount of waste collected were held to be a tax and invalid, both in terms of those Acts and under the Bylaws Act 1910. The concurrent licensing regime was, however, held to be a proportionate balance between the private right to transport materials freely and the public interest in monitoring and regulating the transport of waste.

[79] The High Court considered whether the levies could be authorised under the legislation by necessary implication. In the context of the clear statutory prohibitions on levying taxes without Parliamentary authority[31] and the continuing importance of the *ultra vires* doctrine, that is, that a local authority can only exercise coercive powers that are expressly or impliedly authorised by Parliament,[32] the Court examined the proper ambit of any implied authority. It followed the decision of the Court of Appeal in *Harness Racing New Zealand v Kotzikas*[33] where, after a review of relevant caselaw, it was held that a power to levy money may arise by express words or necessary implication. A review of the caselaw from the United Kingdom showed a progression over time from a strict rule requiring clear and distinct authority[34] to an acceptance of a grant of power by necessary implication in rare situations.[35]

[80] The decision of the Court of Appeal in *Kotzikas* relied on the decision of the House of Lords in *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council*[36] where Lord Lowry said:

> The rule is that a charge cannot be made unless the power to charge is given by express words or by necessary implication. These last words impose a rigorous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service. Furthermore, as it seems to me, the relevance of the contrast attempted to be drawn, with respect to the power of a council

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30 *Carter Holt Harvey* fn 27.

31 Article 4, Bill of Rights 1688 and s 22(a) Constitution Act 1986.

32 Given the limits of the power of general competence conferred by s 12 LGA02.

33 *Harness Racing New Zealand v Kotzikas* [2004] NZCA 325; [2005] NZAR 268; at [78] – [95].

34 *Gosling v Veley* (1850) 12 QB 328, 407 *per* Wilde CJ.

35 *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884 (UKCA) *per* Atkin LJ at 886; approved in (1922) 38 TLR 781 (UKHL); *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council* [1989] UKHL 4; [1992] 2 AC 48; [1991] 3 WLR 941 (UKHL) *per* Lord Lowry at 70-71

36 *McCarthy & Stone (Developments) Ltd* fn 35. Emphasis in original.

> to charge, between duty functions and discretionary functions is vitiated when one has regard to the large number of discretionary functions for the provision of which express statutory authority to charge has been enacted. I am not impressed by the submission that an express power to charge for the performance of discretionary functions may have been conferred "for the sake of clarity."
>
> ...
>
> I would not be prepared to say (and it is for present purposes unnecessary to say) that, in the absence of express statutory power, there can never be a case in which the power to charge arises by necessary implication, but I have heard no convincing argument to show how the present facts, could support such an implication.

[81] The Court of Appeal noted that the meaning of "necessary implication" was as expressed by Lord Hobhouse of Woodborough in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*[37] as follows:

> A necessary implication is not the same as a reasonable implication ... A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation

The Court of Appeal observed that it had not located a case in which a necessary implication has been held to arise.[38]

[82] In *Neil Construction Ltd v North Shore City Council*[39] the High Court considered the nature and validity of certain development contributions for transport and reserve purposes imposed by the Council under the LGA02. The Court acknowledged that while development contributions were like rates in terms of providing a funding tool for local authorities, they were not a revenue tax imposed to balance the council's budget but more in the nature of a charge tied to the expenditure required for capital works to support infrastructure incurred. Even so, they fell short of specific cost recovery by way of a user charge.[40] The Court held that whether such contributions were viewed as a tax or a charge or a hybrid, they involved "a compulsory exaction of money by a public authority for public purposes, enforceable by law . . . not a payment for services rendered"[41] and

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37 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299 (UKHL) *per* Lord Hobhouse at [45]; cited with approval in *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [46].

38 *Harness Racing New Zealand v Kotzikas* fn 34 at [93].

39 *Neil Construction Ltd* fn 28.

40 *Neil Construction Ltd* fn 28 at [46].

41 In the terms used in *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 (HCA) at 276 *per* Latham CJ.

accordingly could only be imposed pursuant to clear and express words contained in a statute and in accordance with statutory powers and requirements, following the approach taken in *Carter Holt Harvey Ltd*.[42]

[83] Examining those powers and requirements, the Court focussed on the requirement in s 199 LGA02 that before a contribution could be required, there had to be a development which had the effect of requiring new or additional assets or assets of increased capacity for which the council must incur capital expenditure.[43] Analysing the Council's policy on development contributions, the Court held that this policy misinterpreted and misapplied the provisions of the LGA02 by not requiring the identification of whether a project was such a development on a case by case basis. The Court also held that the choice of using development contributions as a funding source must be assessed against all the factors listed in s 101(3) LGA02, including the distribution of benefits from the infrastructure, and not simply on the basis of the causation of the need for such infrastructure.[44]

[84] For those reasons, the Court held that the Council had not complied with the LGA02 in making its development contributions policy by adopting a narrow concept of economic efficiency and a causative approach and excluding appropriate consideration of the distribution of benefits and equitable and proportionate allocation. The Court found that the transport charges in that case did not meet the requirements of the LGA02 and had to be reconsidered but that the charges for reserves did and were upheld.

