ORIGINAL

DOUBLE SIDED

Decision No. C 161 /2003

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of references under Clause 14 of the First Schedule to the Act

BETWEEN **REMARKABLES PARK LIMITED**

(RMA 1427/98)

CLARK FORTUNE McDONALD

(RMA 1405/98)

WAKATIPU ENVIRONMENTAL SOCIETY INC

(RMA 1043/98)

Referrers

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson
Environment Commissioner C E Manning
Deputy Environment Commissioner B R Gollop

HEARING at **Queenstown** on 24 and 25 November 2003

APPEARANCES

Mr A M B Green and Mr R A Makgill for Remarkables Park Limited and Clark, Fortune and McDonald
Mr G Thompson for Wakatipu Environmental Society Inc.
Mr N S Marquet for Queenstown Lakes District Council
Mr N McDonald for Skyline Enterprises Limited as a s.271A party

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION ON PROCEDURAL ISSUES

Introduction

[1] Financial contributions in the Queenstown Lakes District Council's proposed district plan; the interpretation and application of section 108 of the Resource Management Act 1991 ("the Act" or "the RMA")[1]; and the place of contributions in the scheme of the Act are the subject of this preliminary decision. The procedural questions we have to answer now are:

(1) Are the amended rules as to financial contributions now being advanced by the Council beyond our jurisdiction to consider because they rely on a document not contained within the proposed district plan? and/or

(2) Are the amended rules beyond our jurisdiction because they are outside the scope of the submissions on the proposed district plan? and

(3) If the answer to (1) or (2) is yes, then should the Court exercise its discretion under section 293 of the Act?

In the later substantive decision we may have to address, amongst other questions:

(4) What place is there in a district plan for environmental compensation – that is the authorisation or creation of positive effects so that the adverse effects are outweighed and there is a net conservation benefit?

(5) And what is the relationship between environmental compensation and financial contributions?

In the latter part of this decision we offer, obiter, some preliminary thoughts in the hope we will assist the parties to answer the second set of questions.

[2] "Financial contributions" cause as much difficulty as any other provision of the RMA. The term, not defined in the Act, contains shades of greenmail. A contribution looks, at first sight, like a kind of (legal) consolation for a local authority when granting

[1] All references in this decision are to the RMA prior to its amendment by the RMAm Act 2003 – see section 112 of the Amendment Act 2003.

a resource consent, since the words "financial contribution" are used for the first time in section 108(2) of the Act which states that:

> (2) A resource consent may include any one or more of the following conditions:
>
> (a) Subject to subsection (10) a condition requiring that a financial contribution be made:
>
> (b) ...

[3] The natural question to ask is "a financial contribution for or to what?" That is not answered directly by the Act, which tells us only that a financial contribution can be money or land or a combination[2] of both; and that there are two other (theoretical) limitations to a local authority's power to take financial contributions. Section 108(10) states:

> (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 (including the purpose of ensuring positive effects on the environment to offset any adverse effects); and
>
> (b) **The level of contribution is determined in the manner described in the plan.**[3] [Our emphases]

Thus the purpose of and how to decide the level of, contribution have to be identified in a plan under the RMA.

[4] Beyond that the Act is silent on financial contributions[4] except to provide some monitoring as to their use[5] to ensure it is used more or less for the purpose it was received. We can, of course, infer what financial contributions are **not** by identifying what other types of conditions may be imposed on resource consents generally under section 108(2) or specifically for subdivisions under section 220 of the RMA. For

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[2] Section 108(9) RMA.

[3] Resource Management Act 1991, Section 108.

[4] The Second Schedule – which lists the matters that may be provided for in plans – used to refer (until the Resource Management Amendment Act 2003 came into force on 1 August 2003) to financial contributions without really adding to section 108 (9) and (10).

[5] Section 111 RMA.

example, by implication, financial contributions do not include covenants[6] or easements[7].

