

IN THE MATTER of the Local Government Act
2002 ("the Act")

AND

IN THE MATTER of Willis Central

SUBMISIONS OF CON ANASTASIOU

Introduction

1. In this matter I appear for Boulcott Land Development Limited which is developing the site at 44-52 Willis Street and 66-70 Boulcott Street as an office retail complex to be known as Willis Central.

Application for Self-Assessment

2. Boulcott Land Limited has applied for self-assessment of the development contribution payable in respect of the project.
3. That application is contained in a detailed document dated 11 August 2009, a copy of which will be submitted to the Hearings Committee by a subsequent witness.
4. The application for self-assessment is made pursuant to that part of the Council's Development Contributions Policy which deals with the assessment process for non residential developments.
5. The provisions in that part of the Council's Development Contributions Policy which are relevant to this application are as follows:

"Assessment process for non residential development

- 2.5.5 *The non-residential unit of demand (65m² GFA per EHU) may be departed from in the following circumstances:*

Self-assessment

- 2.5.6.1 *An applicant may apply for self-assessment of the number of EHUs payable for a particular development as follows:*

- (a) *Application must be made in writing before any development contributions payment in respect of the development become due.*
- (b) *The assessment must relate to all infrastructure and reserve categories for which development contributions are payable under the policy.*
- (c) *The onus is on the applicant to prove (on the balance of probabilities) that the actual increased demand created by the development is*

different from that assessed by applying the non residential unit of demand in paragraph 2.2.1. Actual increased demand means the demand created by the most intensive non residential use(s) likely to become established in the development within 10 years from the date of application.

- (d) The Council may determine an application made under this part at its discretion. In doing so the Council must take into account everything presented to it by way of the written application, and may take into account any other matter(s) it considers relevant.*
- (e) Any application must be accompanied by the fee payable to recover the Council's actual and reasonable costs of determining the application.*

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Assessment guidelines

2.5.6.3 Without limiting the Council's discretion, when assessing an application for a self-assessment, or a special assessment initiated by Council, the Council will be guided by the following:

<i>Infrastructure Type</i>	<i>Usage Measure per EHU</i>
<i>Water supply</i>	<i>780 litres per day including storage</i>
<i>Wastewater</i>	<i>390 litres per day</i>
<i>Stormwater</i>	<i>Runoff co-efficient not exceeding 0.7</i>
<i>Traffic and roading</i>	<i>10 private vehicle trips per day</i>
<i>Reserves</i>	<i>600m² of allotment area</i>

6. The net result of these provisions is as follows:

- The Council is empowered by the policy to depart from the methodology which uses the non residential unit of demand as the basis for calculating development contributions.
- The onus is on the applicant to prove, on the balance of probabilities, that the actual increased demand created by the development is different from that assessed by applying the non residential unit of demand methodology.

- The Council may determine an application for self-assessment at its discretion.
- The Council must take into account everything presented to it by way of the written application, and may also take into account any other matters it considers relevant.
- Paragraph 2.5.6.3 sets out the guidelines for the assessment for an application for self assessment and these guidelines are expressly stated as being guidelines which do not limit the Council's discretion.

Legislative Basis

7. The legislative basis upon which the Council may require development contributions in appropriate cases is set out in Sub-Part 5 of Part 8 of the Act.
8. Section 198 of the Act provides as follows:

"198 Power to require contribution for developments

[(1) A territorial authority may require a development contribution to be made to the territorial authority [[when]]-

(a) a resource consent is granted under the Resource Management Act 1991 for a development within its district:

(b) a building consent is granted under the Building Act 2004 for building work situated in its district (whether by the territorial authority or a building consent [[authority:]])

(c) an authorization for a service connection is granted.]

(2) A territorial authority may only require a development contribution as provided for in a policy adopted under section 102(4)(d) that is consistent with section 201.

[(3) A requirement for a development contribution under subsection (1)(a) or (1)(b) is not-

(a) a condition of a resource consent that gives rise to any right of objection or appeal; or

(b) as the case may be, a matter that gives rise to any right to apply to the chief executive for a determination under the Building Act 2004.]

[(4) Subsection (3) is for the avoidance of doubt.]