[85] In *Waitakere City Council v Estate Homes Ltd*[45] the Council required, as a condition of subdivision consent, that the developer design, form and construct a section of an arterial road over the subdivided land along the path of a longstanding designation. The same condition was being imposed on neighbouring developers along that path. The Council accepted that it should compensate the developer to the extent that the condition required more work and more land than would otherwise have been required simply for the subdivision. The parties could not agree on the basis on which such compensation should be assessed and paid.

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42 *Carter Holt Harvey* fn 27.

43 *Neil Construction Ltd* fn 28 at [108] – [115].

44 *Neil Construction Ltd* fn 28 at [206] – [217].

45 *Waitakere City Council v Estate Homes Ltd* fn 29.

[86] The Environment Court[46] had held that the condition was invalid as it found that the development was not a cause for the road to be built and therefore the condition was unlawful under ss 321A and 322 Local Government Act 1974 (**LGA74**), which the Court considered to be the relevant empowering provisions for financial contributions relating to roading. On appeal, the High Court[47] allowed the Council's appeal and held that the requirement to construct the road was a valid condition for services or works under s 108(2)(c) RMA for which no compensation was payable, but that compensation must be paid for the additional land required for a wider arterial road under s 322 LGA74. The Court of Appeal[48] granted leave to appeal and, by a majority, allowed the developer's appeal on the basis that the land for the road was being taken and therefore there should be a presumption that there would be compensation.

[87] For present purposes, the principal issue addressed by the Supreme Court was whether the land for the road had been taken as an expropriation of property, or whether it was an ingredient of a condition imposed on the granting of the subdivision consent as a form of regulation.[49] The distinction is important because of the relevance of two conflicting principles:

> 1. Subject to inconsistent legislation and compliance with the general law it is the right of every person to use their assets as they please and to be compensated if such assets are expropriated for public purposes.
> 2. Land development requires principled, systematic and sensitive controls without any expectation of or right to compensation.

[88] The Supreme Court observed that the first principle is one of statutory interpretation rather than substantive law, there being no protection in New Zealand equivalent to the Fifth Amendment of the Bill of Rights to the United States Constitution. As such, the first principle only applies if there is actually a taking. In general, a refusal of permission to develop land, even where that results in reducing the value of the land, has been treated by the courts as a form of regulation rather than a taking of property and not a basis for compensation.[50] The Supreme Court held that if a lawful condition to a subdivision consent requires the giving up of land in exchange for the right to subdivide, then no expropriation will be involved and so no presumption of compensation will apply. If the condition is unlawful, then the remedy is to seek invalidation of the condition rather than compensation. The distinguishing characteristic of expropriation is a forced

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46 *Estate Homes Ltd v Waitakere City Council* Decision A 153/2003, 6 September 2003 (EnvC).
47 *Waitakere City Council v Estate Homes Ltd* [2005] NZRMA 128 (HC).
48 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA).
49 *Estate Homes (SC)* fn 29: see the discussion at [43] – [54].
50 Section 85(1) RMA.

acquisition allowing the owner no choice: such absence of choice must be present before the first principle can be invoked.

[89] Whether there is truly a choice available may depend on one's point of view. The Supreme Court recognised that a developer may consider a condition imposed by a consent authority to be excessive and that the delay of exercising the right of appeal against it may result in unfair pressure because of economic imperatives to act promptly on the grant of consent. It nonetheless held that such circumstances provide no sound basis for reading statutory powers of a consent authority as involving expropriation of property for which compensation should be available.

[90] Considering these three decisions, it is important to note that while they are generally related as cases concerning the limits of the powers of local authorities to impose charges, they arose in quite different contexts. The decision in *Carter Holt Harvey Ltd* was made in proceedings seeking that certain bylaws be quashed under the LGA74, the LGA 02 and the Bylaws Act 1910; the decision in *Neil Construction Ltd* was made in judicial review proceedings concerning development contributions under the LGA02; and the litigation concerning *Estate Homes Ltd* concerned conditions of resource consent under the RMA. These differing contexts mean that the reasoning in each case may not be directly applicable in another context.

[91] In neither the *Carter Holt Harvey* case nor the *Neil Construction* case did the High Court have to consider the question posed in this case. Those decisions of the High Court and the authorities cited in them clearly stand for the importance of the *ultra vires* doctrine in relation to the use of coercive funding mechanisms by local authorities. The application of the doctrine depends, as the authorities show, on the relevant statutory context. The differences between the regimes for bylaws and development contributions and the regimes for resource consents and designations are sufficiently great at the threshold of consideration of the respective statutory regimes that the particular reasoning in those two decisions is, with respect, not entirely apt to resolve the present question.

