

## Legal update - First decision by Commissioners under new development contributions regime

Mark Odlin

9 February 2016

More than a year on from the amendments to the development contributions regime in the Local Government Act, (see our previous [legal update](#) for discussion of amendments) the first ever decision by Independent Development Contribution Commissioners has been made.

The Tasman District Council (the Council) charged Mapua Joint Venture (MJV) \$1,008,336 in development contributions in respect of an 80 unit subdivision (the Development).

MJV appealed the development contributions assessment on the basis that the Council had:

- Required development contributions for community facilities extending significantly beyond the facilities required by MJV's development
- Failed to properly take into account features of the Development, that, on their own or cumulatively, with those of other developments, would substantially reduce the impact of the development on requirements for community facilities in the district
- Failed to recognise contributions to roading and wastewater infrastructure that would be made by MJV.

### The council's development contributions policy – district wide approach

MJV's key contention was that the Council imposed development contributions on a district wide basis and that this approach is not appropriate under the Act.

Looking at the Mapua catchment alone and the benefits of the various wastewater and stormwater projects within the catchment, MJV argued that a contribution of \$334,371 (as opposed to the \$1,008,336 assessed) was more appropriate.

One of the key legal issues was whether the Commissioners were entitled to 'look behind' the DCP and determine that the district wide approach was not appropriate. The Commissioners 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.*

On that basis, the Commissioners concluded that the district wide approach was an integral part of the DCP and a determining factor in the setting of the charges. Consequently, the Commissioners found that they could not look behind the DCP in making their determination but did go on to make several observations on the DCP.

### Observations on the DCP

The Commissioners made two key observations about the DCP regarding:

- The depth of information a DCP should contain
- The appropriateness of district wide catchments.

On the first issue, the Commissioners acknowledged the tension between the need for territorial authorities to be accountable to their communities and the administrative demands they face. In this case, there was no published methodology or supporting data (such as information on how the Council will allocate costs between growth and level of service improvements) behind the development contributions. Rather, information was provided in a subsequent methodology memorandum during the hearing. The Council acknowledged this shortcoming, but argued that the lack of specific information did not affect the validity of the DCP.

After considering the methodology memorandum, the Commissioners agreed with the Council's assessment but noted that all local authorities *have an obligation to comply with the information requirement to 'demonstrate' [how calculations for contributions were made].* The Commissioners thought that: *if assumptions are made, these should be explicitly stated and a reason provided to justify assumptions so that the community can assess their validity as part of the consultative process of a draft DCP.*

The second issue concerning the setting of district wide catchments will be of interest to many territorial authorities, given the new principle in the Act that territorial authorities should *avoid grouping [developments] across an entire district wherever practical* when calculating or requiring development contributions. In setting development contribution catchments, territorial authorities must:

- Ensure that development contributions seek the collection of costs from those creating the need for the asset due to growth
- Balance considerations of fairness and proportionality against practical and administrative efficiencies.

Acknowledging this difficult task, the Commissioners said that territorial authorities determining how to set their development contribution catchments should:

- Focus on communities that as a minimum are not contiguous
- If there is no consumption or benefit in an intervening area, then a new catchment is probably justified.

The Commissioners went on to analyse the specific objections made under the Act.

## **Section 199D(A)**

MJV argued under section 199D(a) of the Act that the Council failed to properly take into account features of the Development. At issue was the latent capacity of the wastewater pump station and whether it would substantially reduce the impact of the Development on Council wastewater infrastructure.

Ultimately the Commissioners concluded this ground of objection was not established. Although MJV would be contributing infrastructure that provided both for the Development and (with upgrades) potential wider development, it would not *substantially reduce the impact of the development on requirements for community facilities in the [Council's] district or parts of that district*.

## **Section 199D(B)**

MJV argued that under section 199D(b) the Council had levied development contributions for community facilities not required by, or related to, the Development (as a consequence of requiring district wide contributions). Although the Commissioners had sympathy for this argument, given their determination that they could not look behind the DCP, they could not hold that this ground was satisfied.

## **Section 199D(C)**

MJV argued that under section 199D(c) the Council had levied development contributions in breach of section 200 of the Act insofar that it failed to recognise the contributions to wastewater infrastructure that were to be made by MJV as part of the Development.

The Commissioners rejected MJV's 'latent capacity' argument and went on to state that regardless, the MJV contribution to wastewater facilities does not negate the need for the other wastewater community facilities.

## **Comment**

At first blush the decision could be seen to highlight a shortcoming in the new legislation, namely that the Commissioners, scrutinising a DCP and its application to a development, are powerless to amend a DCP, even if a DCP allows the recovery of a disproportionate portion of the costs attributable to a development.

However, in our opinion, the legislation strikes the right balance. By making comments on a DCP, Commissioners can send strong signals to a territorial authority that amendments to a DCP are called for, without undermining that territorial authority's ability to adopt a DCP in consultation with its community.

The challenge for territorial authorities is to get it right while applying a statutory framework which confers wide discretion as to how they balance competing considerations and demands. Territorial authorities must also provide their communities with sufficient information so that they can understand (and test) the basis on which development contributions are assessed. This case provides some useful guidance as to how territorial authorities should approach both tasks.

## **Auckland**

**188 Quay Street  
Auckland 1010**

**PO Box 1433  
Auckland 1140  
New Zealand**

**P: +64 9 358 2555**

**F: +64 9 358 2055**

## **Wellington**

**Aon Centre  
1 Willis Street  
Wellington 6011**

**PO Box 2694  
Wellington 6140  
New Zealand**

**P: +64 4 499 4242**

**F: +64 4 499 4141**

## **Christchurch**

**83 Victoria Street  
Christchurch 8013**

**PO Box 322  
Christchurch 8140  
New Zealand**

**P: +64 3 379 1747**

**F: +64 3 379 5659**