[(5) In this section-

***building consent authority** means a person whose name is entered in the register referred to in section 273(1)(a) of the Building Act 2004"*

9. Section 198(1) does not use the word "must" it uses the word "may".

10. Accordingly it is submitted that in appropriate cases supported by evidence the Council may elect not to require a development contribution at all so long as that election is made on an equitable basis.
11. For the same reasons it is submitted that a Council may require a development contribution which is less than the development contribution calculated using its standard methodology in appropriate circumstances. Indeed paragraph 2.5.5 and 2.5.6.1 of the Council's own Development Contribution Policy contemplate precisely that possibility.
12. Schedule 13 to the Act sets out the methodology for calculating development contributions. Schedule 13 provides as follows:

"1. Methodology for relating cost of community facilities to units of demand

In order to calculate the maximum development contribution in respect of a community facility or an activity or group activities for which a separate development contribution is to be required, a territorial authority must first -

- (a) *identify the total cost of the capital expenditure that the local authority expects to incur in respect of the community facility, or activity or group of activities, to meet increased demand resulting from growth within the district, or part of the district, as the case may be, as set out in the long-term council community plan in accordance with section 106(2)(a); and*
 - (b) *identify the share of that expenditure attributable to each unit of demand, using the units of demand for the community facility or for separate activities or groups of activities, as the case may be, by which the impact of growth has been assessed."*
13. The development contribution calculated by the methodology set out in Schedule 13 is the "maximum" development contribution. By implication this means that in appropriate cases and once again based on the evidence, a development contribution which is less than the "maximum" may be appropriate. In other words the regime contemplates the application of judgment based on the facts of any particular case and reflecting consistency and equity and not the rote application of an arithmetic formula.

Case Law

14. The matter of development contributions under the Act has received the attention of the Courts on a number of occasions.
15. The leading case is the case of *Neil Construction Limited & Ors v North Shore City Council* [2008] NZRMA 275, a judgment of Potter J.
16. The decision of the Court in the Neil Construction case runs into 60 pages but its conclusions are succinctly summarised on page 334 of the judgment at paragraphs [289] to [292] inclusive.

17. In those paragraphs under the heading "*Summary of conclusions*" Potter J said as follows:

[289] The council has made an error of law in failing to ensure that its development contribution policy complies with the requirements of the Act to assess development contributions against a "development" (as defined in s197) that generates a demand for reserves, network infrastructure and community infrastructure.

[290] The council has made an error of law in adopting a narrow concept of economic efficiency in the causative approach it has applied to the assessment of development contributions, and excluding appropriate consideration of the distribution of benefits and equitable and proportionate allocation.

[291] It follows that the council has made an error of law in failing appropriately to explain in its development contributions policy, as required by s106(2)(c) why in terms of s101(3) it has determined to use development contributions as a funding source.

[292] The council has not erred in law in the reserves standard and the rate of contributions it has adopted in relation to the reserves contribution under the development contributions policy."

18. In the body of the judgment Potter J set out a line of enquiry that a council should go through when considering whether a development contribution may be required. At paragraph [113], page 301 Potter J said as follows:

"[113] I consider the relevant provisions of the Act interrelate to require of councils the following stepped process and line of inquiry when considering whether a development contribution or development contributions may be required.

Step 1 Is the subdivision or development a "development", that is does it generate a demand for reserves or infrastructure? (s197 definition) (s200).

Step 2 Does the development (either alone or cumulatively with another development) require new or additional assets or assets of increased capacity to provide for reserves or infrastructure which will cause the council to incur capital expenditure (s199(1)) or has already caused the council to incur capital expenditure for the development (s199(2)).

Step 3 Is there an alternative source of funding?"

19. Potter J then set out a number of scenarios to illustrate the application of the statutory requirements before development contributions may be required.

20. Potter J summarised the position at paragraph [115], page 302 as follows:

"[115] These examples illustrate application of the statutory requirements that before development contributions may be required there must be first a "development" (as defined) and secondly a causal connection between the development and its effect in requiring additional assets or increased capacity. A development which either alone or cumulatively with another development, does not have the effect of requiring additional assets or increased capacity may not be made subject to development contributions."

21. In the course of her judgment Potter J also considered the "causation" or "exacerbator pays approach" in relation to development contributions. The discussion of this approach covers a number of Potter J's conclusion is succinctly stated at paragraph [220], page 321 as follows:

"[220] Resolution of the economic efficiency: causation versus benefits debate is reached by a proper interpretation and application of the relevant provisions in the Act. The causative approach adopted by the council has excluded appropriate consideration of and allowance for distribution of benefits between the community as a whole, is inconsistent with the council's obligations under the Act. The council has accordingly, erred in law."

22. In the result the Council must do as follows:

- It must consider each development on the facts of each particular case and not by the application of a rote formula.
- It must consider whether or not the development will require additional infrastructure asset or increased capacity.
- It must give appropriate consideration to and allow for the distribution of benefits between the community as a whole.

Other Matters

23. Paragraph 2.5.6.1(d) of the Council's Development Contribution Policy provides as follows:

"(b) The Council may determine an application made under this part at its discretion. In doing so the Council must take into account everything presented to it by way of the written application, and may take into account any other matter(s) it considers relevant."