[92] As the Supreme Court demonstrates in *Estate Homes*, a condition requiring some form of contribution imposed by a Council on a person seeking permission under the RMA is part of the regulatory consenting process rather than a power of expropriation. The validity of such a condition should be considered in the same way as for any other condition.

Schools as infrastructure

[93] We do not accept the premise of Ms Campbell's submission that schools should not be charged for infrastructure as they are themselves infrastructure. We observe that *infrastructure* is defined in s 2 RMA by listing various reticulated or network services or facilities associated with such reticulation or networks. The definition does not include anything like a school. This definition is consistent with the ordinary meaning of infrastructure, being *a collective term for the subordinate parts of an undertaking*[51] or *the underlying foundation or basic framework (as of a system or organization)*.[52] An infrastructure activity is normally an activity which serves (in the sense of supporting or enabling) other activities rather than being undertaken as an end in itself. It is unlikely that anyone would build a road or a drain for its own sake: such things are built where there is a demand or need for transport or drainage arising from other activities.

[94] We acknowledge that in some contexts the word "infrastructure" is used more broadly also to connote public institutions needed for the functioning of society, such as schools, hospitals and prisons. While schools are generally established by the Minister to serve people who have rights to primary and secondary education, nonetheless they exist to be schools rather than to enable or support other activities. In the context of the RMA and for the purposes of contributions, we consider that the meaning of infrastructure should be as defined in s 2 RMA and accordingly that it does not include an activity such as a school.

Whether schools are exempt from contributions

[95] It is incorrect to say, as Ms Campbell did, that schools are exempt from development contributions under the LGA02. The Crown is exempt under s 8 LGA02, so that the Minister of Education is not required to pay development contributions in respect of any development undertaken for the Crown. But there is no exemption in the LGA02 in relation to schools: a private school, that is, one which is owned and operated by someone other than the Crown, would not be exempt from development contributions.

[96] As activities in their own right, schools are likely to place demands on public infrastructure through their effects from such things as the generation of traffic and wastewater and the demand for water. This is identified by the Council in its 2017/18

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51 Oxford English Dictionary, www.oed.com.

52 Merriam-Webster Dictionary, www.merriam-webster.com.

Development Contributions Policy under the LGA02, where the definition of "business activity" in section 1.2 of that policy includes "the use of land and buildings ... for purposes that are not principally for commercial gain but provide employment (this includes but is not limited to schools and other educational facilities ..." This provision of the policy is not determinative of the question in this case, but it shows that the activity of a school is not treated differently in that policy from other comparable forms of development.

Interpreting the powers to impose conditions

[97] The principal issue in this case is whether the power to recommend or impose conditions on a requirement for a designation includes the same or a similar power to impose financial contributions as for a resource consent. In the acknowledged absence of clear words in the statutory provisions conferring the former power, the answer depends on whether the latter power can be included by necessary implication.

[98] Mindful of the caution expressed by the Court of Appeal in *Harness Racing New Zealand v Kotzikas*,[53] we proceed by examining the relevant provisions within the framework of the RMA.

[99] There are numerous differences between Parts 6 (relating to resource consents) and 8 (relating to designations and heritage orders) of the RMA, but the essential powers in relation to the imposition of conditions are very similar, and the limits on them are the same. While the express power to impose conditions on a resource consent includes the list in s 108(2) and the express powers in ss 171 and 174 in relation to requirements do not, we are not persuaded that this difference is determinative of the issue. We are mindful of the maxim of interpretation that the express mention of one thing is the exclusion of others, but it is not a rule of law. As the Supreme Court has said:[54]

> ... the maxim *expressio unius* does little more than draw attention to what might be seen as the obvious proposition that in many contexts mentioning a particular matter may warrant an inference that other relevant matters were intentionally excluded. But whether that is so or not depends on the context. The exclusion might have been accidental or there might have been good reason for it.

[100] For example, the definition of *conditions* in s 2 RMA is stated to be in relation to plans and resource consents and there is no mention of requirements or designations. Given the clear provisions in ss 171 and 174 for there to be conditions on designations

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53 Fn 33.

54 *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139; [2014] 1 NZLR 121 at [74].

and the absence of any good reason on which to interpret the word differently in those provisions from how it is used in s 108, the maxim has no application in relation to that definition. We do not think the maxim is apt in relation to the powers to impose conditions either, for the following reasons.

[101] We think that the list in s 108(2) RMA is enacted to clarify the essential power to impose conditions in s 108(1) by stating particular types of conditions that come within it rather than extending it by stating types of conditions that go beyond it. This is supported by several indications in the provisions:

(a) The text of s 108(1) states that conditions imposed under that subsection include any referred to in subs (2).