[5] The substantive issues in this case include first whether, where as part of a comprehensive development proposal a developer like the referrer, Remarkables Park Limited, proposes various covenants and/or easements over land (in this case along the banks of the Kawerau River) to protect open space and outstanding natural qualities, those should somehow be taken into account as environmental compensation and thus establish a credit to be considered when fixing financial contributions under section 108 of the Act; secondly the method for calculating financial contributions especially for proposed public works. In submissions counsel stated that a contribution may be imposed for purposes other than mitigating adverse effects of a particular subdivision as long as those purposes are specified in the Plan are in accordance with section 108(9): *McLennan v The Marlborough District Council*.[8] We respectfully question whether that is correct: in our view it is highly likely that financial contributions must (approximately) relate to the effects caused on public services and facilities by a new subdivision and/or development. However we do not have to decide that point here.

[6] However, before the Court can hear and decide the substantive issues we have to determine the preliminary issues stated in paragraph [1] above.

Background

[7] The Council notified its proposed district plan ("the notified plan") under the RMA in 1995. After receiving submissions and conducting hearings it issued its decisions and notified the amended proposed plan ("the revised plan") in 1998.

[8] Part 15 of the revised plan manages "Subdivision, Development and Financial Contributions". There are two sets of objectives and consequential policies that

[6] Section 108(2)(d) of the RMA.
[7] Section 220(1)(f) of the RMA.
[8] W58/2001.

expressly require financial contributions for services[9] and for public facilities (to use a neutral, generic term). They provide respectively that the costs of providing or improving services to and within subdivisions and developments should be met by developers[10] (either directly or through financial contributions); and that to mitigate adverse effects on public open spaces and recreational areas from residential growth and expansion[11] the Council should require financial contributions from subdivision and development for more open space, recreation areas and "public amenity"[12].

[9] It is the Council's position that financial contributions for open space, recreation and public amenity should be taken even for developments in the rural areas. This is because residents of rural areas still use public open space and amenity areas such as walkways. Rural dwellers also use district wide facilities such as libraries and the Queenstown Events Centre at Frankton (by the airport), the reserves along the water fronts of the two major lakes, Wakatipu and Wanaka, and therefore it is seen as appropriate that they contribute to the provision of these services by way of financial contributions.

[10] Under the notified plan's rules in Part 15, the purpose of financial contributions for public facilities was to provide money, land, works or any combination of those for the public facilities. As required by the RMA (before a 1997 amendment) the notified plan had to specify a maximum contribution. The **notified** plan calculated this differently in different zones but in each case the maximum contribution was a percentage (e.g. 5% or 10%) of the market value of the land in the additional lots authorised by the subdivision[13]. Various submissions and further submissions were made on these provisions, on the grounds that they were unclear and unreasonable; that the reasons given for establishing the figures were unsupported; that the maximum financial contributions were excessive; that the rule pertaining to the market value of rural land was impractical and flawed in its application; that development within Business and Industrial Zones does not produce an effect requiring the levying of

[9] Roading, water, sewerage, stormwater collection and disposal, energy, telecommunications etc: rule 15.2.5.2 [Revised plan p. 15/10].
[10] Objective 15/2 [Revised plan p. 15/3].
[11] Objective 15/4 [Revised plan p. 15/3] referring to Objective 4.4.3(1) [Revised plan p. 4/17].
[12] Policy 4.4.3/1.1 [Revised plan p. 4/17-18].
[13] 15.2.5.5 Page 15/22 Queenstown Lakes District Proposed District Plan 1995.

financial contributions for reserves; and that financial contributions in respect to open space and recreation should be finite and a specified amount.

[11] The financial contributions provisions in the revised plan differed from the (1995) notified provisions in several ways. Rather oddly, the Council removed a provision where it should not have done so, and retained one it could have removed. First, the provision for "works" was removed as a method of payment for financial contributions. These were removed during the decisions on submissions in order (it appears) for the proposed plan to mirror the RMA following the 1997 Amendment Act[14]. At law it is doubtful whether the Council had power to do that since no submissions sought that relief. Further, it was unnecessary because the power in the plan seems to have been expressly reserved under the 1997 amendment[15]. Secondly, although the RMA no longer required maxima to be stated, the revised plan identified these as follows:

(1) For the Residential, Township and Remarkables Park Zones, the maximum contribution[16] is 7.5% of the market values to the sites authorised by subdivision consent or the equivalent of this amount in land;

(2) For the Rural-Residential, Rural General, Rural Lifestyle, Resort and Rural Visitor Zones the maximum contribution is 5% of the market value; for the Town Centre, Corner Shopping Centre and Industrial Zones the maximum contribution is 10% of the market value.

