IN THE COURT OF APPEAL OF NEW ZEALAND

CA749/2014
[2016] NZCA 223

BETWEEN	BEAUMONT TRADING COMPANY LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing:	17 February 2016
Court:	Ellen France P, Cooper and Kós JJ
Counsel:	R E Bartlett QC and S S Masoud-Ansari for Appellant P M S McNamara and S M McAuley for Respondent
Judgment:	25 May 2016 at 2.30 pm

JUDGMENT OF THE COURT

A **The appeal is allowed. The decision of the respondent to levy an open space land acquisition contribution under the 2013 assessment is set aside.**

B **The respondent must pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.**

C **Costs in the High Court should be set by the High Court in light of this judgment.**

REASONS OF THE COURT

(Given by Ellen France P)

Introduction

[1] After obtaining the necessary land use and building consents in 2012, the Beaumont Trading Company Ltd (Beaumont) built the Quest on Beaumont Hotel. In 2013 Beaumont obtained a subdivision consent for unit titles for each of the hotel rooms. At that point, the Auckland Council decided to levy Beaumont with a development contribution for open space land acquisition in relation to the subdivision (the 2013 assessment). Beaumont unsuccessfully challenged the 2013 assessment in the High Court.[1] Beaumont appeals from that decision.

[2] The power to require contributions for developments is found in s 198 of the Local Government Act 2002 (the Act). Section 198(1) provides that a territorial authority may require a development contribution to be made when a resource consent is granted for a development.[2] A "development" is defined to include any subdivision that "generates a demand for reserves".[3] The principal issue on appeal is whether, when making the 2013 assessment, the Council was limited to considering the effects of the unit title subdivision or whether it could consider the demand for reserves generated by the hotel project in the round.

[3] We consider this issue after setting out the background, the statutory scheme and the Council's policy for development contributions.

Background

[4] There is no dispute as to the factual events. Our description of the chronology largely adopts that in the High Court judgment.[4]

Factual narrative

[5] In 2012 the Council granted Beaumont a land use consent under the Resource Management Act 1991 and a building consent under the Building Act 2004 to

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1 *Beaumont Trading Company Limited v Auckland Council* [2014] NZHC 2954, [2015] 2 NZLR 656 [the High Court judgment].

2 A "territorial authority" is defined as a city council or a district council named in pt 2 of sch 2 of the Act and the definition of "local authority" includes a territorial authority: Local Government Act 2002, s 5(1), definitions of "territorial authority" and "local authority".

3 Section 197(1)(a).

4 The High Court judgment, above n 1, at [2]–[4].

construct a hotel known as the Quest on Beaumont. The hotel as constructed has 34 accommodation units, one commercial unit and one office unit.

[6] On 29 October 2012 the Council issued a land use and building consent contributions assessment.[5] At that stage the Council did not levy any contribution for the acquisition of open space.

[7] In mid-2013 Beaumont applied for subdivision consent to provide the hotel rooms and the office and commercial units with their own unit titles. That application was granted on 11 October 2013. The hotel began operation on 22 October 2013. On 9 November 2013 the Council issued a subdivision contributions assessment. That showed an open space land acquisition contribution of $148,132.80 excluding GST for the units. As Asher J noted, the assessment was carried out on the basis of a unit referred to as an additional household unit equivalent (HUE). Calculations are undertaken per allotment. In this case the allotments were the hotel rooms and the office and commercial units and the unit of demand was 0.6 of a HUE. It is this 2013 assessment that Beaumont challenged in the High Court.

The High Court judgment

[8] Asher J accepted Beaumont's argument that the demand for reserves must arise from the development. But the Judge considered there was no need for the demand and the development to be linked immediately in time. Viewed in this way, the application for the subdivision consent was part of the hotel development and that hotel development "would create demand for infrastructure from the occupants" of the hotel.[6] His Honour considered this approach to a development best met the statutory purpose of ensuring that the Council was appropriately funded and those undertaking developments giving rise to demand for reserves paid their fair share.

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5 The total development contribution was $30,784.69 excluding GST ($21,807.63 for the transport contribution and the balance for the public transport contribution).

