Response to Panel's Questions by Submitters 112, 113, 114, 11, 118 and 143

Is an increase in land value an "effect on the environment".

Counsel indicated the to the Hearings Panel in response to questions that an Environment Court case had previously recognised changes to land value had been previously held to be an amenity effect, with counsel to refer the panel to that case.

The case is not quite as counsel had recollected – the case did not hold that a change in land value was an amenity effect. Rather, it considered valuation evidence was relevant to the issue of assessing the nature of an amenity effect. Ultimately, the court concluded in that case the valuation evidence was not as helpful as the planning assessments and it was given no weight.

The case is: Giles v Christchurch City Council A92/2000

There are no other cases that define an increase in land value as an environmental effect – instead the change in valuation is noted as being a "measure" of the nature, intensity and scale. Counsel was unable to find a case that discussed an increase in land values – likely because the assessment of evidence is typically focused on whether there is an adverse effect that must be avoided, remedied or mitigated by means of a change to the proposal or consent conditions (section 5(2)(c) of the Resource Management Act 1991).

Can an increase in land value be "returned" to the community by means of a financial contribution?

Following on from the above discussion, it follows that an increase in land value may be a measure of an "effect", but is not a matter that is relevant to a resource consent condition as it is not an adverse effect. As such it is not a matter that the Act requires is avoided, remedied or mitigated (section 5(2)(c) of the Resource Management Act 1991).

Therefore, no resource management purpose is achieved by imposing a financial contribution – as there is no adverse effect that the plan is required to address, and there is no adverse effect on which to base a condition of consent.

Transit New Zealand v Southland District Council [2008] NZRMA 379 also provides authority that a developer is not required to meet the costs of an agency's decision to underinvest or fail to invest in infrastructure by way of imposing a financial contribution. The proposal by Transit to require a financial contribution was held not to meet the *Newbury* test of reasonableness as it in effect was transferring the full costs of the roading network underinvestment on to a developer which was not causing a direct effect requiring the network upgrade. The Court reached a different conclusion in the case of

In South Port NZL v Southland DC ENVC 91/2002 the court stated:

> "[28] *We conclude, having regard to the guides to meaning we have discussed, that the provisions in a proposed plan as to determination of the level of financial contribution may be in a broadly discretionary method or in a narrowly pre-descriptive rule but they cannot be left in a policy.*"

The other helpful discussion on limits to imposing a financial contribution in a plan context was discussed by the Environment Court in Contact Energy Limited v CODC ENC Christchurch C204/2004, 23 December 2004 whereby the Court held that (in deciding whether an appeal was properly in scope) the Court discussed (obiter) the context of financial contributions being paid to third parties to achieve a public purpose.

Other Topics of Discussion/Clarifications:

Ring fencing funds

The panel asked whether the funds collected by way of financial contribution were set aside to be applied for that purpose. Counsel's answer was that there is no statutory requirement to ring fence such funds.

However, more specifically the panel should note that section 111 of the Act does impose a duty on a Council to use the funds for the purpose for which they are collected. Section 110 provides for financial contributions to be returned to the consent holder where the consented activity does not proceed.

Environmental Compensation

In the course of research, it appears that there is a helpful discussion in the case law concerning the matter of environmental compensation. Environmental compensation is not a financial contribution – rather it is a separate category of consideration of a proposed activity as it is intended to be evaluated as a positive effect or a beneficial element of a proposal to be taken into account in the overall assessment of a proposed activity.

Environmental compensation offered by an applicant and is a relevant consideration when granting a resource consent pursuant to section 104(1)(ab) which states that positive effects of a proposal can be taken into account when assessing the nature and character of environmental effects. That section states:

> "any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;"

That environmental compensation or offsetting of the adverse effects of a proposal underpins the practice of decision makers taking into account side agreements with respect to the evaluation of adverse effects of a proposed activity. Therefore, it is not necessary for the QLDC to have this particular financial contributions policy to achieve a form of affordable housing as the Act already provides for affordable housing to be offered as part of the assessment of a proposal. In fact, the provision in the Act allows for any form of activity to offer affordable housing not just subdivision and land use in the form of building new homes. Therefore if the QLDC's position is that "something" is better than "nothing" then this proposed policy is simply not required as the Act already provides a mechanism for "something" to be offered by developers.

Case law discussing the parameters of environmental compensation include:

JF Investments Ltd v Queenstown-Lakes DC C048/06 – Court granted consent on the basis that a wilding pine control programme was implemented to offset the environmental effects.

In *Merton* v *Rodney DC* the Court declined subdivision consent predicated on an offer of environmental compensation as the proposed environmental compensation was offered in recognition that the proposal did not meet the standards for subdivision contemplated by the relevant plan provisions.
The Court noted that “the Council has made a value judgement as to what quantum of compensation can be traded off for subdivision rights” commenting that it was not generally acceptable meet a lower standard of development in “exchange” for a different environmental benefit.

Dated: 4 March 2024

K L Rusher