[12] General provisions in part 15 of the revised plan specify how the value of land shall be calculated and gives Council the ability to specify the location and area of the land and when and how it is to be transferred or vested in the Council. They are similar in form to the provisions for "Services" financial contributions.[17] It is not clear to us

[14] Section 24 RMAm Act 1997.
[15] Section 79 RMAm Act 1997.
[16] 15.2.5.6(i), Chapter 15, Page 15/30, Queenstown Lakes District Proposed District Plan.
[17] 15.2.5.8(i) – (vi), Chapter 15, Page 15/15, Queenstown Lakes Proposed District Plan (the notified plan).

from the revised plan itself as to how the Council proposes to exercise its discretion to reduce a financial contribution below the maximum.

[13] There are a number of outstanding references to the Queenstown Lakes District Council's proposed plan concerning these rules. The appeals are by:

- Remarkables Park Limited
- Clark Fortune McDonald
- Wakatipu Environmental Society Inc
- Hensman Family Trust and Others (RMA 1384/98).

Most of the points in these references relate to the provisions for financial contributions for "Open Space, Recreation and Amenity", although some relate to contributions to services.

[14] The first three referrers are part of these proceedings. There was no appearance for the Hensman Family Trust (RMA 1384/98). Consent memoranda are being circulated for other references by Contact Energy Limited (RMA 1401/98) and Millbrook Country Club Inc (RMA 1286/98).

[15] Following mediation in June 2000 and a series of pre-hearing conferences, in January 2002 the Court directed the Council to complete its proposed further analysis as to the need to provide the level of contributions identified in Part 15 of the District Plan. The evidence-in-chief of Ms A Schuler, a resource management witness for the Council, describes how as part of that exercise, the Council developed a Reserves Management Strategy, which feeds into an "Asset Management Plan" for reserves. Similar plans for individual reserves were then developed. The purpose of these documents was to enable the Council to derive a fair and reasonable contribution for "Open Space, Recreation and Public Amenity". As Ms Schuler describes it, the idea was that the findings of these documents could then be fed into Part 15 of the Proposed District Plan.

[16] As it turns out, the main proponent for change to the revised plan is now the Council itself rather than the referrers, at least in the sense that it is the Council's

amended proposed wording which is the intended subject of the hearing before us. The other parties have proposed amendments largely in reaction. The Council's proposed rules 15.2.5.6 to 15.2.5.8 state (relevantly):

> **15.2.5.6 General Provisions – Financial Contributions for Open Space Recreation and Public Amenity – All Zones**
>
> (i) These provisions shall apply to all financial contributions made for the purposes of open space, recreation and public amenity on subdivision and development.
>
> ...
>
> (iii) All financial contributions shall be **GST inclusive**.
>
> (iv) The appropriate proportion of the full costs of providing land and/or facilities for open space, recreation and public amenity, for the entire district and including that part of the district in which the subdivision or development takes place will be assessed by Council and set out in a **policy document**. The policy document will be subject to public consultation in accordance with Council Policy.
>
> ...
>
> (v) Where the open space, recreation and public amenity serves or is intended to serve land in a subdivision or development and other land or land users, the liability of the consent holder shall be limited to the extent to which open space, recreation or public amenity serves or is intended to serve the land in the subdivision or development.
>
> (vi) The actual or estimated costs of providing any open space, recreation or public amenity may include:
>
> (a) An allowance for the **indirect** costs of Council in the provision of open space and recreation facilities;
> (b) Any costs incurred or likely to be incurred by the Council in **servicing** Council expenditure in providing any land and/or facilities for open space and public amenity;
> (c) An allowance or adjustment for inflation;
> (d) Reasonable associated costs incurred in providing the land and/or facilities for open space and public amenity, including but not limited to any legal, survey and engineering costs and disbursements;
> (e) The reasonable value and/or the reasonable costs of acquiring land or interest(s) in land required for the land and/or **facilities for open space and public amenity**;

(f) Any costs in avoiding, mitigating or remedying any effects on the environment of providing the land and/or facilities required for open space and public amenity.

(vii) Differentials shall be applied to non-residential land uses to allow for the different impacts on open space, recreation and public amenity created by other land users.

...

