
REPORT 1
(1215/52/05/IM)

DEVELOPMENT CONTRIBUTION REMISSION REPORT FOR 16 JAMAICA DRIVE

1. Purpose of Report

The purpose of this report is to report on the remission application received from Building Solutions Limited under the Development Contributions Policy.

2. Executive Summary

The Development Contributions Policy (Policy) provides that where a remission application is made Council may remit development contributions in exceptional circumstances.

Building Solutions has made an application for remission in respect of the development contributions assessed of \$254,066.49 on the 40 unit business park at 16 Jamaica Drive.

Council officers consider that there are grounds to consider the application under the remission provisions in the Policy. It is recommended that the remission is granted in part to recognise the competing arguments regarding the application of the Policy, the circumstances leading up to the adoption of the Policy, and the nature of the application made by Building Solutions.

3. Recommendations

It is recommended that the Subcommittee:

1. *Receive the information.*
2. *Receive the remission application.*
3. *Agree to grant the application in part, and remit the amount payable to \$127,033.24, being 50% of the amount assessed (Note that financial contributions are not payable).*
4. *Note that the Policy's remission provision provides that any decision of the Council will not create a precedent or expectations.*

4. Background

The Policy

The Council adopted the Policy on 28 June 2005. The Policy provided that any application for building consent, resource consent or service connection lodged on or after 1 July 2005, will be required to pay a contribution under the Policy (see clause 7.2.1 of the Policy). The Sub committee will recall that non-residential development is assessed on the basis of new gross floor area created by any development. Under the Policy as adopted to take effect on 1 July 2005, gross floor area is calculated on resource consents and building consents for buildings and structures.

The Policy as adopted included a transitional provision, to deal with scenarios where a consent was sought after 1 July 2005 to give effect to a proposal for which a resource consent had been sought prior to the policy coming into effect (see clause 7.2.3 of the Policy).

The relevant part of the Policy is set out below:

7.2 *Effective Date*

7.2.1 Any resource consent, building consent or application for service connection received by the Council on or after 1 July 2005, will be required to pay the development contribution payable under this policy except that if an application lodged prior to 1 July 2005 is rejected under s88(3) of the Resource Management 1991 or s48(1) of the Building Act 2004, it is deemed not to have been received by the Council prior to 1 July 2005.

7.2.2 If an application lodged prior to 1 July 2005 is amended and the amendment results in an increase in the total EHU assessment from that which would have been applicable (had this policy been applied to the development) then this policy will apply to the increase in EHU's.

7.2.3 Where the Council has received an application for resource consent prior to 1 July 2005, development contributions will not be payable on any subsequent resource consent, building consent, or service connection application for that same development where:

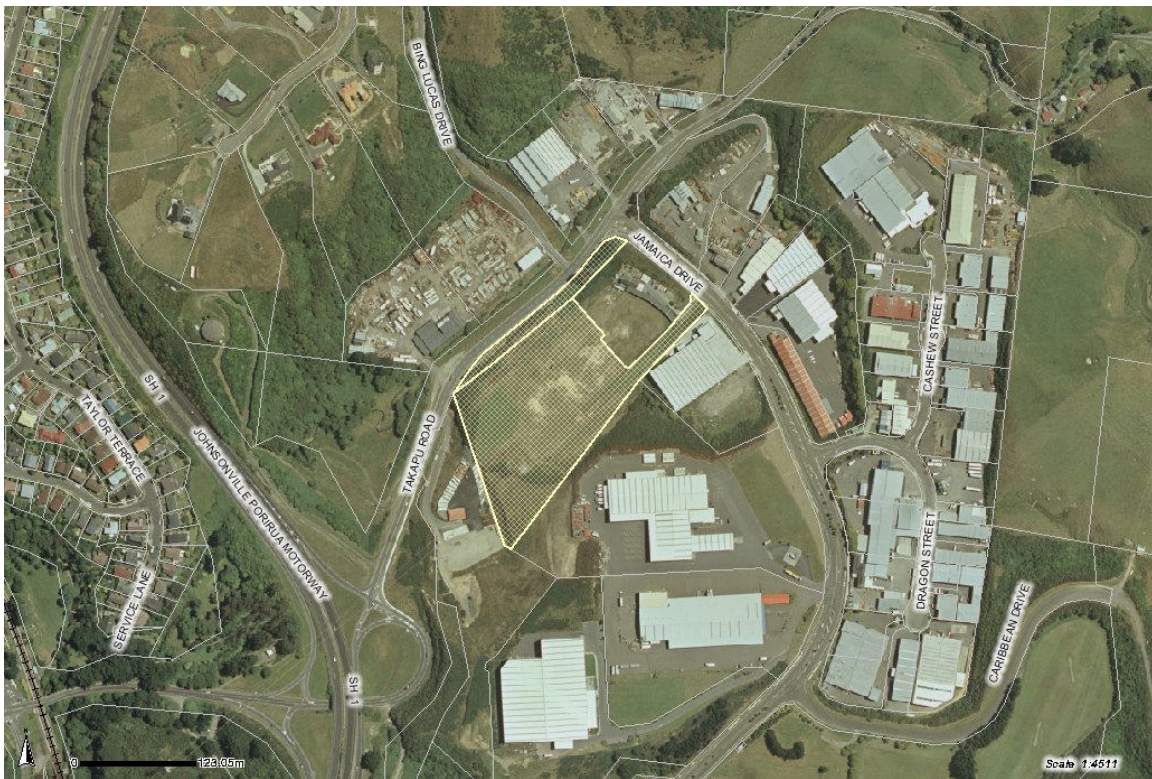
- *No financial contribution was required when the application lodged prior to 1 July 2005, was granted; or where*
- *A condition of consent has been imposed on the development requiring a financial contribution to be paid, and the condition has been met (ie the financial contribution has been paid in full to the Council in accordance with the conditions of consent if payment is due under the condition); and*
- *The subsequent application for resource consent, building consent or service connection is received by the Council within 5 years of the date that the resource consent received prior to 1 July 2005 was granted, or the resource consent received prior to 1 July 2005 has been given effect to;*

provided that, if there is an increase in EHU's, development contributions will be payable in an equivalent manner as provided for in paragraph 7.2.2 above.

As was anticipated at the time of development of the Policy, the 'commencement date' of the policy meant that a large number of resource consents were sought in the period immediately leading up to 1 July 2005.

Building Solutions development

Building Solutions is developing the site at 16 Jamaica Drive, Grenada into a business park. The proposal involves a 44 unit business park that is constructed in phases.



The site is zoned Suburban Centre. Under the Suburban Centre rules in the District Plan the business park buildings and structures are a permitted activity. The signs proposed for the development required a resource consent, which was granted by Council on 12 September 2005.

Development Contributions assessment

On 20 September 2005 an application for building consent was lodged for stage 1 of the business park development. When officers advised the developer that the proposal had been assessed for development contributions, Building Solutions responded that the Policy did not apply to the building consent (or future stages of the business park) as an application for resource consent was lodged for the business park development before 1

July 2005. The application for resource consent (SR 131375) lodged by Building Solutions on 30 June 2005 is attached as appendix A.

Council officers have reviewed the resource consent lodged against clause 7.2 above, and following receipt of legal advice concluded that the transitional provision did not apply in this situation, therefore clause 7.1 of the Policy applied. The basis for this conclusion was:

- The resource consent, which was received prior to 1 July 2005, was not for the same development as is now subject to the building consent (ie the buildings in stage 1 of the development).
- The resource consent was only for signs, being the element of the activity that did not comply with the permitted activity conditions. No resource consent was required for the business park buildings and structures as they are a permitted activity under the District Plan. The fact that an applicant includes information in a resource consent application does not change the substance of the application.
- The building consent sought and assessed for development contributions (i.e. stage 1 of the business park) is for the buildings and structures required for the business park and therefore are not the same development as is the subject of the resource consent.

Council officers advised that it did not have the ability to waive or negotiate the amount payable. The only basis to depart from the Policy is through the remission process.

Building Solutions do not seek to challenge the demand created by the development, and the appropriateness of the development contribution sums in the Policy, but rather the application of the Policy to the development.

Building Solutions advised that it was of the understanding that it would not need to pay development contributions on the proposal if it lodged an application for resource consent for it prior to 1 July 2005. It further advised that it had accordingly instructed its advisors to lodge such an application. It has confirmed that it accepts the obligation to pay the financial contribution payable for the development, which is \$28,884.00 (This is made up of traffic impact fees only). During discussions with Council officers Building Solutions have sought that Council recognise that it had proceeded in good faith and that its actions were based on 'well publicised' information on when the Policy was to take effect. Building Solutions also (on a without prejudice basis) offered to make a contribution over and above the financial contributions payable in an effort to reach a compromise.

