Appellants	**Retro Developments Limited; Hemisphere Properties Limited**
Respondent	**Auckland City Council**
Decision Number	A038/04
Court	Judge LJ Newhook; IG McIntyre; RM Dunlop
Judgment Date	26/03/2004
Counsel/Appearances	Brabant, RB; Kirkpatrick, DA
Cases Cited	Auckland CC v Retro Developments Ltd 23/05/02, Paterson and Chambers JJ, HC Auckland AP127/01 (No 1), 8 ELRNZ 157, [2002] NZRMA 445, 7 NZED 553; Far East Investments Ltd v Auckland CC A048/01, 6 NZED 493; Far East Investments Ltd v Auckland CC 25/03/02, Paterson and Chambers JJ, HC Auckland AP404/87/01, 8 ELRNZ 198, [2002] NZRMA 433, 7 NZED 413; Newbury DC v Secretary of State for the Environment [1981] AC 578, [1980] 1 All ER 731; Retro Developments Ltd v Auckland CC A084/01, 6 NZED 843; Retro Developments Ltd v Auckland CC CA161/02, [2003] 8 NZRMA 360, 8 NZED 371
Statutes	Local Government Act 1974, s294; Resource Management Act 1991, s5, s108, s108(1), s108(10), s108(10)(a), s108(10)(b), [s385]
Full text pages:	21 pages

Keywords

appeal procedure; district plan; financial contribution; reserve contribution; residential

Significant in Planning and Law, s108 RMA

The Court found the most important principles when setting reserve contributions include: the condition being in accordance with the purpose specified in the District Plan; fairness and reasonableness; consistency with other contributions; and the likely additional demand for public reserve space generated by the development.

SYNOPSIS

This was a decision following a reference back from the Court of Appeal concerning the amount of financial contributions for reserves levied by the Auckland CC on two resource consents under the provisions of the District Plan (Isthmus Section). The properties in question were a 24-unit development by Retro Developments Ltd at 51 Brown Street, Ponsonby, and a 24-unit development by Hemisphere Properties Ltd at 11 Augustus Terrace, Parnell.

The Court found that the most important considerations in setting reserve contributions as conditions of resource consent included: the condition being in accordance with the purpose specified in the District Plan; the fairness and reasonableness of the contribution; consistency with other contributions; and the contribution being proportionate to the likely additional demand for public reserve space generated by the development [10 ELRNZ 335 at 1].

The Court held that in these two developments it was not appropriate for the council to impose the maximum levy. However, the Court had not seen sufficient evidence to enable it to give a precise calculation of the appropriate levies. The Court concluded that if the parties could not reach agreement as to quantum, the Court would have to hear additional evidence addressing the relevant issues.

Costs were reserved.

FULL TEXT OF A038/04

Background

[1] This decision follows a hearing after reference back from the Court of Appeal. It concerns financial contributions for reserve purposes levied by the respondent on two developments in Auckland.

[2] The original decision of this Court was issued by a panel presided over by the late Judge W J M Treadwell[1]. On appeal to the High Court, a decision was issued by a Full Bench comprising Chambers and Paterson JJ[2]. The decision of the High Court was overturned by the Court of Appeal.[3] Appeals to the High Court and the Court of Appeal proceeded principally on one narrow legal issue which we will shortly describe.

[3] A further decision of the High Court, on costs, after the Court of Appeal decision was released, requires brief mention in the course of this decision[4].

The issues

[4] The main issue can be stated simply as "*what should be the amounts levied on the two resource consents respectively, by way of financial contributions for reserves under the provisions of the respondent's operative District Plan (Isthmus Section) ("the Plan")?*"

[5] The sums first levied by the respondent, and the amounts to which the appellants sought to reduce them, may appear somewhat academic until we describe the legal background to them, but we offer them at this stage to provide some commercial and environmental perspective to the dispute.

[6] Retro developed 24 units on a site at 51 Brown Street, Ponsonby, in respect of which a condition was imposed requiring payment of reserve contribution of $407,657.60 (including GST), being the total value of 20 m^2 of the site in respect of each of the third and subsequent units, that is Units 3 to 24.

Retro in its appeal sought a reduction to just over half, $231,000 (including GST), for the 22 units — or $10,500 each.

[7] Hemisphere was levied a reserve contribution of $603,174.57 (including GST) based on the value of 20 m^2 of land for 22 of its 24 residential units constructed at 11 Augustus Terrace, Parnell. On objection to the Council a small discount was given for outdoor space being provided for 8 roof-top apartments, but on appeal Hemisphere sought to reduce the contribution further to $240,970.57.

[8] For a variety of reasons Judge Treadwell's Court reduced the Retro levy to $288,398 (including GST), and the Hemisphere levy to $330,000 (including GST).

[9] The respondent appealed to the High Court on four questions of law, but the Judges there held that those four questions were somewhat secondary to a fundamental question that they enunciated as "*the meaning to be given to the Isthmus Plan and the extent to which the plan confers on the Council a discretion*". The High Court allowed the appeal, holding that "the Environment Court must assess the reserves contributions in accordance with Part 4B of the Isthmus Plan, and that the only condition that that could be imposed was a condition whereby the level of contribution was determined in the manner described in Part 4B".