(x) **Whether**[18] [sic] financial contribution is or includes land, the Council may specify

(a) The location and area of the land;
(b) When and how the land is to be transferred to or vested in the Council.

...

15.2.5.7 Financial Contributions for Open Space Recreation and Public Amenity – Subdivision – All Zones

The following provisions shall apply to financial contributions for open space, recreation and public amenity.

Purpose

A financial contribution may be included as a condition of a subdivision consent for the purposes of providing land and/or facilities for open space, recreation and public amenity, for the entire district and including that part of the district in which the subdivision takes place.

...

Level of Contribution

The appropriate proportion of the full costs of providing land and/or facilities for open space, recreation and public amenity, for the entire district and including that part of the district in which the subdivision or development takes place; **provided that the maximum contribution shall not exceed:**

The amount calculated by multiplying the cost of the relevant unit of demand by the number of units of demand assessed for the subdivision.

Plus land or cash in lieu of land required for each relevant unit of demand multiplied by the number of units of demand assessed for the subdivision.

[18] For the Council, Mr Marquet pointed out that this should read "where" (not whether).

Maximum Contribution Per Lot = (A x C) + (B x C)

Where: A = The cost of the relevant unit of demand: The capital expenditure for growth, whether already incurred or anticipated, within a contributing area, during a specified period of time apportioned by the number of new residential equivalents (units of demand) whether already created or anticipated, within the same contributing area, for the same specified period of time described herein and having demand on that capital expenditure for growth as assessed herein and in accordance with **Council's policy identified in 15.2.5.6 (iv).**

B = Land: Land or cash in lieu of land for each residential equivalent (unit of demand) as calculated in accordance with **Council's policy identified in 15.2.5.6 (iv).**

C = No. of New Residential Equivalents: The number of new residential equivalents in the subdivisions for which a resource consent is being sought calculated in accordance with **Council's policy identified in 15.2.5.6 (iv).**

In determining financial contributions for a subdivision, the Council will make a reasonable assessment of the likely development and financial contributions shall be calculated accordingly.

15.2.5.8 Financial Contributions for Open Space, Recreation and Public Amenity – Developments – All Zones

...

[Our emphases except for the rule headings]

The text of rule 15.2.8, which we have not quoted, is similar to that of rule 15.2.7. It will be noted that all three rules refer to a "policy document" not contained in the plan. We will call this controversial document "the calculation document".

Are rules 15.2.5.6 to 15.2.5.8 too uncertain?

[17] We turn to consider the alleged uncertainty of the rules 15.2.5.6 – 15.2.5.8. The key issue is whether they comply with section 108 (10) (b) by describing the "manner" or method in which "the level of contribution is determined". In *South Port New Zealand Limited v Southland Regional Council*[19] the Court stated:

> As for paragraph (b) of section 108 (10) this does not, since the 1997 amendment to the RMA, require that the level of contribution be stated in a plan, but that the manner of determining the level be described. There is a temptation to think that "determining" the level of contribution must have some kind of near arithmetical certainty to it. However the words "determine" appear to be used elsewhere in the RMA as simple synonyms for "decide" (which is a normal meaning of the word).

So all that is required by section 108(10)(b) is that the plan describes a method for deciding the level of contribution.

[18] Much more authoritatively, the same phrase was considered by the Court of Appeal in *Retro Developments Limited v Auckland City Council*[20] when considering the proposed [Isthmus] plan which expressly contained only a formula for calculating a maximum financial contribution. Delivering the decision of the Court, W Young J stated[21]:

> The Isthmus Plan does not specifically say that the Auckland City Council has a discretion to reduce contributions calculated in accordance with the relevant rules. So, no reduction mechanism is "described" in the plan. But, if it is the case that the relevant rules must have been intended, when enunciated, to specify maximum levels of contribution only and this in a context in which it was plainly envisaged that the Auckland City Council would have a discretion to impose lower contributions, we would be reluctant to construe the phrase "in the manner described in the plan" as defeating that intention [in the Isthmus Plan]. So, we propose to construe that phrase, "in the manner described in the plan" [in the RMA] as meaning "as provided for in the plan".
>
> [Our emphasis]

[19] Decision C91/02, 25.7.02 at paragraphs [19] and [20].
[20] [2003] NZRMA 360.
[21] [2003] NZRMA 360 at para [24].

