

Development
Contributions SC
1215/52/05/11m
Reference 012/10DC(A)

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.
2. This matter first came before the Development Contributions Subcommittee on 17 March 2010.
3. A number of issues arose in the course of that hearing in respect of which the Development Contributions Subcommittee requested further information. The hearing was adjourned to enable such further information to be compiled and presented.
4. After the adjournment of the initial hearing it was our expectation that Council officers would consult with the applicant and with the applicant's technical advisors in preparation of the additional information to be presented to the Development Contributions Subcommittee. This did not happen.
5. Instead a Report Number 2 was prepared by the officers and this was not made available to the applicant until Monday of this week.

Officers Report 2

6. The officers second report still treats the application as a remission application pursuant to clause 2.6 of the Council Development Contributions Policy 2007.
7. As explained at the adjourned hearing, the applicant has an outstanding application for self assessment which has not been determined by the Development Contributions Subcommittee. That application must first be determined by this Committee before it considers a remission application.
8. The "purported decision" of Council officers in respect of the applicant's self assessment application does not constitute a decision of this Subcommittee or of the Council.
9. That aside the Officers Report 2 contains a number of errors of fact and principle which render its conclusions unsustainable.
10. These errors of fact and principle will be traversed in the evidence of Mark Ashby to follow.

Application for Self-Assessment

11. To recap Boulcott Land Limited has applied for self-assessment of the development contribution payable in respect of the project.
12. That application is contained in a detailed document dated 11 August 2009, a copy of which was submitted to this Committee at the adjourned hearing.
13. 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.
14. The provisions in that part of the Council's Development Contributions Policy which are relevant to this application are set out in paragraph 2.5 of that policy. The provisions of paragraph 2.5 of the Council's Development Contributions Policy were set out in detail in my initial submissions.
15. It reiterate that 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

16. In my earlier submission to this Committee I set out the legislative basis upon which the Council may require development contributions in appropriate as set out in Sub-Part 5 of Part 8 of the Act and in particular section 198 of the Act.
17. I emphasised that section 198(1) does not use the word "must" it uses the word "may".
18. Accordingly I 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.
19. For the same reasons I submitted that the Council may require a development contribution which is less than the development contribution calculated using its standard methodology in appropriate circumstances. Indeed paragraphs 2.5.5 and 2.5.6.1 of the Council's own Development Contribution Policy contemplate precisely that prospect.

20. Schedule 13 to the Act sets out the methodology for calculating development contributions. 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

21. At the earlier hearing I advised the Committee that the matter of development contributions under the Act had received the attention of the Courts on a number of occasions and traversed in some detail the leading case of *Neil Construction Limited & Ors v North Shore City Council* [2008] NZRMA 275, a judgment of Potter J.
22. In that case Potter J determined that the Council had made a number of errors at law in both the formulation of its development contributions policy and in the application of that policy.
23. 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.
24. Potter J then set out a number of scenarios to illustrate the application of the statutory requirements before development contributions may be required.
25. Potter J summarised the position at paragraph [115] of her judgment, 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."

26. In the course of her judgment Potter J also considered the "causation" or "exacerbator pays approach" in relation to development contributions. Potter J's conclusion in respect of this matter is succinctly set out in paragraph [220], page 321 of her judgment 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."

27. 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 assets or increased capacity.
 - It must give appropriate consideration to and allow for the distribution of benefits between the community as a whole.
28. Paragraph 4.6 of the officers Report 2 sets out the officers analysis of the Neil Construction case and concludes that the Council's Development Contributions Policy is in accordance with the Act and in accordance with the judgment in Neil Construction.
29. With respect even assuming that to be the case, the Officers report does not deal with the question of whether or not the policy has been properly applied in the context of the officers "purported determination" of the applicant's self assessment application and in the formulation of their reports to this Committee.
30. It is my submission that both the officers "purported determination" of the applicant's self assessment application and the officers reports and recommendations to this Committee have failed to properly apply the Council's Development Contributions Policy in the manner contemplated by Potter J.

Other Matters

31. In my earlier submission I directed the Committee's attention to paragraph 2.5.6.1(d) of the Council's Development Contribution Policy which 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."*
32. I submitted that 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;
- and traversed the relevant parts of these documents in detail.
33. In particular I noted the following:
- 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.
 - 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.
 - 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. The Action Plan specifically

refers to the Green Star rating tool as an appropriate rating tool for office buildings.

34. Accordingly I submitted 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.
35. At the end of paragraph 4.4 of the officers Report Number 2, under the heading "*Green Buildings*", the officers assert that the Council's Development Contributions Policy does not specifically provide for "green buildings" and record advice given to the Committee by officers on 5 November 2008 as follows:

"There are a range of potential financial incentives [for environmentally sustainable design initiatives such as green buildings], of which development contribution reductions are only one form. Others include grants, rates rebates, low interest loans or reduced fees. There is also a range of potential regulatory concessions such as planning concessions."

36. The report then asserts that the Committee having considered the issue agreed that:

"The DC Policy is not the most appropriate vehicle to advance environmentally sustainable design, and that incentives to encourage environmentally sustainable design be excluded from the scope of the current [2009] review."


37. With respect the Development Contributions Policy does not exclude the recognition of "green buildings" and their environmental and infrastructure benefits at all. On the contrary the Council is specifically empowered to take into account any other matters it considers relevant. Clearly the green buildings status of a particular development and the consequent mitigation of the burden on infrastructure are such matters.

Conclusion

38. The Officer's Report Number 2 continues to treat the application as an application for a remission of development contributions under paragraph 2.6 of the Council's Development Contributions Policy.
39. In point of fact, the application is an application for self assessment under paragraph 2.5.6.1.
40. The tests are quite different in each case.
41. 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.
42. In a remission application under paragraph 2.6 the Council requires the establishment of exceptional circumstances.
43. If the Committee treats this application as an application for self assessment then 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*.

44. In my submission the Officer's reports 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*.
45. If 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 been clearly made out.
46. The exceptional circumstances are as follows:
- The development achieves a high green star rating and significantly mitigates the burden imposed on Council infrastructure.
 - The proposed development is consistent with the Council's Built Heritage Policy dated June 2005.
 - The proposed development is consistent with the Council's Environmental Strategy dated July 2006.
 - The proposed development is consistent with the Council's Climate Change Action Plan dated December 2007.
 - The proposed development achieves a height of 40 metres AMSL in deference to environmental and infrastructure considerations as opposed to the 95 metres AMSL permitted for the site.
 - The proposed development has retained a substantial corporate resident in the shape of Telecom in Wellington whose departure would have had a significant adverse effect on Wellington's economy.
47. Viewed collectively, all of these elements qualify as exceptional circumstances justifying a remission of the development contribution in this case.
48. If this Committee chooses to address the matter as an application for remission then 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 21st day of April 2010



Con Anastasiou
Counsel for the Applicant