[10] As subsidiary matters, but "*for sake of clarity*", the High Court held that it was irrelevant for the Council or the Court to take into account former transitional provisions under s 294 of the Local Government Act 1974, and former policies and contribution levels under that old regime.

[11] Retro and Hemisphere appealed to the Court of Appeal. Acknowledging that the High Court was partially correct in holding that financial contributions were, after the district plan had been made operative, to be assessed in the context provided by s 108(10) RMA and the relevant provisions of the Plan itself, they posed the question as to whether the financial contributions formulae in the plan described fixed contributions, or whether instead they provided maximum contributions coupled with a discretion reserved to the Council to impose lower contributions.

[12] The Court of Appeal analysed the history of the promulgation and confirmation of Part 4B of the Plan (an exercise apparently not requested of the High Court). The Court held[5], that it would assume (without deciding

the point) that "s 108(1) authorises rules which apply prescriptively", but that this Plan provided differently. The Court said:

> *[24] On the basis of our interpretation of s 108(l0), the issue in this case turns on the true meaning of the relevant provisions of the Isthmus Plan. In saying this we recognise that the phrase used in s 108(10) is "in the manner described in the plan". The Isthmus Plan does not specifically say that the Auckland City Council has a discretion to reduce contributions calculated in accordance with the relevant rules. So, no reduction mechanism is "described" in the plan. But, if it is the case that the relevant rules must have been intended, when enunciated, to specify maximum levels of contribution only and this in a context in which it was plainly envisaged that the Auckland City Council would have a discretion to impose lower contributions, we would be reluctant to construe the phrase "in the manner described in the plan" as defeating that intention. So, we propose to construe the phrase, "in the manner described in the plan" as meaning "as provided for in the plan".*

[13] The Court of Appeal acknowledged that the relevant rules when read in isolation might appear prescriptive, and that it was understandable that the High Court had construed them thus. Nevertheless, given the legislative history of the rules, it was *"perfectly clear that a prescriptive meaning is not intended by those responsible for their drafting*".

[14] The Court of Appeal then held[6]:

> *In those circumstances the appeal must be allowed. The appeals to the Environment Court are remitted to that Court with a direction that the Court determine them in accordance with s 108(10) of the Resource Management Act and the relevant provisions in the Isthmus Plan but on the basis that the rules specify only the maximum levels at which contributions may be fixed.*

[15] Having heard submissions on behalf of the parties, we indicated (and counsel concurred) that a necessary part of our task would be to read the evidence that had been placed before Judge Treadwell's Court, including the transcript of oral evidence which had been prepared for the High Court appeal. This seemed particularly necessary in view of the fact that none of the members of the previous Court were available for the rehearing.

[16] Unfortunately some of the briefs of evidence from the first hearing had been mislaid, and the gaps had to be filled by counsel supplying copies.

Again unfortunately, that exercise took until the end of last year, and we have been unable to apply ourselves to the case again until recent weeks. We say "unfortunate" because we are aware that the progression of a number of other cases is apparently awaiting guidance from our rulings in this case.

Side issue — extent of relevance of High Court subsidiary findings

[17] We have already mentioned that the findings of the High Court were in two parts: the part in para [44] (subsequently overturned by the Court of Appeal), and the answer to some subsidiary questions, in para [45]. The latter read:

> *[45] For the sake of clarity, we emphasise that it is irrelevant for the Court to consider the levels of contribution required by the Council under the old s 294 regime. It is irrelevant for the Court to consider Council policies under that old regime. It is also irrelevant for the Court to consider levels of contribution required by the Council after 15 November 1999 if such cases were erroneously determined as if the old s 294 regime is still applied.*

[18] Given that only the previous paragraph, [44], was expressly appealed from and overturned by the Court of Appeal, counsel before us remained at odds over the status of the High Court's findings in its para [45]. Mr Kirkpatrick contended that as they had not been appealed they had not been overturned, and therefore still had effect. Mr Brabant contended that in the process of the proceedings in the Court of Appeal, the subsidiary questions had impliedly been overruled or overtaken.

[19] The same debate apparently surfaced during a costs hearing in the High Court after conclusion of the case in the Court of Appeal[7]. For the purposes of considering costs issues, Justice Chambers recorded that it "could not be said that the subsidiary answers **must** be wrong". . ., but conceded that "part of our reasoning in coming to the answers we did has been undermined".

[20] We do not find it necessary to dwell on this particular debate. Instead, it is important for us to set out the true nature of our task based on what we consider to be the correct principles.

What are the correct principles?

[21] We consider that the task has been described with clarity in the decision of the Environment Court in ***Far East Investments Limited v Auckland City Council***[8], upheld by the High Court in ***Far East Investments Limited v Auckland City Council***[9].

[22] The task falls into four broad parts:

- The condition must be imposed in accordance with the **purposes** specified in the district plan: section 108(10)(a) RMA.
- The level of contribution is determined in the **manner** described in the district plan: section 108(10)(b) RMA.
- It must satisfy what have come to be known as the ***Newbury*** tests[10].
- The condition must be fair and reasonable on the merits.