Apart from the (no doubt unintended) suggestion in the wording of the Court of Appeal's decision that it is working backwards from a desired result to the interpretation of section 108(10)(b), this retro-interpretation is, we respectfully suggest, consistent with the wide and more orthodox interpretation advanced in *South Port*.

Can the financial contributions rules refer to a calculation document not contained within the revised plan?

[19] For the referrers Mr Green submits that the reasons that the manner in which the financial contribution is determined must also be provided for in that plan include that:

- The public should be given an opportunity to make submissions on all rules and associated requirements under a district plan: and
- The Council should only be able to amend rules and requirements under a district plan pursuant to the Act.

He submits that the referrers (and the public generally) have not had an opportunity to make submissions on the method of calculating financial contributions as set out under the draft calculation document upon which the Council now intends to rely in the forthcoming hearing. Counsel also points out that the draft calculation policy as now proposed could be changed without affording the referrers (or anyone else) an opportunity to make a submission on that change, as is required in respect of amendments to district plan rules under the Act (via a plan change).

[20] For the Council, Mr Marquet submits that the requirements of section 108(10) of the RMA are met; that the "policy document" referred to in rule 15.2.5.6 is misnamed, because the document should simply be called the calculation document; and that it provides a mechanical formula for setting financial contributions.

[21] At a policy level it is correct that a district plan may refer to a document outside the plan itself. For example, a district plan may refer to a regional policy statement or plan, since it must not be inconsistent[22] with those documents which are higher in the hierarchy of resource management instruments.

[22] Section 75(2) RMA.

[22] However, if an external document is referred to, its terms must be settled and known, or at least there must be a recipe for fairly changing the district plan. Thus, for example section 82 of the RMA provides solutions for where there are inconsistencies between policy statements and plans. The difficulties that arise when a New Zealand Standard changes are demonstrated in *Telecom New Zealand Limited v Christchurch City Council*[23]. There the Christchurch City Council's proposed plan referred to New Zealand Standard AS/NZ 6609 (1990) in relation to exposure levels to microwave and ultra high frequency emissions. By the time of the Environment Court hearing that had been replaced by NZ 2772.1: 1999, but of course the City Plan still referred to the old standard. The Court held that the new standard could be substituted, since the proposed plan, a submission and reference had all contemplated such a change.

[23] In our view, reference in a district plan to an external document is generally undesirable. However if an objective or policy is involved it is not illegal to do so. The position may be different for a rule, since rules require greater certainty. Since a person can, in effect[24], be prosecuted for not complying with a rule, it is important that a rule should not be able to be set or changed without the notification and participatory processes of the RMA being followed.

[24] We accept, of course, that it is unlikely any consent holder would be prosecuted for failing to pay a financial contribution. In practice it is unlikely a situation with outstanding contributions would often arise since a Council would normally collect them upfront as a condition of issuing a "section 224 certificate". However the principle remains that a rule should not be capable of being changed without the process in the First Schedule to the RMA being followed.

[25] The position is slightly different if a proposed plan specifies a maximum, with the implication that a lesser contribution may be assessed on the facts of each case. Such a lesser contribution may be assessed individually in each case or on the basis of a formula in a document like the calculation document. In the latter case it may be

[23] [2003] NZRMA 280.
[24] Section 338 of the RMA in combination with sections 9, 11, 12, 13, 14 and 15 of the Act.

permissible, in the light of *Retro Developments*, to specify a method of calculating maximum financial contributions in the plan and to refer to another document as to how the discretion to levy less than the maximum is to be exercised. We will decide that later if we need to, but it is not the issue here.

[26] Our concern in this case does not relate to the calculation document in itself. It is to the fact that the external document is used not only for assessing the actual (discretionary) levy in a given case, but also for "specifying" the maximum. In fact, as Mr Gollop has pointed out to his colleagues on the Court, the technique used in proposed rules 15.2.5.7 and 8 does not specify a fixed maximum at all, but a moveable maximum which varies when the Council revises the estimate of its future capital expenditure. Thus the answer to question (1) in para [1] above is "Yes". We hold that the proposed rules 15.2.5.7 and 15.2.5.8 are beyond the Council's powers to impose.

