

MINUTES

TITLE: Environment & Planning Subcommittee
DATE: Monday, 5 November 2007
TIME: 9.30 am
VENUE: Tasman District Council Chamber, 189 Queen Street, Richmond

PRESENT: Crs T King (Chair), M Higgins and N Riley

IN ATTENDANCE: Co-ordinator Subdivision Consents (M Morris), Principal Resource Consents Adviser (R Askew), Administration Officer (B D Moore)

1. APPLICATION RM060688 – NELSON DIOCESAN TRUST BOARD, SELWYN STREET, MOTUEKA – OBJECTION TO CONDITIONS OF CONSENT PURSUANT TO SECTION 357 RESOURCE MANAGEMENT ACT 1991

Mr S Jones, Registered Surveyor, on behalf of the applicant, objected to Condition 3 (including the Advice Note relating to that condition) of a decision on application RM060688 issued under staff delegated authority on 5 June 2007.

The Committee proceeded to hear the application, presentation of submissions and staff reports as detailed in the following report and decision.

The Committee reserved its decision at 11.00 am.

RESOLUTION TO EXCLUDE THE PUBLIC

Moved Crs King / Higgins
EP07/11/15

THAT the public be excluded from the following parts of the proceedings of this meeting, namely:

Nelson Diocesan Trust Board

The general subject of the matter to be considered while the public is excluded, the reason for passing this resolution in relation to the matter, and the specific grounds under Section 48(1) of the Local Government Official Information and Meetings Act 1987 for passing this resolution are as follows:

General subject of each matter to be considered	Reason for passing this resolution in relation to each matter	Ground(s) under Section 48(1) for the passing of this resolution
Nelson Diocesan Trust Baord	Consideration of a planning application	A right of appeal lies to the Environment Court against the final decision of Council.

Moved Crs Wilkins / King
EP07/11/16

THAT the open meeting be resumed and the business transacted during the time the public was excluded be adopted.

CARRIED

APPLICATION RM060688 - NELSON DIOCESAN TRUST BOARD, SELWYN STREET, MOTUEKA – OBJECTION TO CONDITIONS OF CONSENT PURSUANT TO SECTION 357 RESOURCE MANAGEMENT ACT 1991

Moved Crs Higgins / Wilkins
EP07/11/17

THAT pursuant to Section 357D of the Resource Management Act, the Committee DECLINES IN PART AND UPHOLDS IN PART the objection of Nelson Diocesan Trust Board as detailed in the following report and decision.

CARRIED

**Report and Decision of the Tasman District Council
through its Hearings Committee Meeting
held in the Tasman District Council Chambers, Richmond**

on Monday, 5 November 2007, commencing at 9.30 am

A Hearings Committee (“the Committee”) of the Tasman District Council was convened to hear the objection lodged by **Nelson Diocesan Trust Board** relating to conditions of a subdivision consent issued under delegated authority on 5 June 2006. The objection, made in accordance with Section 357A of the Resource Management Act 1991 (“the Act”), was lodged with the Tasman District Council on 5 September 2007 and refers to resource consent RM060688.

- PRESENT:** **Hearings Committee**
Cr T King, Chairperson
Cr M Higgins
Cr E Wilkins
- APPLICANT:** Mr S Jones, Jones and Associates Ltd, representing the applicant Nelson Diocesan Trust Board.
- CONSENT AUTHORITY:** **Tasman District Council**
Mr M Morris, Co-ordinator Subdivision Consents
- IN ATTENDANCE:** Mr R Askew , Principal Resource Consents Adviser -
Assisting the Committee
Mr B Moore- Committee Secretary

1. BACKGROUND OF CONSENT AND CONDITIONS

The property in question is 1350 square metres in area and is situated at 9 Selwyn Street Motueka.

In 2005 the applicants were granted resource consent (RM040293) for a Comprehensive Residential Development involving the construction of five dwellings on the one title. According to the application the dwellings were constructed between July and November 2005.