24. In my submission the "other matters" which are relevant to this application are as follows:

- The Council's Built Heritage Policy dated June 2005.
- The Council's Environmental Strategy dated July 2006.
- The Council's Climate Change Action Plan dated December 2007.

Built Heritage Policy

25. The goals of the Council's Built Heritage Policy are stated as follows:

- **Recognition** - Wellington's built heritage is recognized as contributing to our understanding of our cultural diversity and awareness of sense of place.
- **Protection, conservation and use** - Wellington's unique character is enhanced by the protection, conservation and use of its built heritage.
- **Sustainable economic use** - Wellington's built heritage is acknowledged as contributing to a vibrant economy."

26. The development the subject of this application incorporates and restores a heritage building listed in the District Plan at a considerable cost to the project overall. The outcome is entirely consistent with the goals of the Council's Built Heritage Policy.

Environmental Strategy

27. The Council's Environmental Strategy sets out the long term environmental outcomes to which the Council aspires. Outcome 4.5 reads as follows:

"4.5 Wellington will reduce its environmental impact by making efficient use of energy, water, land and other resource; shifting towards renewable energy resources; conserving resources; and minimising waste."

28. On page 9 of its Environmental Strategy document, the Council identifies four priorities for its contribution to the City's environmental well-being for the period 2006-2009.

29. Two of those priorities are as follows:

- "• We will increase our promotion of water and energy efficiency and conservation, energy security, energy sources, and we will take a more active leadership role in these areas.*
- We will strengthen our partnerships with stakeholders to increase environmental awareness, community participation, and the achievement of environmental goals."*

30. On page 10 of its Environmental Strategy document the Council sets out the pathway to the achievement of these priorities.

31. One element in that pathway reads as follows:

"Over the next three years, we're planning several new initiatives to protect and enhance Wellington's environment. We'll be taking steps to encourage water conservation and to promote energy efficiency, both within our own operations and throughout the City. This will include development of sustainable building guidelines aimed at encouraging greater energy efficiency and other sustainable features in building projects."

32. The proposed development is totally congruent with the Council's Environmental Strategy and voluntarily achieves the outcomes to which the Council's Environmental Strategy aspires.

Climate Change Action Plan

33. The Council's Climate Change Action Plan starts with the following passage:

*"The Council understands the risks that climate change presents to our economy, society and environment. These risks are shared on both a micro-community scale and a macro-global scale. The risks can only be mitigated through urgent and sustained action to **reduce greenhouse gas emissions** ('emissions') and safeguard the community by **adapting to changes** to the environment and economy."*

34. Under the heading "4. **Weaknesses**" the Council lists the challenges that the Council will be addressing through the Action Plan and by way of other Council policies. One of the key weaknesses identified is the following:

- Poorly designed office buildings and commercial buildings lead to energy consumption wastage through heating, water heating, lighting, airconditioning and ventilation.

35. The principles the Council has developed to guide its actions on climate change are set out in section 6 of the Climate Change Action Plan. Of particular relevance to this application are the following:

"5. Council decisions will consider economic, social, environmental and cultural imperatives to taking action on climate change.

10. The Council will show leadership in partnering and engaging with businesses, residents and visitors to take action on climate change."

36. Under the heading "**Corporate Action Plan**" the Climate Change Action Plan identifies the following key action as one of the six key focus areas:

"Action: Developing Sustainable Building Design Guides

Sustainable buildings provide significant environmental benefits as well as operational savings and increased productivity for occupants. The Council will maximize environmental and financial benefits of sustainable building by developing mandatory Sustainable Building Design Guidelines by July 2008 to use during the planning process for:

- *new buildings and facilities*
- *upgrades and retrofits*
- *renewals.*

Council facilities that fit under these categories must either meet specific design rating tools (e.g. Green Star rating tool for office buildings) or performance guidelines for specific building types. The purpose of the guidelines is to optimize energy efficient design and reduce the total cost of ownership of Council assets. This means that Council will identify cost-effective design features that will reduce energy consumption, water consumption and ongoing maintenance requirements. Research shows that a 50% reduction in energy is achievable for office buildings with reasonable additional capital costs. The design focus will be on maximizing natural lighting, efficient lighting and heating, energy efficient technology, renewable energy, natural ventilation, recycling rain water and efficient water heating in the most cost-effective manner."

37. Note the reference to the Green Star rating tool for office buildings.

38. Once again the development the subject of this application responds in a totally congruent way to the Council's Climate Change Action Plan and will achieve the outcome contemplated by that plan voluntarily and without compulsion in the best interests of the City.