[23] The *Newbury* tests may be broadly stated as follows:

(a) The condition must be imposed for a planning purpose, not an ulterior purpose.

(b) The condition must fairly and reasonably relate to the development permitted by the consent to which the condition is attached.

(c) The condition must not be so unreasonable that no reasonable planning authority could have imposed it.

[24] The fourth part of the task (the examination as to "*whether the condition is fair and reasonable on the merits*"), has itself been subdivided into three parts[11], as follows:

(a) The condition must be the result of a process of reason rather than whim or arbitrariness.

(b) The condition must be fair both to the appellant and the community.

(c) The condition must be proportionate.

[25] In coming to a decision as to what is fair and reasonable on the merits, the Environment Court held in ***Far East*** that the Court must make its own judgment, based on findings from the evidence presented.

[26] The High Court in ***Far East***, while upholding the Environment Court's decision, addressed the extent to which the setting of a financial contribution condition should (or rather should not) take account of past levies in other cases. The High Court held that each case must be decided in its own circumstances. It held that councils were entitled to change their practices, and in particular a council which had been lenient to previous applicants was perfectly entitled to bring its practices into line with statutory provisions and acceptable practices[12].

[27] We will now approach each of the four parts of the task: **purposes, manner, *Newbury* tests**, and "**fair and reasonable on the merits**".

[28] It may help in understanding of the two sections of this decision that follow, to record in advance that our reading of the relevant provisions of the district plan indicates to us that "purposes" are found generally within Objectives and similar provisions like Issues and Strategies, and that "manner" is generally described in Policies, Rules, and "Expected Outcomes". We see some logic in that.

Condition to be in accordance with the purposes specified in the plan

[29] Section 108(10) RMA provides as follows:

> *(10) The consent authority must not include a condition in a resource consent requiring a financial contribution unless—*
>
> *(a) the condition is imposed in accordance with the **purposes** specified in the plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and*
>
> *(b) the level of contribution is determined in the manner described in the plan.* [**Emphasis supplied — and note that subsection (b) is addressed in the next section of this decision**].

[30] Mr Kirkpatrick was at pains to submit that subsection (a) does not require the condition to be imposed in accordance with the objectives and policies of the plan; rather, it requires that the condition be imposed in accordance with the "purposes specified in the plan".

[31] Part 2 of the Plan sets out Resource Management Issues, including the following which appear to be of relevance:

> *The need to accommodate ongoing change within the urban area while maintaining the enhanced quality of the present environment.*
>
> *The need to provide for a range of different community needs and services including healthcare; education and leisure.*
>
> *The need to protect and maintain the elements of the natural environment which contribute to the City's unique character, particularly its coasts, its volcanic cones, its parks and reserves.*

[32] Part 4B is the part of the Plan which makes provision for financial contributions. Certain of the objectives in that part bear upon the **purpose** for which conditions about reserves contributions may be imposed.

[33] We cite various objectives of note as follows:

OBJECTIVE 4B.2.1

To make use of financial contributions to remedy or mitigate identified adverse effects on the environment.

OBJECTIVE 4B.2.2

To ensure that the costs of urban growth are fairly shared between new and existing residents and businesses.

OBJECTIVE 4B.2.3

To maintain public confidence in and support for the financial contributions policies.

OBJECTIVE 4B.4.1.1

To provide for the open space needs of new residents.

OBJECTIVE 4B.4.1.2

To ensure that financial contributions are levied fairly on new residential development.

[34] It may be noted that financial contributions levied on residential subdivision and development (Section 4B.4) are for reserve purposes specifically, as opposed to the broader mitigation and infrastructural purposes related to other kinds of development.

[35] It is relevant as well to quote one of the provisions of Part 8 (Business Activity) of the Plan:

8.5.1.2 ACTIVITIES

In order to facilitate and encourage economic growth, the plan provides increased flexibility in the range and location of activities within business zones. Not only is a wide range of business activities permitted in most zones, but residential, community and recreational activities are also permitted. This flexibility is tempered by the need to ensure that the effects of any activity do not adversely impact, or have the potential to adversely impact on the environment of a particular area of the City.

[36] Reference needs also to be made to some of the provisions in Part 9 (Open Space & Recreational).