Although the resource consent for dwellings was issued in 2005, there had been building consents lodged for the dwellings in April 2004. The dwellings were classified as "pre LTCCP" and were accordingly charged the lower Financial Contribution payable for multiple dwellings under the Proposed Tasman Resource Management Plan (PTRMP) at that time being a total amount of \$1,450.

In August 2006 the applicant applied for subdivision consent to create separate certificate of titles for each of the completed dwellings. The application was discretionary in that each of the lots were below the minimum lot size of 500 m² provided as a controlled activity for infill residential subdivision. The effects of the subdivision were considered to be no more than minor as each of the proposed allotments already had an existing dwelling and there would be very little change that would result from the proposed subdivision. The subdivision consent was issued on 31 August 2006.

The applicant lodged an objection to the condition and advise note relating to the imposition of Financial Contributions and Development Contributions pursuant to Section 357A of the Resource Management Act 1991.

Since the receipt of the Section 357 objection, the objection to the Development Contributions has been handled by Council's Environment & Planning Manager, Mr Dennis Bush-King who has considered the High Court Case in Neil Construction Ltd v North Shore City Council, which was a Judicial Review on the imposition of Development Contributions for infrastructure on a housing development on the North Shore. This case and judgement is referred to in more detail in the reasons for the decision..

In the light of the North Shore decision, Mr Bush-King concluded, that in this case, because there was no "development" resulting from the activity, that the Development Contributions for the roading, water, stormwater and sewage should be waived and that reserve fund contributions be reduced from 5.5% to 3.25%.

This offer, which was made on a without prejudice basis, was declined by the applicant.

2. THE OBJECTION

On 6 September 2006 a Section 357 objection was received by Council objecting to the imposition of Financial Contributions for Reserves and Community Services (5.5% of the value of four allotments for Reserves & Community Services) under Condition 3. The applicant also objected to the imposition of Development Contributions under the LTCCP as detailed in the Advice Note

The applicant objects to **Condition 3 Financial Contribution**, which provides:

Financial Contributions are required on one allotment. The following shall apply:

Reserves and Community Services

- *Payment of a reserves and community services levy assessed at 5.5% of four allotments (land value only). Valuation shall be by way of a special valuation undertaken by a registered valuer at the Consent Holder's request and cost.*
- *The reserves levy that was paid as part of the land use and building consents for the dwellings (\$1,450 in total) will credit against the reserves levy payable for the subdivision.*

Advice Note – Development Contributions

Council will not issue the Section 224(c) certificate in relation to this subdivision until all Development Contributions have been paid in accordance with Council's Development Contributions Policy under the Local Government Act 2002. The power to withhold a Section 224(c) certificate is provided under Section 208 of the Local Government Act 2002.

The Development Contributions Policy is found in the Long Term Council Community Plan (LTCCP) and the amount to be paid will be in accordance with the requirements which are current at the time the relevant Development Contribution is paid in full.

This consent will attract a Development Contribution on four allotments in respect of:

- *Roading*
- *Stormwater*
- *Water*
- *Sewage*

The following levies that were paid as part of the building consents for the dwellings will credit against the amounts payable as Development Contributions.

- *Roading \$698*
- *Water \$307*
- *Sewage \$335*

3. REASONS FOR THE OBJECTION

The applicant considers that no payments should be made to the Council for the following reasons:

- The dwellings have been erected pursuant to previous Land Use Resource Consent and Building Consent and that a development levy has already been charged and paid for that work (to the amount of \$1,450);
- That the subdivision does not change the demand or effects of the existing development;
- That the High Court Decision in the case of Neil Construction Ltd v North Shore City Council [CIV 2005-404-4690] provides case law that has relevance to this

objection in regards to the Council's ability to require Development Contributions and to establish "causal nexus" between the development and the demand for infrastructure the activity generates and therefore the applicant now questions whether there is any lawful provisions for applying the condition.

