



Developer contributions: back to the future?

INTRODUCTION

Development contributions (DCs) are one of the funding mechanisms a territorial authority (Council) may employ to fund the costs of certain activities, namely the growth-related costs of reserves, network infrastructure and community infrastructure. DCs can only be imposed in accordance with a development contribution policy (DC policy), which is contained in a Council's long-term plan (and can be updated in its annual plan). One of the other funding mechanisms is financial contributions (FCs). FCs are imposed as conditions of resource consents, in accordance with the purposes and determined in the manner specified in the relevant District Plan.

DCs were introduced as an alternative to FCs in 2002, with the enactment of the Local Government Act 2002 (LGA 2002). They were a response to complaints from Councils about "difficulties" with the FC regime. As conditions of resource consents, FCs could be appealed to the Environment Court (and beyond). The FC provisions in a District Plan could themselves also be appealed to the Environment Court (and beyond). Many Councils complained about the time, cost and delay in resolving appeals. There were also some concerns about whether FCs could capture wider growth-related costs.

The DC regime introduced in the LGA 2002 was the response to these concerns. There was no provision in that legislation for appeals to the Environment Court

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(or otherwise) in respect of a DC policy, or an individual DC assessment. The only basis by which a substantive challenge could be mounted was judicial review.

It was left to Councils to decide whether to have a DC policy, FC policy, or both. However, Councils could not "double-dip" and collect both DCs and FCs from the same development to fund the same activities. Over time, most Councils have moved to DCs, although some operate dual policies.

Complaints from developers about the lack of appeal rights under a DC regime, and less than robust DC policies, have increasingly surfaced (despite the success of an early judicial review challenge, *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC)). The Local Government Act 2002 Amendment Act 2014 (LGAAA 2014) introduced a number of changes to the DC regime to make it fairer, better focused, more transparent

and more workable. One change was the introduction of a right to “object” to a DC levy under s 199C of the LGA 2002 – which was something of a return to an FC appeal rights regime.

The current Resource Legislation Amendment Bill 2015, in cls 153–159, proposes to remove the FC provisions from the Resource Management Act 1991, so that all “developer contributions” in the future will be through the DC regime. In light of this potential move to one regime only (DCs) with objection rights (is this back to the future?), this article:

- briefly recaps some of the DC “fundamentals”;
- summarises the key changes to the DC regime introduced by the LGAAA 2014;
- analyses *Mapua Joint Venture v Tasman District Council: A Decision by Development Contributions Commissioners* (Commissioners Atkins, St Clair and Abley, 11 December 2015), with a focus on the limitations of the objection process; and
- concludes with brief observations about the potential for judicial review of a DC policy or levy.

DC FUNDAMENTALS

Neil Construction established the need for Councils to strictly apply the “critical filter” (at [214]) of s 101(3) of the LGA 2002 to their funding decisions, including those in respect of a DC policy. Section 101(3) requires a Council to consider (in relation to each activity to be funded) a range of matters, including:

- community outcomes;
- the distribution of benefits;
- the period in or over which those benefits are expected to occur;
- the extent to which the actions or inaction of particular individuals or a group contribute to the need to undertake the activity; and
- the costs and benefits, including consequences for transparency and accountability, of funding the activity distinctly from other activities.

Failure to give genuine thought and attention to any of these matters could give rise to an error of law in adopting a DC policy.

In addition, before imposing a DC a Council must also consider:

Whether the relevant activity is a “development”, ie does it generate demand for reserves, network infrastructure or community infrastructure (refer s 197(1))?

If the relevant activity is a “development”, whether there is a causal nexus between it and the particular activities that are to be funded by the DC. For example, capital expenditure directed solely at providing higher levels of service rather than to accommodate growth from the development should not attract a DC.

The alternative sources of funding available (s 199). Obviously, Councils have a range of funding mechanisms and sources available to it (such as rates, direct user charges, and so on). Councils cannot consider DCs in a vacuum.

Under s 198(1), DCs can be imposed at the time a resource consent is granted, a building consent is granted, or a service connection is granted (for example, water and wastewater connections). Usually Councils will look to impose development contributions at the first available opportunity.

THE 2014 AMENDMENTS TO THE DC REGIME

Key changes introduced in the LGAAA 2014 included the introduction of two new sections, ss 197AA and 197AB of the LGA 2002, to explain the purpose and principles of DCs. They emphasise the need for there to be a “causal nexus” between development and the demand for infrastructure.

Significantly, the LGAAA 2014 provided a new right to “object”, under s 199C of the LGA 2002, to a DC that has been levied. An objection can be made on one of four grounds identified in s 199D, being that the DC, or the Council in levying the DC:

- failed to properly take into account features of the development that would, on their own or cumulatively with those of other developments, substantially reduce the impact of the development on requirements for community facilities in the Council’s district or parts of its district;
- required a DC for community facilities not required by, or related to, the objector’s development, whether on its own or cumulative with other developments;

- required a DC in breach of s 200; or
- incorrectly applied the DC policy to the development.

An objection is heard by a DC “commissioner” appointed under s 199F. In making a decision, under s 199J a DC commissioner must consider:

- the grounds on which the DC objection was made;
- the purpose and principles of DCs under ss 197AA and 197AB;
- the provisions of the DC policy;
- the cumulative effects of the objector’s development, in combination with the other developments in a district or parts of a district, on the requirement to provide the community facilities that the DC is to be used for or put toward; and
- any other relevant factor associated with the relationship between the objector’s development and the DC to which the objection relates.