[37] One of the Resource Management Issues listed in Part 9.2 of the Plan states:

> *The need to ensure that opportunities for reserve contributions through subdivision and development are employed so as to derive maximum benefit for particular localities concerned.*

[38] In Part 9.4.3 ("Furthering the Resource") it is stated:

> *The Council's strategy is to promote an appropriate level of residential redevelopment and infill throughout the Isthmus. This is expected to place greater demands on existing open space and recreational resource. The Council recognises the need for additional open space and recreational resources to meet these demands. The Council will take advantage of the opportunities provided through its own fiscal management, and through its ability to obtain financial and land contributions for reserves from private developed initiatives, to appropriately increase the district's stock of open space and recreational land. It will also where appropriate use such contributions to secure and acquire areas of significant ecological value.*
>
> *Financial contributions for reserve purposes from land and/or cash will be based on the objectives, policies and rules provided in Part 4B of this Plan. Whereas a quantifiable guideline for the provision of reserve land was used in the past, the new guideline will aim to achieve distribution of open space land on a fair basis, with consideration being given to sustaining the qualities of open space, population density and community preferences. (See Clause 9.9 Recreational Reserves Standards) . . .*

[39] Part 9.9 (Recreational Reserves Standards) contains the following:

> *9.9.1 GENERAL STRATEGY*
>
> *The Isthmus is substantially built up and has extensive reserves which contribute greatly to the amenity of the City. However some areas in the City do not have as much open space areas as others.*
>
> *The increasing opportunities for participation in recreational activities, together with the trend for residential expansion to occur via infill development, will place greater demand upon public open space. The loss of private open space within sites as a consequence of infill development places a greater demand upon neighbourhood reserves.*
>
> *Council's aim is to ensure that the current level of reserve provision is maintained, and that reserves are developed and*

provided with appropriate facilities to meet both the recreational needs of the community and to enhance the environment. Given the developed nature of the Isthmus it will not always be possible to obtain significant additional reserve land from subdivisions in order to maintain the standards set by this Plan. Consequently financial contributions will be sought from most residential subdivisions and from additional residential development for the provision and development of reserves within the Isthmus.

To ensure that financial contributions for reserves are spent equitably, it will be the Council's policy to use at least 60% of such cash contribution for the purchase, development or upgrading of reserves in the Ward in which they are collected. The remainder of these contributions will be spent on reserves of city-wide importance. This approach recognises that resident's (sic) recreational and public open spaces needs are not limited to the area in which they live but may extend to other parts of the City. This approach also recognises that through more intensive development, it will be possible to permit greater utilisation of existing reserves and thus serve the needs of a growing population.

Rather than identify specific areas of land which will be purchased for reserves, the Council will take an opportunity driven approach for such purchases. This approach will attempt to purchase future reserve land on the open market as opportunities arise and as local needs determine. Notwithstanding the above position, in the case of land of exceptional value for recreational, heritage, landscape or environmental reasons, Council may designate future reserve land for the sake of protecting these values. Such designation will be undertaken in consultation with affected landowners.

Condition to be determined in the manner described in the district plan

[40] This topic is driven by subsection (b) of s 108(10), quoted in para [28] above. Provisions that dictate the **manner** of determination of financial contributions appear to include various of the policies that support the above quoted objectives, together with the relevant rules in the Plan and some "expected outcomes".

[41] The following appear to be policies of relevance on this topic:

POLICIES SUPPORTING OBJECTIVE 4B.2.1.

- *By identifying adverse effects on the natural and physical resources of the City which may be addressed through the use of financial contributions.*

- *By selecting an appropriate mix of financial contributions to adequately address each of these identified effects.*
- *By ensuring that these financial contributions are applied consistently to all developments or resource uses which generate identified effects.*

POLICIES SUPPORTING OBJECTIVE 4B.2.2

- *By using financial contributions to recover from new residents and businesses a fair contribution towards the costs of urban growth.*

POLICIES SUPPORTING OBJECTIVE 4B.2.3

- *By applying financial contributions policies consistently across all new developments and activities according to policies and exemptions provided below.*

POLICIES SUPPORTING OBJECTIVE 4B.4.1.1

- *By requiring all residential development and residential subdivision on the Isthmus to contribute to the City's public open space by way of cash or land.*
- *By using cash contributions provided for reserve purposes on the purchase and development of reserves both in the locality of the development and elsewhere in the City. By ensuring that land acquisitions made under this policy meet the criteria for the acquisition of reserves (see Clause 9.9.2).*

POLICIES SUPPORTING OBJECTIVE 4B.4.1.2

- *By applying financial contributions to all forms of residential development and residential subdivision.*
- *By assessing financial contributions on the basis of the likely additional demands for public open space generated by the development.*
- *By providing for exemptions from payment of financial contributions in those circumstances outlined in Clause 4B.4.6.*

[42] Then following, is a section, 4B.4.2, "EXPECTED OUTCOMES":

. . . the revenue generated will be significantly higher than that gathered from residential development under the former Local Government Act requirements. This revenue increase arises because of the application of financial contributions for reserve

purposes to all types of residential subdivision including cross leases and unit titles.

While the financial contributions made by residential development is higher, it is not anticipated that this increase would have a measurable effect on the level of residential development within the City. It is possible that these higher charges may impact on the price paid for development of land and perhaps the developers' margins. However given the strong demand for infill sites on the Isthmus these impacts, by themselves, are unlikely to result in the decline in the supply of new residential units in the City . . .

[43] The relevant rule is 4B.4.4 "CALCULATION OF FINANCIAL CONTRIBUTIONS":

Financial contributions from residential development for reserve purposes shall be paid in the form of land, cash or a combination of these . . .

(a) "Contribution in land"

. . .