4. PROCEDURAL MATTERS

No Procedural matters were raised.

5. EVIDENCE HEARD

The Committee heard evidence from the applicant / objector and the Council's reporting officer. The following is a summary of the evidence heard at the hearing.

5.1 Applicant's Evidence

Mr S Jones of Jones and Associates Ltd spoke to the objection on behalf of the applicant and referred to his negotiations with the Council's Environment & Planning Manager, Mr Bush-King, that had been carried out in an attempt to resolve the objection under delegated authority.

Mr Jones then referred to an e-mail of 15 August 2007 sent by Mr Bush-King to Mr S Jones. This e-mail stated that in light of the Neil Housing vs Northshore City Council case, that Mr Bush-King was of the view that development contributions for dwellings are not now payable.

As far as the financial contribution for reserves and community services, Mr Bush-King believed that the Nelson Diocesan Trust Board was liable because of the creation of the new lots; however the e-mail stated that in similar situations the Council has accepted a figure less than 5.5% and that 4% and 3.25% had been used.

Mr Bush-King stated in his e-mail that he would be prepared to settle the Section 357 Objection on the basis of:

1. Withdrawing the obligation to pay development contributions on utilities;
2. Fixing a financial contribution at 3.25%.

Mr Bush-King offered that if the Nelson Diocesan Trust Board accepted this proposal that the Consent Co-Ordinator Subdivisions, Mr M D Morris could arrange for the new decision to be issued recognising any prior contribution prior to building.

Mr Jones tabled and read his submission and noted that Council can charge two types of levy under different pieces of legislation. Development Contributions can be charged under the Local Government Act, and Financial Contributions can be charged under the Resource Management Act.

Mr Jones stated that as a condition of construction in 2005, the Nelson Diocesan Trust Board was required to install a new water main and new stormwater main for the full length of Selwyn Street at a cost of \$42,000.

Mr Jones acknowledged the e-mail offer of 15 August 2007 from Mr Bush-King. He stated that the applicant objects to paying 3.25% reserve fund contribution (a total of \$21,937 inclusive of GST relating to four new allotments).

Mr Jones noted that the Proposed Tasman Resource Management Plan states that financial contributions are contributions of land or money that the Council may require to assist in managing adverse effects of activities. It states that Financial Contributions will be imposed when land is subdivided and when buildings are constructed to assist in managing effects anticipated to be generated by the subsequent use of those allotments and buildings.

Mr Jones questioned what are the anticipated effects that require mitigation were and questioned what is the subsequent use of those allotments compared to the current use of these allotments. He stated that the answer is nil in the applicant's case where the five units are already constructed on this subject site.

Mr Jones provided comments on the Council officer's report contained within the agenda. He stated that the five units are not a comprehensive development and questioned the Council officer's decision to impose the reserve levy at the time of subdivision. He said that had the Diocesan Trust Board decided not to have separate titles, then the Council would not have had the opportunity to impose an additional Financial Contribution.

Mr Jones commented that the situation highlights a major anomaly in the Council's policy of charging Development and Financial Contributions at the time of subdivision when there are no effects, rather than charging at building consent stage when the actual effects occur. Mr Jones said that the recent case of Neil Construction vs Northshore City Council, the High Court decision considered only development impacts imposed under the Local Government Act and not reserves contributions under the Resource Management Act.

Mr Jones tabled and read extracts from the Neil Construction case and stated that these demonstrated that no reserve contribution should be payable by the Nelson Diocesan Trust Board for the subdivision of the land containing existing units at 9 Selwyn Street, Motueka.

Mr Jones requested that Council uphold this objection in full and delete condition 3 of consent RM060688.

5.2 Council's Reporting Officer's Report and Evidence

Consent Co-Ordinator Subdivisions, Mr M D Morris spoke to his report contained within the agenda. Mr Morris referred to Section 16.5 of the Proposed Tasman Resource Management Plan regarding financial contributions that are imposed on subdivision and development. He stated that the Reserves Development Impact Levy of \$1,450 that had been imposed when the buildings were constructed would be credited against the Financial Contribution payable at the subdivision stage.