6 High Court judgment, above n 1, at [45].

The statutory scheme

[9] Local authorities are required to manage their financial dealings "prudently and in a manner that promotes the current and future interests of the community".[7] The Council is required to make adequate and effective provision in various planning documents to meet the associated expenditure needs.[8] Section 101(3) of the Act provides that the local authority's funding needs must be met from sources the local authority determines to be appropriate following consideration of various factors. The factors apply in relation to each activity to be funded and include, for example, "the community outcomes to which the activity primarily contributes" and "the extent to which the actions or inaction of particular individuals or a group contribute to the need to undertake the activity".[9]

[10] As Asher J noted, development contributions are one of the sources upon which a local authority may draw to fund its capital works. Development contributions are imposed "so that the Council can obtain funding for capital works to support infrastructure of the type that will be required by those who occupy the development".[10] A "development contribution" is defined in s 197(2) of the Act as a contribution:

> (a) provided for in a development contribution policy of a territorial authority; and
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> (b) calculated in accordance with the methodology; and
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> (c) comprising—
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> (i) money; or
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> (ii) land … ; or
>
> (iii) both

[11] "Development" is defined to mean:[11]

> (a) any subdivision or other development that generates a demand for reserves, network infrastructure, or community infrastructure; but

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7 Local Government Act, s 101(1).
8 Section 101(2).
9 Section 101(3)(a)(i) and (iv).
10 High Court judgment, above n 1, at [14].
11 Section 197(1), definition of "development".

(b) does not include the pipes or lines of a network utility operator

[12] The critical provision for present purposes is s 198. Section 198(1) empowers a territorial authority to require contributions when:

> (a) a resource consent is granted under the Resource Management Act 1991 for a development within its district:
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> (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):
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> (c) an authorisation for a service connection is granted.

Under s 87 of the Resource Management Act a resource consent includes a subdivision consent.

[13] Section 198(2) states that:

> A territorial authority may only require a development contribution as provided for in a policy adopted under section 102(1) that is consistent with section 201.

Section 201 sets out matters to be included in the Council's development contributions policy.

[14] Section 199 provides the basis on which development contributions may be required, namely:[12]

> Development contributions may be required in relation to developments if the effect of the developments is to require new or additional assets or assets of increased capacity and, as a consequence, the territorial authority incurs capital expenditure to provide appropriately for—
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> (a) reserves:
>
> (b) network infrastructure:
>
> (c) community infrastructure.

[12] Local Government Act, s 199(1).

[15] Section 199(2) makes it clear the section:

> does not prevent a territorial authority from requiring a development contribution that is to be used to pay, in full or in part, for capital expenditure already incurred by the territorial authority in anticipation of development.

[16] Section 199(3) provides that "effect" in subs (1) "includes the cumulative effects that a development may have in combination with another development".

The Council's policy

[17] The Council is required to consult on and adopt a revenue and financing policy and a policy on development contributions or financial contributions.[13] The Act sets out various requirements for the development contributions policy.[14] In the present case, chapter 9 of the Council's *Long-term Plan 2012–2022* contains the contributions policy. The policy has a number of stated purposes including to provide for:

> those involved in development to make fair payments to the council to reflect the expected demand their developments will have on council infrastructure and the expected benefits residents and businesses occupying these developments will derive from council infrastructure.

[18] The policy sets out how the Council will assess a development:

> Development can be in the form of additional allotments or additional land use activity or a combination of both. Using Schedule 2 it is possible to calculate the units of demand from all allotments and land use expected after the development occurs and use the higher amount (allotment or land use) to determine the final demand on the site.

[19] The HUE is used as the measure of demand. The HUE is described as creating "an equivalency factor between a type of development and one detached dwelling unit (household unit)". The calculation of units of demand is undertaken on an activity by activity basis.

[20] Schedule 1, table 9.4.9 of the policy sets out the activities to be funded by development contributions. The schedule relevantly provides as follows:

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13 Local Government Act, s 102.
14 Section 106.

Class	Activity	Activity description
Reserves	Open space land acquisition	Land acquisition for public open space of all types from small local parks to large regional parks

[21] Schedule 2 of chapter 9 sets out development types and units of demand from which contributions are calculated. "Retail, hospitality, recreation and personal services" is a development type. This development type includes land use associated with commercial accommodation, which is defined as "any accommodation units other than dwelling units, such as hotels, motels, holiday flats, which are offered at a tariff, on a per unit basis and student accommodation".

[22] The relevant part of sch 2, table 9.4.10, deals with land and building development. It makes it clear that retail, hospitality, recreation and personal services, such as the Quest on Beaumont incur no contribution for open space land acquisition at that stage.