(b) "Contribution in cash"

Where the financial contribution for reserve purposes is to be made in cash, the owner shall pay the Council a sum based on the site value and site area of each residential unit as follows:

Site value ($) x 30 / Site area in square metres

"Site value" shall have the same meaning as "land value" as defined by the Valuation of Land Act 1951. The value shall be fixed at or about the day on which the valuation needs to be made for the purposes of ascertaining the contribution to be made under this rule.

A contribution assessed according to this formula shall be applied to each additional residential unit, or in the case of subdivisions, each equivalent residential unit . . .

[44] In Part 9 of the Plan there appears the following provision, which is also relevant to the manner of determining the contribution:

9.9.2 FINANCIAL CONTRIBUTIONS FOR RESERVES

Under section 108 of the Act, a Council is permitted to take financial contributions for any purpose stated in the Plan. The Council intends, through policies and rules of

> *this Plan, to take financial contributions for reserve purposes from all new residential development in the Isthmus. The level of contribution will be related to the additional demand which a development places or may place on the City's public open space . . .*

[45] We consider that there is a strong theme running through some of the policies and other provisions concerning "**manner**", that of fairness and reasonableness. (Interestingly, this provides a link to later topics of importance identified in the ***Far East*** decisions). More particularly, we perceive references to financial contributions being applied **consistently** to all developments or activities, the recovery of **fair** contributions, and the identification of likely **additional demands** for public open space generated by developments. These seem to us to be key issues.

Condition to satisfy the *Newbury* tests

[46] Concerning the first of the ***Newbury*** tests, there seems little doubt to us that the conditions have on these occasions been imposed for a planning purpose, and not an ulterior purpose.

[47] The second and third of the ***Newbury*** tests, ie that conditions must fairly and reasonably relate to development permitted by the consent, and must not be so unreasonable that no reasonable planning authority could have imposed them, have strong links to the next main topic that we have recorded as needing to be addressed, "*that the condition must be fair and reasonable on the merits*". It will be convenient to deal with them together.

Condition must be fair and reasonable on the merits

[48] It will be recalled that we took from the ***Far East*** decisions that there are 3 parts to this section of our inquiry, namely that the condition must be the result of a process of reason rather than whim or arbitrariness, that the condition must be fair (both to the appellant and the community), and that the condition must be proportionate.

[49] As previously recorded, we have considered the evidence placed before the Court as first constituted, in order to be able to come to our own judgment on these issues.

[50] There is nothing in the evidence to suggest that the conditions were imposed as a result of whim or arbitrariness. All parties have applied themselves to a process of reason, even if (understandably) they took different views. We have looked closely at the evidence to ascertain fairness to the appellants and the community, reasonableness, and that the conditions should be proportionate. We have taken particular guidance from the policies and other provisions of the plan that call not only for a fair contribution, but for consistent application across all new developments and

activities, and for identification of likely additional demands for public open space created by the developments (ie what we identified as key issues in paragraph [43] above).

Analysis

[51] It may be helpful to reiterate the "platform" from which we have worked. First, it will be remembered that the case was referred back to this Court from the Court of Appeal on the basis that the provisions of the rule in Clause 4B.4.4 provide a **maximum** contribution, and that we are to exercise a discretion as to what level of contribution should be imposed up to that maximum. Secondly, we should focus on the purpose for which financial contributions are levied, and the manner in which they are to be levied in the district plan, rather than consider the approach formally taken under the Local Government Act. Thirdly, we recognise (as indeed we are bound to do) the findings of High Court in the ***Far East*** case that Councils are entitled to change policies, and to put aside past poor practices. This reinforces the appropriateness of maintaining focus on the district plan provisions.

[52] It was the case for the Council on this occasion that it had in effect exercised a discretion to award the appellants a discount from the maximum cash equivalent of 30 m^2 site value contribution. It had done so, it said, by imposing the equivalent of the (lower) maximum under the LGA system, the cash equivalent of 20 m^2 site value.

[53] It seems to us from the evidence that the council did that at a time that it was coming under criticism from developers for changing its policy approach, and possibly out of "sympathy" for appellants who initiated their resource consent applications when the LGA system was still being applied.

[54] We consider that if the contribution arrived at in that way were to be fair and reasonable under the new system, such an outcome would be more by good luck than good management, because the **purposes** specified in the district plan, and the **manner** for setting contributions in the district plan, make no mention of those issues. It may however be relevant to consider that "**fairness**" to developers might entail applying a discount, not necessarily to the LGA "20 m^2" level, but instead having some regard to the levels being applied at the time the Retro and Hemisphere applications were first lodged with the council. Evidence as to those levels was contained in an Appendix C to the evidence of a planning witness called by the council, Mr H C Perkins and was discussed by him and other witnesses. We see fairness in considering this for two reasons: first, the new district plan was still then in proposed form and possibly amenable to change so its final form could still be said to be conjectural; secondly, developers are entitled (and indeed need) to undertake their projects on the basis of careful

preliminary viability studies and budgets. Variances in a "big ticket" item like a reserves contribution could be expected to have a significant impact on the commercial outcome of a project.