Collective Response

39. It is my submission that the positive responses of this development project to the Council's Built Heritage Policy, Environmental Strategy and Climate Change Action Plan must be factored into the assessment of the development contribution payable in respect of the project and given the credit that they clearly deserve.

Officers Report

40. The Officer's Report treats this application as an application for a remission of development contributions under paragraph 2.6 of the Council's Development Contributions Policy.
41. In point of fact, the application is an application for self assessment under paragraph 2.5.6.1.
42. The tests are quite different in each case. In the case of an application for self assessment the applicant is simply required to prove on the balance of probabilities that the actual increased demand created by the development is different from that assessed by applying the non residential unit of demand in paragraph 2.2.1. In a remission application under paragraph 2.6 the Council requires the establishment of exceptional circumstances.
43. As was the case in the "purported decision" of the Officers, the Officer's report to this Committee has completely failed to address the facts of the development project and the analysis contained in the applicant's self-assessment application. The Officer's report persists in applying a rote arithmetic approach to the development project, rather than the approach clearly contemplated by paragraph 2.5.6.1 of the Council's Development Contributions Policy.
44. The first sentence in the second paragraph in section 5.1 of the Officer's report states that:

"The remission application is largely based on the view that the development will be a "green building" and as such will have a reduced level of demand on the Council's infrastructure."

45. It does not go on to make the statement that:

"The (Council's) Policy does not grant remissions currently for buildings classified as "green" and that developments must design for the use of infrastructure under its standardized approach."

which appeared in paragraph 5 of the Officers' "purported decision". This is somewhat ironic given the fact that the Council's own Climate Change Action Plan identifies the Green Star rating tool as a mechanism for developing sustainable building design.

46. Paragraph 4 of the Supporting Information sheet attached to and forming part of the Officer's Report reads as follows:

"4) Decision-Making

Whilst the monetary figure involved with this decision is substantial, this is not a significant decision. The Policy has no scope for considering the applicant's departures from the standardised GFA and EHU measures that the Policy is based on. Furthermore, the applicant's proposed measures

and justifications and their new development contributions fee calculation, which they believe is reasonable and which more accurately reflects the actual demand Willis Central will have on services and infrastructure, should be rejected. Lastly, the recommendation is that there should be no reduction in the amounts charged for those components of the development contributions fee that the applicant is agreeable to paying, with the exception of stormwater

47. This is an extraordinary assertion and is totally inconsistent with the requirements of the Act; the findings and judgment of Potter J in the *Neil Construction* case; and the Council's own Development Contributions Policy. If the assertion was correct it would render paragraph 2.5.6.1 of the Council's Development Policy of no effect.

48. Paragraph 7 on the Supporting Information Sheet reads as follows:

"7) Consistency with existing policy

This report is consistent with the Development Contributions Policy and with all other existing policies of the Council."

49. Once again this statement is clearly incorrect as is demonstrated by the foregoing analysis of the Council's Built Heritage Policy, Environmental Strategy, and Climate Change Action Plan.

50. Accordingly it is my submission that the Officer's recommendation number 2 should not be adopted.

Conclusion

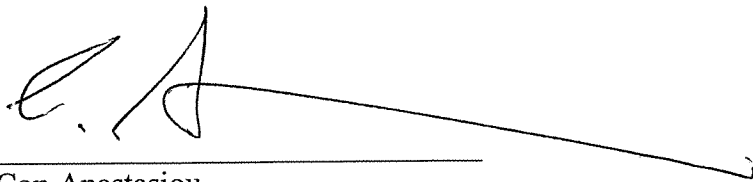
51. It is my submission that from a procedural point of view this application is an application for self-assessment.

52. It is my further submission that in this context the development contribution calculated in accordance with the applicant's self-assessment is the correct development contribution applicable in this case and accords with the intent of the Act and the decision of Potter J in *Neil Construction*.

53. In my submission the Officer's report and recommendations have not properly or adequately addressed the applicant's self-assessment and their conclusions and recommendations are consistent neither with the Act nor with the decision of Potter J in *Neil Construction*.

54. In the event however that this Committee chooses to address the matter as an application for remission under paragraph 2.6 of the Development Contributions Policy then it is my submission that exceptional circumstances have clearly been made out and that the Council should in its discretion grant a remission of part of the development contributions calculated using the Council's standard methodology. The level of remission should be such that the development contribution payable by the applicant should be the sum calculated by the applicant's self-assessment.

DATED at Wellington this 17th day of March 2010

A handwritten signature in black ink, appearing to be 'C. Anastasiou', written over a horizontal line. The signature is stylized and extends to the right.

Con Anastasiou
Counsel for the Applicant