(b) The text of s 108(2) repeats that inclusive approach without any indication that the list is separate from the power conferred in subs (1).

(c) The listed matters do not import elements that are outside the scope of s 108(1):

i. Items (a) – (d) relate to mechanisms to ensure the achievement of the purposes of the relevant plan and the methods of avoiding, remedying or mitigating the adverse effects of any activity authorised by the consent.

ii. Items (e) – (h) are cross-references to other provisions in the RMA which are relevant to the basis on which resource consent may be granted.

(d) The listed matters therefore do not, by themselves, offend the *Newbury* principles relating to conditions, as discussed above at [67].

[102] Another approach to analysing whether the difference between s 108 and ss 171 and 174 means that designations cannot be made subject to the same or similar conditions as resource consents is to consider whether there is any relevant difference between them that would justify or otherwise support a difference in the extent to which conditions may be imposed on them. If there is not, then it may be appropriate to interpret the two provisions in a way that makes their operation consistent according to the purpose of the Act.

[103] The most obvious difference is that s 176 affords the holder of a designation two significant benefits: the ability to undertake the designated work without needing to

comply with the district plan and the ability to stop any person from doing anything on the land that might hinder the designated work. Significant as those benefits are, they do not reduce the considerations to which the territorial authority or the Court must have regard under s 171 and s 174 respectively. Those considerations are at least congruent with the considerations for resource consents under s 104. In particular, they are both focussed on the effects of the proposal on the environment and they both require regard to be had to relevant statutory planning documents, which are the matters most likely to form the basis for any conditions that could lawfully be imposed. To the extent that the considerations are different, the differences do not appear to be in relation to matters that might affect the subject-matter, form or content of such conditions.

[104] It is also relevant to consider the frameworks within which land use resource consents and designations are approved, both involving consideration by the district council. The fact that the council as territorial authority can only recommend an outcome to the requiring authority and not make a decision as it can for a resource consent may be a relic of the origins of designations in public works by the Crown, so that local government does not presume to tell the Crown what to do. In practical terms, both processes are subject to full rights of appeal to this Court: the council as territorial authority may appeal against the decision of the requiring authority, and the requiring authority as an applicant for resource consent may appeal against the decision of the consent authority. The Court then has full substantive decision-making power on the merits in relation to both processes.

[105] Following that review, it is difficult to identify any reason why the powers to impose conditions in those two processes should be substantially different in any way. On that basis, it can be said that the identification of a power to impose financial contribution conditions on a designation is not so much a matter of implying or otherwise creating a new power or even of extending an existing one into a new area. Rather, it amounts to interpreting the provisions for designations on the basis that designations should be subject to having conditions imposed on them on the same basis and for the same reasons as for resource consents, including conditions requiring financial contributions where provided for in the district plan and where appropriate.

[106] We have therefore determined that the imposition of financial contribution conditions is within the scope of the general powers to recommend and impose conditions in ss 171 and 174 RMA. To the extent that it amounts to incorporating the provisions in s 108(2)(a), (9) and (10) into ss 171 and 174, with any necessary changes

having been made, this is a necessary implication in order to ensure that designations can be made subject to appropriate conditions to the same extent as resource consents in light of the purpose of the RMA.

Conclusion

[107] For the foregoing reasons, we determine that the agreed question:

> Do sections 171 or 174 of the RMA allow a Territorial Authority to recommend, and the Environment Court to impose, conditions requiring monetary contributions on designations (in circumstances where the requiring authority has not offered such conditions on an *Augier* basis)?

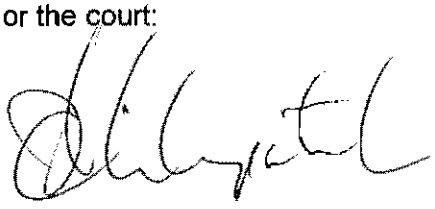
should be answered: Yes.

[108] We have addressed the two elements of the designation process, the council's power of recommendation under s 171 and the Court's power of decision under s 174, together in the course of this decision, rather than in sequence as the parties initially requested. We see no reason to separate the two, as they depend on each other: the effectiveness of the Council's power of recommendation depends on having a right of appeal where a recommendation is not accepted, and the jurisdiction for the Court's power of decision on appeal depends not only on the content of the notice of requirement but also on the scope of the recommendation.

[109] The substantive appeal may proceed accordingly. The parties are directed to confer and report to the Court by 29 March 2019 as to the arrangements they seek for an evidence exchange timetable and the hearing of the appeal. A conference can be convened if that would be of assistance.

[110] Both parties being public bodies and having co-operated to bring a question of general interest before the Court in an efficient way, there is no order as to costs.

For the court:



D A Kirkpatrick
Environment Judge