[23] The next table in sch 2, table 9.4.11, applies to subdivision development. It specifies a unit of demand of one HUE per allotment for open space land acquisition in relation to retail, hospitality, recreation and personal services developments.[15]

Our assessment

[24] The Council's power to require a development contribution is relevantly triggered when a resource consent is granted "for a development".[16] As we have noted, "development" means a subdivision "that generates a demand for reserves".[17] We agree with the appellant that this means the unit title subdivision must generate a demand for reserves. That is the plain meaning of development as defined in the Act. In this case, it is accepted that the subdivision itself did not generate an additional demand for reserves. On this approach, the appeal must be allowed.

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15 The Council in its discretion applied a unit of demand of 0.6 HUE per allotment: High Court judgment, above n 1, at [44].

16 Local Government Act, s 198(1)(a).

17 Section 197(1), definition of "development".

[25] As we have foreshadowed, Asher J took a broader approach to the meaning of "development". His reasoning is summarised in this way:[18]

> [43] The Quest on Beaumont hotel construction project was a development. The later application for subdivision was part of that development. The fact that the subdivision consent was granted after construction does not mean that the consents were not granted "for" a development under s 198(1)(a). They were granted specifically for the Quest on Beaumont subdivision development, which is a development under s 197(1) of [the Act]. Consistent with the Act, requirements for assessments are made when consents are granted and must be for a development, but do not have to be made prior to or contemporaneous with that development.

[26] In supporting the Judge's interpretation, Mr McNamara for the Council submits that approach is consistent with both the statutory wording and its purpose.

[27] Mr McNamara relies first on the Council's power under s 198(1)(a) to require a development contribution in granting consent "for" a development. He says "for" means "in relation to", the phrase used in s 199(1). The submission is that the unit title subdivision consent was a consent in relation to or connected with Beaumont's hotel development project.

[28] The difficulty we see with this submission is that it is the resource consent to which the demand for reserves must be related. The word "for" has to be read in that context. That this must be so is supported by the balance of s 198(1). The development contribution may be required when "(b) a building consent is granted … for building work" and "(c) an authorisation for a service connection is granted". The use of the word "for" in (b) and (c) suggests a direct relationship with the particular consent or authorisation.

[29] Secondly, Mr McNamara relies on the dictionary definition of "development", namely:[19]

> The action of developing land etc so as to realise its potentialities; speculative building; a developed site; especially a new housing estate.

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18 High Court judgment, above n 1.

19 Angus Stevenson (ed) *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007) at 666.

[30] The word is, however, defined in the Act by reference to a resultant demand for reserves. In this sense, Mr Bartlett QC for Beaumont is right that the word "development" has a particular meaning, in other words, it is used as a term of art.

[31] On the interpretation of the word "development" both parties draw in aid the decision of Potter J in *Neil Construction Ltd v North Shore City Council*.[20] That was a challenge to the decision-making process followed by the North Shore City Council in determining its 2004 development contributions policy. Potter J described a three-step process that councils were to follow in considering whether a development contribution may be required.[21]

[32] Mr McNamara submits the Council in this case followed that three-step process. He relies on the Judge's observation that the statutory "triggers" for requiring a development contribution are that a given "project" is a development with the requisite effects.[22] Potter J referred to the need for councils to decide "as a preliminary point" whether a particular "project" is a "development" as defined in s 197.[23] The submission is that the "project" is the hotel development viewed overall and that it is the project so defined that must create the demand. In other words, the Judge's use of the word "project" signifies the concept of development in its widest sense.

[33] We do not consider Potter J was envisaging a broader definition of "development". The Judge made it clear the development is the subdivision or other development that generates a demand for infrastructure.[24] Her Honour explained the s 199 assessment can only be made in relation to projects that meet the s 197 definition:

> [110] While s 199 authorises councils to take account of the cumulative effects of developments in assessing whether capital expenditure will be incurred as a consequence of the requirement for further assets or assets of

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20 *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC). Aspects of the provisions referred to by Potter J by way of background have been amended since the judgment and minor changes made to ss 197 and 198. None of these changes is material for present purposes.

21 At [113].

22 At [116].

23 At [120].

24 At [109]

> increased capacity, the assessment can only be made in relation to projects which qualify as a "development" in terms of s 197.

[34] Potter J gave examples of how her approach operates, saying they illustrated the need for "a causal connection" between the development and its effect in necessitating further assets or increased capacity.[25]

[35] Nor does *Olliver v Marlborough District Council* assist the Council.[26] In that case the High Court was considering the assessment of the effects on the environment of a resource consent application under the Resource Management Act. The Court rejected an argument there was a distinction between "development and subdivision" so it would be the development that undermined the proposed plan rather than the subdivision. Gendall J said:[27]

> Residential subdivision, whilst a legal division of parcels of land, is usually undertaken with a view to disposal of the separate parcels for use or residential development, or for building upon, and in considering effects of a subdivision I accept the respondent's argument that it is appropriate to have regard to the development which will follow as a logical consequence of such division being permitted.