The LGAAA 2014 also provided for a “reconsideration” process under ss 199A and 199B of the LGA 2002. This is more of a process to correct errors in calculations of application of a DC policy. The LGAAA 2014 also formalises the scope and process around “development agreements” between Councils and developers, under ss 207A–207F of the LGA 2002.

THE MAPUA JOINT VENTURE DECISION

This objection related to a DC of some \$1,000,000 imposed by the Tasman District Council (TDC) in respect of an 80-lot subdivision. The developer, Mapua Joint Venture (MJV), considered that, properly applied, a DC of approximately \$335,000 was the appropriate amount (ie it sought a reduction of around \$665,000).

While there were a number of issues in contention, the key issue of wider relevance was whether the use of a district-wide catchment in the DC policy was within or outside the scope of a valid objection under the LGA 2002. MJV considered that the DC policy should have taken a finer-grained “catchment” approach, rather than spread costs across the entire district away from where many of the works were occurring.

This gave rise to a legal question. As the DC commissioners framed it, the question was whether they were entitled

to “look behind” the DC policy and determine that the district-wide approach was not appropriate. They stated:

“At face value, s199J appears to impart significant scope on our enquiry and considerations. However, this is tempered by the caveat in s199C(3) that we cannot enquire into the content, or as we say look behind the DCP.” (at [38])

Section 199J provides:

“When considering a development contribution objection and any evidence provided in relation to that objection, development contributions commissioners must give due consideration to the following:

- (a) the grounds on which the development contribution objection was made;*
- (b) the purpose and principles of development contributions under sections 197AA and 197AB;*
- (c) the provisions of the development contributions policy under which the development contribution that is the subject of the objection was, or is, required;*
- (d) the cumulative effects of the objector’s development in combination with the other developments in a district or parts of a district, on the requirement to provide the community facilities that the development contribution is to be used for or toward;*
- (e) any other relevant factor associated with the relationship between the objector’s development and the development contribution to which the objection relates.”*

Section 199C(3), however, provides:

“The right of objection conferred by this section does not apply to challenges to the content of a development contributions policy prepared in accordance with section 102.”

While MJV was not seeking a rewrite of the DC policy or its setting aside as unlawful (it was seeking that the application of the DC policy to its 80-lot development be modified to meet the relevant statutory requirements), the DC commissioners ultimately found:

"In summary we consider the district wide approach is an integral part of the DCP and is a determining factor in the setting of the charges. We therefore agree with the submissions for Council that 'the proper focus of these proceedings must be the section 199D objection grounds set out in the notice of objection'. Consequently we do not look behind the DCP in making our determination but we do make a number of observations regarding the appropriateness of district wide catchments within the existing DCP." (at [41]; footnote omitted)

The DC commissioners' observations indicated that they were not impressed with the TDC approach, despite finding that they could not look behind the DC policy. In respect of the use of catchments, the DC commissioners observed or emphasised that a key DC principle is that the cost "should be determined according to, and be proportional to, the persons who will benefit from the assets", and that while this could be the "whole community", they expected that this would be "specific to the community of benefit" (at [49], citing s 197AB(c)). This was consistent with another general principle that DC policies should avoid "grouping [assets] across an entire district wherever practical" (at [49], citing s 197AB(g)(ii)). In particular, the DC commissioners commented that:

"... it [was] difficult to understand [how] the existing DCP wastewater catchment grouped assets in Mapua, St Arnard and Takaha given these communities are distant from each other by at least 75 kilometres. ...

...

... it appeared odd that vastly disconnected spatial communities should ... somehow be connected through a financial mechanism. Consequently on that matter the existing DCP also fell short of expectations." (at [51]–[53])

The DC commissioners also had concerns about the level of information that the TDC had originally provided to support its DC policy. Much of the information only came out through the objection process, rather than being provided up front and/or accompanying the DC policy itself.

The TDC has since acknowledged some of these shortcomings in its DC policy, and is considering moving

to a multi-catchment approach in the future. Accordingly, the MJV objection might have triggered a review of the TDC DC policy of potential benefits to other developers in the future. But the objection did not directly help MJV, and in light of the approach that the DC commissioners took to "scope", many developers might still look to judicial review in the future, rather than the objection process under the LGA 2002.

JUDICIAL REVIEW

The validity or lawfulness of a DC policy or a specific DC levy remains open to challenge by way of judicial review, notwithstanding the objection procedure. The LGA 2002 also preserves, in s 199N, the opportunity to judicially review a decision of a DC commissioner on an objection (there is no general right of appeal against a decision on a DC objection).

Judicial review of a DC policy would generally be framed within one or more of the three traditional grounds of judicial review, ie "procedural impropriety", "irrationality" and/or "illegality"; or, as Robin Cooke put it in "Third Thoughts on Administrative Law" (1979) 5 New Zealand Recent Law 218 at 225, has the decision-maker acted "in accordance with law, fairly and reasonably"?

The shortcomings in the TDC's provision of information to explain and support its DC policy, and allow its validity to be tested through the development of the DC policy, might have grounded a procedural challenge, for example. The substantive failure of the TDC to use catchments when it is practical to do so might also have founded a challenge based on a failure to comply with the relevant statutory requirements.

It will be interesting to see if developers do still take up the objection process in the future, despite its limitations, or instead continue to seek judicial review. In other words, are we back to the future of judicial review (as was the case with DCs originally), rather than the limited quasi-appeal objection process now provided under the LGA 2002?

**Note: The author was counsel for Mapua Joint Venture in respect of its objection to the development contributions imposed by the Tasman District Council.*