Officers appreciate that Building Solutions have been caught in the transitional period of the Policy, which combined with the operation of the Suburban Centre rules, has resulted in an outcome that was not envisaged by the transitional provisions when formulated. Had Building Solutions either required a resource consent for the buildings (if the proposal had breached the District Plan) or applied for a certificate of compliance no development contributions would have been payable on the subsequent building consent(s) as the transitional provision would then apply. Equally, had Building Solutions been undertaking the development in the Central Area, a resource consent would have been required for the buildings and again the transitional provision would apply.

However officers do not have the discretion in the way it applies clause 7.2, or the discretion to waive the requirement to pay development contributions or reach a negotiated or compromise on the amount payable. Such decisions are to be made through the process established by the Council (i.e. by the Development Contributions Sub committee).

Building Solutions was therefore advised that the only way to advance its position that development contributions do not apply is to judicially review the decision that the Policy applies, or to make an application for remission. The later was favoured by officers and Building Solutions as the least costly and time efficient way of advancing this issue.

Building Solutions has applied for a remission under the Policy. The remission application dated 26 June 2006 is attached as appendix B. In the interim, arrangements have been made to enable the code compliance certificates for the first stage of the development to proceed.

5 Discussion

5.1 Remission application

The provisions of the Policy relating to remissions are as follows:

8.1 Remission and postponement

8.1.1 The Council may remit or postpone payment of a development contribution at its complete discretion. The Council will only consider exercising its discretion in exceptional circumstances. Applications made under this part will be considered on their own merits and any previous decisions of the Council will not be regarded as creating precedent or expectations.

8.1.2 Remissions will only be granted by resolution of the Council (or a Committee or Subcommittee acting under delegated authority).

8.1.3 An application under 8.1 must be applied for before a development contribution payment is made to the Council. The Council will not allow remissions retrospectively.

The remission application, by implication, seeks a remission from the requirement to pay development contributions as a whole. The reasons supporting the remission application have been put forward as follows:

- a) Resource consent was applied for due to the proposal not being a permitted activity. District Plan rule 7.1.1 “permitted” the business park if it complied with the signage standard. The proposed signage exceeded both permitted and discretionary standard therefore, by default the park came under rule 7.5: a non-complying activity.
- b) The resource consent application was lodged before the 1 July 2005. This was acknowledged by the Council in a letter referring to the application, “*In which you seek approval for a new business park*”.
- c) The application made it clear in the written text and on the plans that the proposal was for a 40 unit business park. The first page of the application stated, “*Our*

proposal is to construct a business park comprising of 40 units varying in area between 100m² and 1,023m² (see site plan)."

- d) *"Council was assessing the total visual effect, not just the signage."* An information request for elevations was sought to confirm the relationship between the signs and the business park. The decision report then mentioned that the signs associated to the business park were of a scale and use that were consistent with the activity.
- e) The Policy transition provision applies. There is no material difference between the resource consent (SR 131375) and the staged building consent (SR135346). Therefore, the building consents should not be assessed under the Policy as the resource consent was received before the 1 July 2005.
- f) Council officers had advised developers during public consultation in 2005 that if a consent application had been received before the 1 July 2005 any subsequent consent for that development would not pay development contributions.
- g) The Council is not entitled to "un-bundle" the proposal by separating the minor non-compliance aspects from the whole development.
- h) Building Solutions is willing to meet obligations under section 3.4 of the District Plan. (These are the financial contribution provisions known as development impact fees 'DIF').

Officers have considered the grounds for remission, and other issues raised as follows:

5.2 The scope of the application

As set out above, Building Solutions have advanced an argument that clause 7.2, is met as the application for resource consent was in fact an application for the business park, as the application as a whole was a non-complying activity.

Phillips Fox have reviewed this argument and the legal advice in support, and have advised that the application should be considered in light of how development contributions are assessed under the Policy (ie on gross floor area of new buildings) and what required resource consent, not what was included in the resource consent. The buildings and structures are a permitted activity and any proposal to "bundle" them with the activity is not consistent with the relevant caselaw on bundling the Council's District Plan, nor the applicants own resource consent application.