[36] We see that observation as reflecting the particular statutory provisions in issue in that case.

[37] Mr McNamara also relies on the rejection in other cases of the conception that applications for subdivision consents "can be limited to the exercise of the creation of new lots on paper".[28] Again, the matter has to be considered against the applicable statutory framework. Further, as Mr Bartlett submits, where the building is already occupied there is a sense in which the "lines on a plan" analogy is apt because the subdivision in fact makes no other changes. In a case such as the present it will not lead to or engender environmental effects not already taking place.

[38] Finally, Mr McNamara submits the Judge's approach better meets the statutory purpose. We agree with Asher J that the purpose of the provisions relating

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25 At [115].
26 *Olliver v Marlborough District Council* HC Blenheim CIV-2004-485-1671, 8 July 2005.
27 At [41].
28 *Mawhinney v Auckland Council* [2013] NZHC 3566 at [27]; and *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) at [99].

to development contributions is essentially to ensure the Council is funded and that developers pay their fair share. However, that does not advance matters if the statutory trigger, here the resource consent, does not create the necessary demand. Further, in response to the concern Beaumont otherwise does not pay its fair share it is relevant that there would have been practical barriers for Beaumont if it had sought to deposit a unit plan for the subdivision prior to the building work being completed.[29]

[39] Further, the Council chose not to impose a development contribution for open space land acquisition on hotel developments at the land use and building consent phase in the policy applicable to the 2013 assessment. That appears to be because the Council took the view that s 203 of the Act did not permit it to do so. Section 203(1) as it was at the relevant time stated that the development contributions for reserves must not exceed the greater of:

> (a) 7.5% of the value of the additional allotments created by a subdivision; and
>
> (b) the value equivalent of 20 square metres of land for each additional household unit created by the development.

[40] As Asher J explained:[30]

> The Council took the view that it was implied by s 203(1) that development contributions for reserves were not payable on commercial hotel developments that did not involve a subdivision, because in terms of s 203(1)(a) the development did not involve the creation of "additional allotments". Therefore, in terms of s 203(1)(b), there had been no creation of an "additional household unit". The Council took the view that it had no power to require a reserve contribution when granting the [Resource Management Act] use consent or a building consent for such a development, as without a subdivision there were no new allotments. It could only require such a reserve contribution at the time of granting a subdivision consent, which would at that point create additional allotments.

[41] The legislative history suggests it is not clear that the Council's approach to s 203 was necessarily right. Section 203(1)(b) was amended in 2014 by adding "or accommodation unit" after the reference to each additional household unit.[31] The addition of the words "or accommodation unit" appears to arise out of the fact the

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29 See Unit Titles Act 2010, s 32(2).
30 High Court judgment, above n 1, at [22].
31 Local Government Act 2002 Amendment Act 2014, s 60(1).

2014 Amendment Act introduced a definition of "accommodation units", rather than, as the Council appears to have understood, because of a need to address uncertainty arising from the "old" s 203(1).[32] The legislative history suggests there was a concern the new definition of "accommodation units" might imply there was a difference between a household unit and an accommodation unit for the purposes of s 203(1).[33] However, we do not need to reach a final view on the correctness of the Council's approach given our view of the meaning of s 198. The issue is not one with any precedential effect.

[42] It also follows from our conclusion on s 198 that we do not need to deal with the argument that the 2013 assessment was a reassessment and so outside of the Council's power. Nor do we need to deal with the argument that the Council did not correctly apply its policy.

Result

[43] For these reasons, the appeal is allowed. The decision of the Council to levy an open space land acquisition contribution under the 2013 assessment is set aside.

[44] The parties agree costs should follow the event. We order the respondent to pay the appellant costs for a standard appeal on a band A basis together with usual disbursements. Costs in the High Court should be set by that Court in light of this judgment.

Solicitors:
Corban Revell, Auckland for Appellant
Simpson Grierson, Auckland for Respondent

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32 Section 51(3).

33 Department of Internal Affairs *Local Government Act 2002 Amendment Bill (No 3) Report of the Department of Internal Affairs to the Local Government and Environment Committee: Part two of two (development contributions)* (15 April 2014) at 73.