[55] We have not lost sight of fairness to the community. That is to some degree bound up with the following issue of likely additional demands.

Likely additional demands

[56] The importance of the factor "likely additional demands" stems, we consider, not just from the purposes of the district plan as we have described them, but also from the very purpose of the Act like in section 5.

[57] The appellants' experienced planning witnesses, Mr A A Bradbourne and Mr J B Childs, opined that the approach taken by the Council had been unfair, inconsistent as between developments in different zones, and ultimately was not demand-driven. In particular, they spoke of inequities which emerge as a result of significant differences in land value between various zones where residential activities are enabled. They also considered that the Council had failed to take into account differences in the types of units proposed (ranging between one bedroom studios and three bedroomed apartments and terrace houses), and the different consequent demands likely to be placed on public reserves in the future.

[58] The witnesses' approach may have been coloured by their describing the contributions levied as being at the "maximum". While a levy based on the value of 20 m^2 of Business 4 land might have been the maximum under the old system, it is not of course the maximum provided in the district plan. Nevertheless, we have carefully considered the evidence offered on behalf of the appellants and the Council to see whether Mr Childs' and Mr Bradbourne's criticisms are justified in a general sense.

[59] Mr Bradbourne went further, and opined that if reserves contributions were set without having regard to different land values between zones, the result could discourage intensification of residential activities in Business zones on major transport routes, which would be inconsistent with regional planning objectives that encourage such intensification.

[60] In essence, the concern about contributions being inflated by using Business zone valuation levels was that the approach took no account of the fact that demand for use of recreation areas is essentially the same for the occupants of equivalent sized apartments in any of the residential or business zones. That concern seems to us to have some force. We do not ignore that Rule 4B.4.4 is based around land value, but we acknowledge what Mr Kirkpatrick said to us in his submissions in reply that it would not

be appropriate to consider "particular objectives, policies or statements from the Isthmus Plan in isolation", but rather the provisions in Parts 4B and 9 must be considered as a whole — that is the condition should be imposed in accordance with the **purposes** specified in the plan. We interpolate and add that this broad consideration should include the **manner** described in the plan. We have found that "manner" may go beyond the strict terms of the rule and may embrace policies that include concepts of fairness and reasonableness. The factors mentioned in paragraph [54] above should in our view be borne in mind for applications made around the time these two were, in taking this approach.

[61] As to the concern that different sized dwelling units will produce different levels of demand on reserves, the appellants' witnesses perceived a lack of fairness and consistency flowing from the council failing to acknowledge that.

[62] Mr Childs pointed to evidence from the Council indicating fairly clearly that the average statistical occupancy of 1 bedroomed units is 1.7 people, of 2 bedroomed units 2.3 people, and 3 bedroomed units 2.8 people. He considered it wrong that the approach taken by the Council to the levying of contributions in the present cases did not reflect the numbers of persons who would create demands on reserves. We see merit in that view, albeit that some might see a loose correlation between the "site area of a unit" and the numbers of occupants.

[63] The respondent called the evidence of Mr Perkins previously referred to, who is an experienced consultant planner who had had particular involvement in assisting with the assessment of financial contributions by the Council. Having outlined the basic statutory considerations in s 108 RMA (and also under s 294 LGA), Mr Perkins offered the uncontentious opinion that conditions should be imposed in accordance with the purpose of the RMA to promote the sustainable management of the urban environment and provide for the social wellbeing of the existing and future community. Further, that the provision of reserves would also assist to remedy or mitigate the adverse effects of a development relating to the additional demand for recreation reserves.

[64] Mr Perkins said that at the time the plan was first promulgated as a proposed plan in 1993, the level of reserves on the Isthmus was approximately 5ha per/1000 persons, but that by the 1996 census the level of reserves had dropped to approximately 4.5ha/1000 persons. He postulated that the Plan's regime was more onerous than the previous one under the LGA, in recognition of "inadequate provision of reserves on the Isthmus". He then offered an historical overview of the approach taken by the Council during the early to mid-1990s. He told us that a requirement of 20 m^2 per unit or cash equivalent was a relatively small contribution when

considered against researched open space needs in the Auckland City. He offered calculations which he said demonstrated that the cumulative effects of residential development in terms of demand for reserves was a long way from being met by this level of contribution, such that the Council would have to make up the shortfall from other revenue resources if accepted standards of open space were to be maintained.

[65] The latter observation was not the subject of dispute in the case. It was recognised by all parties that this would be likely to remain the case whatever average level of contributions up to the Plan's maximum, occurred. The opinion did not however address all aspects of the key issues of fairness, consistency, and levels of additional demand for recreation space coming from developments. Its value was in recognising "fairness to the community" and the increasing level of additional demand apparently occurring.

[66] Having proceeded to offer calculations based on an average occupancy per unit of 2.3 persons (which we are concerned may possibly be something of a generalisation), Mr Perkins proceeded to offer the opinion that the 20 m^2 per unit maximum under LGA had been seen on this occasion to be fair in comparison to the maximum in each case that could be levied (which would have been over $250,000 in the case of ***Retro*** and over $550,000 in the case of ***Hemisphere***). In our view, with respect, that fails to assist with the question of what is fair and reasonable under the operative plan.