Are the proposed rules outside the scope of the submissions and the notified plan?

[27] As to jurisdiction it is unlikely that any reader of the revised plan in 1998 or subsequently would have contemplated that the various submissions and appeals (references) would enable the Council to put in place a policy for the calculation of financial contributions that is expressly outside the plan. We think such a technique is self-evidently beyond the scope of a submission or appeal and thus outside the Court's jurisdiction. In any event no submission or reference in these proceedings sough such a change to the proposed plan and thus the Council's proposals are outside the Court's jurisdiction to grant: see re *Vivid Holding Ltd*[25]. The answer to question [2] (2) is also "Yes".

Should we consider an application under section 293?

[28] We have found that the proposed rules are beyond our jurisdiction in two respects – they refer to a calculation document which should be fixed in the district plan, not subject to changes outside it; and secondly such a course was not contemplated by any of the submissions. However that is not the end of the matter. Clearly the Council

[25] [1999] NZRMA 467; (1999) 5 ELRNZ 264.

needs some sort of financial contributions policy. It might, for example, consider bringing the calculation document inside the plan at least for the fixing of maximum contributions.

[29] As to the use of section 293, we consider that on the evidence we have read (and counsel agreed to us considering this although it is not yet formally on the record) there is a reasonable case for amending the proposed district plan along the lines contemplated by the Council but with some changes to make the proposed rules sufficiently clear as to be within jurisdiction.

[30] We invite an application under section 293 of the Act by the Council. At the least this should remedy the jurisdictional problems we have identified: notification will automatically resolve the problem of other persons not knowing what the Council is proposing; and specification of a maximum contribution in the district plan itself, without reference to another protean document, will remedy the other.

Environment compensation and financial contributions

[31] As the second set of questions in paragraph [1] above suggests, counsel asked us for some guidance as to the relationship between financial contributions and other positive effects, for example environmental compensation, which might be achievable upon subdivision and/or development. We are torn between the realisation on the one hand that such remarks are obiter, and on the other with the hope that some comment might narrow the distance between the parties.

[32] There is an elusive phrase in section 108 (10) of the Act as to the purpose of financial contributions needing to be specified in a plan:

> ... (including the purpose of ensuring **positive effects** on the environment to offset any adverse effects) ...
> [Our emphasis]

In our view it is important to understand the relationship of financial contributions to other ways of achieving positive effects under the RMA.

[33] Regardless of how the biophysical bottom lines of sections 5 and 6 are explained or qualified it is clear that the Act contemplates, first, that positive effects of development and use of natural and physical resources must always be taken into account; and secondly, that wider social, economic and cultural factors must be taken into account if (but only if[26]) the management and use of the resources would disenable the wellbeing, health and safety of people and communities: *Baker Boys Limited v Christchurch City Council*[27].

[34] Positive effects of development proposals include both the financial and employment effects but also any positive environmental and ecological effects. Indeed, one of the useful tests for sustainability under the RMA, applying the appropriate standards in the hierarchy of sections 5 (2) (a) to (c) and sections 6 to 8, is whether development and use would lead to a net conservation benefit: *Baker Boys Limited v Christchurch City Council*[28].

[35] Of course in exceptional cases there may be no net conservation benefit even when a matter of natural importance under section 6 is involved. In *Trio Holdings Limited v Marlborough District Council*[29] the production of sponges for medical purposes outweighed section 6 matters in Pelorus Sound. However, in other cases the importance of environmental/ecological positive effects (justified under sections 5(2)(c) – "mitigating"; 7(c) and (e) – "enhancement"; and section 32 of the RMA) has been recognised: *Rutherford Family Trust v Christchurch City Council*[30] and *Memon and Others v Christchurch City Council*[31]. A useful phrase for these positive effects is to identify them as "environmental compensation".