However it is noted that the drafting of clause 7.2 of the Policy, combined with the Suburban Centre provisions of the District Plan do raise an alternate interpretation. (ie that the resource consent for the 'activity' is sufficient to meet the requirements of 'same development'). If this was considered by a Court on judicial review, Building Solutions case would be that when a Policy can be interpreted with different conclusions (ie one being that development contributions are payable and the other being they are not payable), the more favourable view ought to prevail.

5.3 Council acceptance of the application as an application for the business park

Building Solutions have placed reliance on the fact that the application was formally acknowledged by Council as a new business park.

Whenever a resource consent application is received the Council's standard procedure is to acknowledge its receipt. This acknowledgement is sent without any substantive analysis of the application against the District Plan. Building Solutions application was acknowledged in the same terms as it was sought for (ie a consent application for a new business park).

5.4 Reliance on Council officer advice

Building Solutions have raised the point that it was acting in accordance with Council officer advice that development contributions would not be payable if a resource consent application was received before the 1 July 2005. While Building Solutions has been unable to name the officer spoken to, it is acknowledged that it is likely that such a discussion was held with Council officers at the time. Such a discussion is likely to have been in 'general terms' without specific knowledge of the proposal, in particular that a resource consent was not required for the business park buildings under the Suburban Centre rules.

5.5 Reliance on the Policy as drafted - and subject to consultation

Under the draft Policy an activity that was permitted under the district plan would be required to pay development contributions under the Policy, on any building consent application lodged after the operative date of the Policy. Officers therefore do not believe that Building Solutions, which made a submission (with others) on the Policy, was misled by the draft Policy. However, it appears that this aspect of the assessment regime in the draft Policy was not picked up by parties participating in the consultation process. The parties who were involved in the process were focused on large scale Central City or Residential area developments that required resource consent.

It is also noted that the assessment regime in the Policy was changed significantly from that in the draft Policy. This meant that there needed to be a transitional provision, which was inserted, by way of amendment, in the late stages of the Council's decision on the Policy. As a result Building Solutions would not have been able to check its application against the final form of the Policy, and in particular the transitional provision.

5.6 Overall consideration

The Policy requires that remissions are only granted in exceptional circumstances. There is no definition of what might comprise such circumstances.

There are a number of factors that would support the Sub committee reaching a conclusion that this application comprises an exceptional circumstance:

- There are alternate interpretations as to whether the transitional provisions of the Policy applies. A definitive answer on the correct interpretation would be costly and would not serve any useful purpose for the ongoing application of the Policy as officers are satisfied that this is the only application of its type, and the transitional regime has passed.

- The applicant took all the steps that would need to be taken for buildings requiring a resource consent, but because of the permissive rules in the District Plan (for Suburban Centres) the transitional provision does not on the face apply.
- Had the buildings and structures required a resource consent the transitional provision would apply.
- Had the applicant received advice (either from its own advisors or Council officers) a certificate of compliance could have been sought prior to 1 July 2005, which would have meant that the transitional provision would have applied.
- As part of the assessment of this application officers have closely examined whether there are other applications in a similar category and have confirmed that there are not.

If the Sub committee was to reach a view that the circumstances are exceptional, it is open to the Sub committee to remit the application in full or in part.

The factors relevant to this decision are the same as those set out above, and in addition it is noted that:

- Building Solutions took its own advice on the Policy during the consultation period and had advisors lodge the resource consent application.
- If Building Solutions were to seek that this issue is determined by the High Court, such proceedings would be costly (both in terms of legal costs and in terms of officer time) and as noted above would not assist with the ongoing application of the Policy.

It is recommended that the development contributions payable is remitted to 50% to recognise the above factors. This is believed to be a reasonable approach to the remission application given the competing arguments on the application of the Policy and the circumstances set out above leading up to the Policy being adopted.

6. Conclusion

The Development Contributions Sub-committee must decide, taking into account the factors in this paper, whether to grant the remission sought.

Contact Officer: *Phil Stroud, Development Contribution Officer*

Supporting Information

1) Strategic Fit / Strategic Outcome

The Development Contributions Policy supports Council's infrastructure-related activities, by ensuring those responsible for increased demand through growth contribute to the cost of services.

2) LTCCP/Annual Plan reference and long term financial impact

The Sub committee decision has implications for the LTCCP and financial impacts where the cost of the growth related portion of infrastructure development is paid for by those generating the additional demand.