[67] Mr Perkins went on to address the issue of whether it would be fair that a residential apartment development on lower value land should pay a lesser contribution than a similar development on higher value land. He indicated that in his opinion, in assessing what was fair, it would be important to take into account the likely costs of mitigating the effects of a particular development; and generally, the costs of mitigating the effects of a development where land costs are higher will be greater than those where land costs are lower, as the cost of purchasing land for reserves in an area of higher value land will itself be higher.

[68] We are concerned that this may be a somewhat simplistic approach, and may not adequately address the issue. For instance, the district plan tells us[13] is that at least 60% of the levy will be applied locally, and the balance City-wide. His view also ignores the relative closeness on many occasions of lower valued land in a zone other than the one in which the development is being undertaken and the levy imposed. We consider that it would not invariably be the case that the Council will be buying Business 4 zoned land to provide reserves for persons occupying developments in Business 4 zoned land. It is further worth noting, as Mr Perkins conceded, that the Council will not always be using the fund to buy

land, but instead on many occasions will be improving and developing existing reserves.

[69] The Council also offered the evidence of Mr AM Johnson, a resource management and public policy consultant who had been responsible for much of the background work for the preparation of the financial contributions section of the district plan. Mr Johnson discussed in some detail principles in the complex area of "good taxation", involving such concepts as allocative efficiency, administrative efficiency, administrative clarity, equity, and policy transparency. Concerning "equitable taxation" he offered a detailed comparison of the public policy concepts of "ability to pay" and "beneficiary pays". In summary, the former involves the concept that some measure of an individual's wealth and income should be taken into account when designing a tax regime, while the latter is based on the principle that individuals who benefit from goods or services should pay for the benefit in proportion to what they receive. For public good elements such as parks and public open spaces, he offered the opinion that it was generally not feasible to exact a user payment, and that some form of "proxy pricing" such as "so much per person" or "so much per dwelling" needed to be developed. He mentioned as well the closely related concept of "polluter pays" as having relevance to the requirement for levying financial contributions.

[70] Mr Johnson reiterated the uncontentious view that reserve contributions will never cover the whole cost of acquiring and developing public reserves, then spoke of some of the history of problems with the Council's former LGA approach, in particular failure or inability to levy cross lease and unit title subdivisions and developments. He took some comfort from the fact that the RMA approach helps with curing these difficulties, by providing an opportunity to "spread the reserves contribution net across all residential subdivisions".

[71] Mr Johnson said that the next policy that the Council considered was the basis for such levies, and that "some thought" was given to the actual development impact represented by increased demand for public open space brought about by a larger population.

[72] Having conceded that ultimately it is individuals, not households, that produce a demand for public open space, we found it surprising that Mr Johnson postulated that the Council considered that the number of new households was a reasonable proxy for the number of additional people likely to be living in a new development. We found that this did not sit well with the research results that we have already mentioned about average occupancies of different sized dwellings, and we were concerned once again that in the present cases the Council may have generalised matters to an inappropriate extent, and may not have clearly focussed on the increased

demand for public open space brought about by the increased population attracted by the subject developments.

[73] Mr Johnson next advised that in devising the financial contribution provisions in the plan, the Council had given thought to three basic approaches:

- A flat dollars per dwelling approach
- An approach based on the value of a development (ad valorem tax)
- An approach based on the equivalent value of a set amount of land within the development.

[74] Because this is not a district plan reference case, we will refrain from undertaking a critique of the three approaches. We will simply consider the opinions offered by Mr Johnson to the extent that they may guide us in understanding the approach taken by the Council in exercising its discretion on these two applications, analysed in the holistic fashion advocated by Mr Kirkpatrick.

[75] Mr Johnson said that a flat charge per unit across the various zones could have the effect of lifting the cost of developing low-cost housing to the point where housing affordability could become a problem; alternately if the level of the charge was kept low, Council could be missing revenue from higher valued developments which could most afford to pay higher charges. He said that an ad valorem tax had been rejected mainly because the value of a development did not appear to bear a close relationship to the impact of increased demand for public open space. He saw partial validity in an approach based on a set area per dwelling as reflecting the possibility that in "large developments" there may be potential for an actual contribution of land for public open space rather than cash contributed for the purchase of the space off site. He considered that the impact of this approach in terms of requiring bigger contributions from more intensive developments and from developments on higher valued land, had been "recognised". He saw this outcome as a way of addressing the distributional limitations of the flat rate approach having a means of assessment which was related to the impact in question. He thought that such an approach also had a built in relationship between the contribution and the reason for the contribution.

[76] Assuming that these philosophies have had an impact on the Council's approach to the setting of the levies on this occasion, we are concerned that the Council may have allowed itself to take insufficient account of the key issues of fairness, consistency, and likely demand arising from a particular development.