[36] "Environmental compensation" – as discussed in *Rutherford Family Trust v Christchurch City Council*[32] and *Memon and Others v Christchurch City Council*[33] –

[26] Subject to, in a general sense, sections 6 (d) and (e), section 7 and section 8 of the Act.
[27] [1998] NZRMA 433 at para (61); (1998) 4 ELRNZ 297 at para (61).
[28] [2000] NZRMA 433 at para (98); (1998) 4 ELRNZ 297 at para (98).
[29] (1996) 2 ELRNZ 353; [1997] NZRMA 97.
[30] Decision C 26/2003.
[31] Decision C 116 /2003.
[32] C26/2003.
[33] C116/2003.

might include provisions including vesting of land and/or easements and covenants in or in favour of a council. Such vesting, covenants or conditions can be for pedestrian or other essentially utilitarian reasons – vesting of rights of way, roads etc; or for ecological and/or landscape reasons. But essentially environmental compensation is almost always of land subject to the subdivision/development. In theory conditions could be volunteered for other land not subject to the applications if it is available to the subdivider/developer and of equivalent ecological/environmental value. We note that it is impossible to predict or preset the value of environmental compensation because it depends – especially in this district when rural general land is being developed – on the circumstances.

[37]. Given that broad background, section 108 of the RMA then contemplates "financial contributions" (upon the granting of resource consents). As we have stated, these are not defined in the RMA. However, they are clearly not usually contemplated to be for services to be provided on the land being subdivided and/or developed (those are normally the landowner's/developer's responsibility) – but for services off-site, that is from the site's boundary and radiating outwards. The very name of these specialist (Pigovian-type) taxes suggests that only a contribution not the full cost of such services needs to be paid by the landowner/developer. Further, these financial contributions are subject to the *Newbury*[34] tests that they have:

(a) to be for an RMA purpose not an ulterior one;
(b) to fairly and reasonably relate to the development authorised;
(c) to be reasonable;

– see *Housing Corporation of New Zealand v Waitakere City Council*[35]. Contributions to roads, sewerage, water supply, reserves usually fit within RMA purposes. Contributions towards housing, hospitals, education and libraries are not usually required. However, when a council has particular regard to the maintenance and enhancement[36] of the quality of the environment and the breadth of the latter term[37],

[34] Referring to *Newbury v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731.
[35] [2003] NZ RMA 202 (CA).
[36] Section 7 (f) of the RMA.
[37] See definition of "environment" in section 2 RMA.

then the social, economic, aesthetic and cultural conditions which affect people and communities appear to allow contributions to be levied for these types of buildings and the institutions they house.

[38] Finally, councils need to bear in mind that there is a wider "contribution" scheme contemplated by the Parliament under the Local Government Act 2002 ("the LGA") as explained in *Turvey v North Shore City*[38]. There the Environment Court stated[39]:

> To sum up, in providing for development contributions under the 2002 [Local Government] Act, the legislature has conferred upon local authorities a very significant new means of funding capital expenditure for a comprehensive range of growth-related infrastructure. Importantly, the proportions of such expenditure to be funded by the various means available at law (for example, development contributions under the new LGA, financial contributions under the RMA, asset sale proceeds, rates, or borrowing) must be stated as part of the Council's policy making obligations (refer s.106(2)(b) and s.102(4)(d) [LGA 2002] ...).
>
> Clear limits and directives for development contributions are specified in a detailed way under the 2002 Act, bearing in mind that, unlike a financial contributions regime in a district plan under the RMA, no right of appeal to this Court against a requirement to make or pay a development contribution is provided for. Neither does any appeal lie to this Court regarding the provisions of a development contributions regime at the stage that the local authority proposes to introduce it. On the other hand, an RMA-based approach may be quite innovative (as the present Change demonstrates) in seeking to address the perceived capital requirements of a district in coping with a high growth demand – subject, however to the statutory rights of objection and appeal.

[39] Despite the express relationships between the LGA and the RMA, a council should not confuse its jurisdiction in respect of the LGA and its "equitable" methodology[40], with its powers under the RMA. It is beyond a council's powers to use the LGA principles in district plans under the RMA. It is also of interest that development contributions under the LGA are subject to maxima specified in section 203 of the LGA. That requirement no longer applies to financial contributions under the RMA.

[38] Decision A195 2003 (31.10.03).
[39] A195/2003 at paras [95] and [96].
[40] Schedule 13 to the LGA.

Other Matters

[40] First, Mr Green drew to our attention that in the light of a recent ruling by the Inland Revenue Department there may be no need for the Council to collect GST since apparently financial contributions are not taxable.