Mr Morris provided three examples of early subdivisions in Tasman District where Financial Contributions have been imposed at the subdivision stage but dwellings had been previously erected on site.

Mr Morris said there would be serious negative financial consequences if the Council was to uphold this objection and the integrity of the financial contributions system to

manage development in relation to reserves and community services would be severely undermined.

Mr Morris recommended that the applicant's objection be declined and that condition 3 remain unchanged.

5.3 Applicant's Right of Reply

Mr Jones responded and stated that the Richmond Comprehensive Subdivisions, which Mr Morris had referred to, had Financial and Development Contributions all imposed under prior agreements. He reminded the hearing panel that developers can create a comprehensive development and that dwellings can be used for rental purposes where a subdivision does not occur.

Mr Jones stated he was interested in what the law actually says about this situation, not what levies Council staff believe can be justified.

Mr Jones stated that he believed the subject application has been caught in a transitional situation. He reminded the hearing panel about the cost of the water main and stormwater system in the public street that the applicant had been required to fund.

6. DECISION

Pursuant to Section 357D of the Act, the Committee **DECLINES** the objection in part and **UPHOLDS** the objection in part as set out below.

Condition 3 "Financial Contribution"

A. "Reserves and Community Services" objection declined in regards to removal of payment but upheld in regards to amount of contribution payable and reworded as follows:

Financial Contributions are required on four allotments (*note correction of typographical error*). The following shall apply:

Reserves and Community Services

- Payment of a reserves and community services levy assessed at 3.25% of four allotments (land value only). Valuation shall be by way of a special valuation undertaken by a registered valuer at the Consent Holder's request and cost.
- The reserves levy that was paid as part of the land use and building consents for the dwellings (\$1,450 in total) will credit against the reserves levy payable for the subdivision.

B. "Advice Note – Development Contributions" objection upheld in regards to removal of Advice Note detailing liability for Development Contributions payment for this subdivision consent.

7. REASONS FOR THE DECISION

In relation to each of the issues raised in the objection, the Committee considered as follows:

A. Reserves and Community Services (Financial Contribution)

The Committee noted that the development had been undertaken to erect five dwellings on one title in 2004 and that a total of \$1450 reserves levy payment chargeable at that time was agreed to and paid by the applicant. The Committee agreed that this previous payment should be acknowledged.

The Committee accepts that subdivision by itself does not generate any significant adverse effects; rather it is the subsequent land use and land ownership that may generate the adverse effects. In this case the land use is established by previous consents but the land ownership and number of titles/title holders will change.

The applicant raised the matter of the dispensation provided on Financial Contributions when holders of cross-lease titles obtain freehold titles for their properties. The Committee noted that a typical cross-lease title of 999 years duration is a de-facto subdivision and if one was to apply for such a title today, it is specifically interpreted as a subdivision pursuant to the provisions of Section 218 of the Resource Management Act 1991 so in that case there is only a change in the type of title held by the proprietor.

The Committee considered the High Court case of Neil Construction Ltd v North Shore City Council which was referred to both by the applicant and the Council staff. The Committee was advised that this case was specifically relevant to the matter of Development Contributions imposed under the Local Government Act 2002.

The Committee requested further advice on this matter during the public excluded part of the hearing. The Committee was referred the unreported judgment of Housing New Zealand Limited v Waitakere City Council [HC Auckland, AP41-SW00], (copy appended), which provides that Financial Contributions can be taken on subdivision when the land has already been developed. In this case the High Court held that the Environment Court was correct in finding that a reserve contribution could be payable upon the subdivision of existing household units.