[77] We are further concerned to note that Mr Johnson considered that such a revenue collection policy was "very efficient administratively", and also that such approach to what he called "vertical equity" suggested that the burden of a policy should take account of a person's ability to meet the burden in applying some form of proportional, rather then flat allocation of costs. He thought that such policy paid "adequate attention to ability to pay", and that that was a relevant policy consideration. We have our doubts, and again, we think that there is a real risk that the Council may have paid inadequate attention to the key issues.

[78] Mr Johnson also appeared to favour focussing on numbers of units rather than the size of dwelling units or the numbers of bedrooms within them, in his discussion of what he called "logical units of impact". He was content to take the view that there was a clear relationship between the number of new dwellings being built and the expected growth of population, saying that *"the administrative problems of taking account of say the number of bedrooms in a development and using this as a basis for applying financial contributions, are in my view excessive*". He did not elaborate on what those "problems" might be, and we are again concerned to perceive the possibility that there has been inadequate attention paid to certain key issues, especially those of demand and fairness.

[79] When it came to discussion of the approach based on land value, we again thought that the evidence of Mr Johnson illustrated a misconceived approach to the exercise of the discretion. On this topic, he reiterated that the land value approach was used partly to provide consistency of approach between cases where land itself would be provided and those cases where cash would be paid, thus also taking account of the "ability to pay" principle. Interestingly, he then said:

> *There are some valid criticisms against this approach such as the fact that the money obtained is not being used entirely to purchase additional space and so the proxy of space is itself not relevant. I accept that as the basis for calculating contributions an area based formula may be criticised but it is my opinion that it is the least flawed of the options available. Furthermore it is the option most able to meet the requirement of the policy tests outlined earlier.*

[80] We consider that, to the extent that these opinions are likely to reflect the approach that the Council took to setting the subject contributions, they may have influenced the Council to take inadequate account of the key issues.

Decision

[81] With the guidance obtained from the findings of the Court of Appeal and the High Court in these cases, and also the findings of the

Environment Court and the High Court in the ***Far East*** cases, we have approached our task in a manner that may be seen to be a little different from the approach taken in this Court at first instance. That is understandable, we think, because the evidence which was offered to the Environment Court placed some emphasis on the Council's past policies and practices under the LGA, and on some of the notions we have most recently mentioned above.

[82] We have concluded from our deliberations that it would not be appropriate to impose the maximum levy (based on 30 m^2 site area), in exercising our discretion. Indeed the Council expressly conceded that it does not seek to increase the levy above the level that it had imposed equating to the former maximum under the LGA. Nevertheless, the former maximum under the LGA provides us with no relevant pointer, because it takes no or insufficient account of what we have identified as key issues, namely:

- fairness and reasonableness (both to developer and community);
- consistency
- likely additional demand

[83] We have not seen sufficient evidence to enable a particularly precise calculation of appropriate levies, especially having regard to demand, mainly because the cases of the parties (particularly the Council) before the Court on the first occasion, had a focus on past policies and practices. If the parties are unable to reach agreement as to quantum, we will have to hear further evidence addressing the relevant issues. We come to that conclusion with reluctance because of the long-standing nature of this litigation and the knowledge that other cases are pending that involve similar issues.

[84] Having said that, one aspect of the case which has reasonable certainty about it, is the issue of "fairness" to those developers who set their budgets against former general levels of financial contribution and lodged their applications before the district plan became operative on 15 November 1999. An overview of Mr Perkins Appendix C and his discussion of the appendix in evidence gives us a reasonable feel for what the researches undertaken by the developers would have indicated to them in this regard. Factoring in the pluses and minuses of all the other issues, and then taking due account of this factor in seeking a solution, we have the present feeling that a level of one half of the maximum contribution in the Plan would represent fairness in the case of these two particular developments.

[85] If the parties wish us to hear further evidence, we request a joint memorandum from the parties within 30 working days of this decision,

setting forth proposals for finalisation of the case. We sincerely trust that the quantum of the 2 contributions can now be agreed between the parties based on guidance to be gained from this decision. If agreement cannot be reached between the parties on that, the presiding Judge will conduct a conference to arrange preparation of further aspects of the case for hearing.

[86] Costs are reserved.

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[1] *Retro Developments Limited and Hemisphere Properties Limited v Auckland City Council* Decision A84/2001

[2] *Auckland City Council v Retro Developments Limited and Hemisphere Properties Limited* [2002] NZRMA 445

[3] *Retro Developments Limited and Hemisphere Properties Limited v Auckland City Council* (25 February 2003) William Young J, CA161/02

[4] *Retro Developments Limited and Hemisphere Properties Limited v Auckland City Council* (19 May 2003) Chambers J, HC Auckland, AP127/01

[5] In para [23]

[6] In para [30]

[7] *Retro Developments Limited and Hemisphere Properties Limited v Auckland City Council* (19 May 2003, Chambers J, HC Auckland AP127/01

[8] Decision A048/01

[9] [2002] NZRMA 433

[10] *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER

[11] In the Environment Court decision *Far East Investments Limited v Auckland City Council* Decision A048/01

[12] Paras [39] and [40]

[13] Clause 4B.4.7 ("Policies: Expenditure of Cash Contributions")