3) Treaty of Waitangi considerations

This report has no direct impact on iwi.

4) Decision-Making

This is not a significant decision.

5) Consultation

a) General Consultation

As part of the remission process developed for Development Contributions the applicant received a copy of this report for their information.

b) Consultation with Maori

This report has no direct impact on iwi so consultation was not conducted.

6) Legal Implications

Council's lawyers have been consulted during the development of this report.

7) Consistency with existing policy

These are no inconsistencies with other existing WCC policies.

Appendix A

Extracts from the resource consent application (SR 131375) dated 30 June 2005.

Appendix B

Copy of Richard Burrell's application for remission dated 26 June 2006.



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EMAIL firstname@building-solutions.co.nz

26 June 2006

Development Contribution Officer
Wellington City Council
PO Box 2199
Wellington

Attention: Phil Stroud

Dear Phil

Building Solutions Limited - Application for Remission under Development Contributions Policy

1. We refer to our previous correspondence about Development Contributions in relation to Grenada Business Park. In particular, we refer to your assessment of Development Contributions on the building consent application for Stage 1 of that development.
2. In accordance with Part 8 of the Development Contributions Policy we write to apply for a remission in respect of that assessment, and in respect of all subsequent stages of the Business Park development. We set out the reasons for remission below.

The Original Consent

3. We applied for Resource Consent for the Business Park in June 2005. That is because the Business Park included signage that exceeded both the permitted and discretionary activity standards for the Suburban Centre Zone. In particular, rule 7.1.1 of the Plan only "permitted" the Business Park activity if it complied with, amongst other things, the signage standard. As the park's signage exceeded both that standard, and the discretionary signage standard, the park was by default an activity to which rule 7.5 applied: a non-complying activity. Accordingly, resource consent for the Park (not just the signage) was sought:
 - The first page of the application stated that the application was for a business park activity, not simply for signage. It stated: "*Our proposal is to construct a business park comprising of 40 units varying in area between 100m² and 1,023m² (see site plan).*"

- The site plan that was appended to the application reinforced that position, as it depicted amongst other things, locations and dimensions of 40 units and associated car parking in relation to land contours and site boundaries.
 - Further, the application included a description of the function of the Business Park, the nature of the expected tenants, the parking and loading provisions, and the functions that the signs would need to perform in relation to the Park; all of which was to enable the Business Park, not just the signage, to be assessed.
 - The application further included architectural sketches of typical elevations and sections for the units, and plans for the units; none of which would have been necessary if only the signage were being assessed.
 - Council acknowledged that it received the application on 30 June 2005 (by letter dated 5 July 2005), and clearly understood that the application was for a Business Park, not simply signage, as the letter refers to the application, "*In which you seek approval for a new business park*".
 - Council made a further information request (19 August 2005) for a building elevation showing the location of sign C in relation to the building, "*to assess the visual effect of the sign in relation to the building itself and its context in the surrounding environment.*" This suggests Council was assessing the total visual effect, not just the signage.
 - The decision report went on to state (page 4) that, "*The proposed signs are associated with a large business park development and their sizes are considered to be consistent with the intended scale and use of this activity*" (sic), again indicating an understanding that the proposal involved the actual business park activity, not just signage as a business park 'precursor'. It stated that Sign C will not "*detract from the architecture of the complex*" (page 5) indicating consideration of the business park visual effects.
4. In summary, the original application received by Council on 31 June 2005 was for the Business Park, and Council's receipt of the application unambiguously indicated Council's understanding that the application was for a business park activity.

The Transitional Provisions of the Policy

5. As at the time of your assessment of development contributions, Council's policy was that no contributions would be assessed (or payable) in respect of a building consent application, if resource consent for the same development had been applied for prior to 1 July 2005 (clause 7.2.3, Development Contributions Policy).



6. As outlined above, a resource consent for the business park was required, and was applied for, prior to 1 July 2005. Any subsequent building consent applications relating to the same business park (ie for the purpose of implementing the resource consent) should therefore be exempt from contributions, under Council's transitional provisions.
7. Accordingly, we apply for a remission on your assessment, and understand that we will be provided an opportunity to address the subcommittee who will determine whether to grant a remission. We would seek to address the subcommittee on the various matters outlined above, and any other questions that arise in relation to the assessment of contributions for this development.

We look forward to hearing from you in due course.

Yours sincerely

Richard Burrell
Director