[41] Secondly, we are concerned that if the jurisdictional problems are overcome, then in the quest for certainty (as requested by one referrer Messrs Clark Fortune and McDonald) the Council is potentially creating problems in the future by imposing an over-simple regime on a complex district. We outline below some of the difficulties it would be good to know the Council had considered.

[42] There are at least four common types of subdivision and development which need to be considered in the Queenstown Lakes District:

(1) subdivision and residential development in Living zones;
(2) subdivision and residential development in the Rural General zone;
(3) subdivision and residential development in special zones – Millbrook, Remarkables Park amongst others;
(4) industrial subdivision and development.

[43] We can see that the Council's concept of a maximum figure (amended to be calculable **from the district plan** in advance) and arithmetical calculation of the actual contribution under that might work in zones where subdivision and development is a residential activity. Some amendment to contributions for open space, reserves and public facilities might need to be considered for industrial zones (category (4) above).

[44] More importantly, we are concerned that the regimented financial contributions regime might cause difficulties with achieving net conservation benefits in the many, often contentious, applications to the Council for subdivision consents in the rural zones. We appreciate that the Council may not want to increase its reserves – and that is not a problem since the Council cannot be forced to take reserves it does not want. However open space – given a high priority in Part 4 of the revised plan[41] – can be protected by

[41] See for example Objective 4.4.3/3 [Revised plan p. 4/23].

covenants and/or easements: *Just One Life Limited v Queenstown Lakes District Council*[42]. It would, in our view, be comforting to know that the maximum financial contributions did not exclude the possibility of appropriate environmental compensation being obtained.

[45] We note that in his extra evidence Mr Donnelly states that:

> As currently drafted the rules provide no incentive to subdividers or developers to offer to provide positive effects on the environment as a means of reducing the level of financial contributions otherwise payable with respect to open space … etc

We have read no other evidence on that point yet, nor has Mr Donnelly been cross-examined. But, if Mr Donnelly is correct on this point, then there is some economic evidence backing our concerns about the way development is occurring in the district.

[46] We would at least like the Council to consider a concept – if only to reject it – in any section 293 application, of no maximum financial contributions for open space, recreation and public amenity, and to have a wide discretion to take into account any environmental compensation being offered in the rural zones and in any special (residential) zones.

[47] Thirdly, another potential fish-hook is the rules in Parts 5 and 15 of the revised plan which allow approval of "residential building platforms" – effectively a land use – upon granting of subdivision consent. Because only a subdivision consent is being granted, the Council has no power to impose conditions that covenants be entered into: section 108(2)(d) anomalously excludes covenants as conditions of subdivision consents. That has implications for open space which the Council will in our view need to think through very carefully, especially for subdivision in the Rural General zone.

[48] Fourthly, we make a preliminary comment on the economic evidence. While that has not yet been formally written into the Court's record, and noting the care and

[42] Decision C163/2001.

expertise with which the briefs of evidence have apparently been written, we wish to express some concern about the generality and theoreticality of some of that evidence. It is not particularly useful for the Court to have presented to it wide-ranging debates about the theory of utility pricing and/or of natural monopolies. We would greatly prefer it if the economists could confine their evidence to an agreed (and restricted) range of costing options concentrating on cause and effects rather than economic theory (if that is possible).

[49] We accept of course that complicated issues arise as to, amongst others:

(1) The remoteness of potential effects and the fairness of charging for them in advance when they may not occur;
(2) How close a link there has to be between a contribution and ensuring it is used for the purpose for which levied; and
(3) Whether extensive valuable environmental compensation should be offset against standard financial contributions.

Nothing in this decision should be read as having decided those issues.

Directions

[50] The hearing was adjourned on 25 November 2003, pending this decision on the jurisdictional issues. We now direct:

(1) That the Council lodges with the Registrar and serves on the other parties a memorandum from counsel by Friday 27 February 2004 indicating:
    (a) whether the Council wishes to apply under section 293 of the Act; and
    (b) if so, what timetable is proposed for restating the rules and for further notification etc; or
    (c) what other course is proposed;

(2) Leave is reserved for any other party to apply for further directions;

(3) Costs are reserved.

DATED at CHRISTCHURCH 5 December 2003

For the Court:

J R Jackson
Environment Judge

Issued[43] - 5 DEC 2003

[43] Jacksoj\Jud_Rule\D\RMA1427-98(2).doc.