The Committee were advised that the matter of the Financial Contribution for Reserves and Community Services was sought pursuant to section 108 of the Resource Management Act 1991 and more particularly sub-sections 108(2)(a), 108(9) and 108(10). This section and sub-sections provide for the Council to impose a Condition in regards to requiring a Financial Contribution subject to such condition being in accordance with the purposes specified in the Proposed Tasman Resource Management Plan (PTRMP), including for the purpose of ensuring positive effects on the environment to offset any adverse effect and that the level of contribution is determined in a manner described in the Plan.

The PTRMP provides that Section 16.5 – Financial Contributions, "...establishes Council's ability to require payment of Financial Contributions as

a condition of subdivision, building development...or resource consents for other purposes.” And further that the circumstances where Financial Contributions will be required includes a statement that “Financial Contributions will be imposed when land is subdivided, and when buildings are constructed, to assist in managing effects anticipated to be generated by the subsequent use of those allotments and buildings”.

The Committee notes that there are two key circumstances that trigger a requirement for payment of Financial Contribution. The first circumstance is when land is subdivided, and the second circumstance is for building. The matters are clearly separate and either one or both of the circumstances may trigger a Financial Contribution and there is no set sequence as to which kind of activity could come first. It is also acknowledged however that where a previous contribution has been made, this is acknowledged and credited against the subsequent activity.

These are matters that have been referred to in High Court decision of Housing New Zealand v Waitakere City Council, referred to previously.

The Committee accepted the previous offer made by Mr Bush-King should stand and that the Reserves and Community Services Financial Contribution would be 3.25% of the value of four allotments (being a reduction of the 5.5% provided for in the Plan), and that the payment already made of \$1450 be deducted from the ascertained value. From the evidence given by Mr Jones at the hearing that the value of each section would be around \$150,000 would result in a Financial Contribution payable of around \$21,937 and with previous payment of \$1,450 deducted, would be \$20,487.50

B. Advice Note – Development Contributions

The Committee acknowledge that Development Contributions for Services are provided under the Local Government Act 2002 and that the hearing was limited to consider an objection to a condition for resource consent under the Resource Management Act 1991.

The Committee noted that the Environment and Planning Manager in light of the Neil Construction Ltd, High Court ruling, had agreed, without prejudice, to waive these charges.

In the circumstances the Committee considered that the phrasing and detail in the advice note (although not a condition of consent) may lead to some misunderstandings by the applicant and therefore the Committee has removed the Advice Note.

For the avoidance of doubt however it should be noted that Financial Contributions are still required pursuant to condition 3 (as amended) prior to issue of section 224(c) certificate.

Comment on Legal Matters Raised

The Committee felt that although the matter of Development Contributions under the Local Government Act 2002 was not an issue for a hearing convened pursuant to Section 357 and 357C of the Resource Management Act 1991, they did consider the matter in regards to the Advice Note appended to Condition 3 and have reworded that Note to remove specific reference to services that may attract a Development Contribution.

The Committee also noted the relevance of the Neil Construction Ltd Case in regards to Development Contributions for infrastructure services and the opinion of the Environment and Planning Manager that Development Contributions were now no longer payable for utilities for this subdivision.

Regarding the matter of the Financial Contribution under the PTRMP, the Committee feels that the Neil Construction Ltd Case which required a causal nexus for Development Contributions under the Local Government Act 2002 should be distinguished from the proposed Financial Contribution required under the PTRMP and the Resource Management Act 1991.

The Committee considered that the case of Housing Corporation NZ v Waitakere City Council provides clear case law on the matter of Council's ability to require a Financial Contribution for Reserves and Community Services for a subdivision following the building development on the site.

Issued this 9th day of November 2007

Councillor T King
Chair of Hearings Committee

Appendix 1

Copy of Extract of AP41-SW00

Housing New Zealand Ltd -v- Waitakere City Council; Palmerston North City Council

Judgment Date: 17/7/2000

Glazebrook, J; HC Auckland

Appearances: Bartlett, RE; Simons, SJ; Kirkpatrick, DA;

McNamara, PMS; Maassen, JW

Appeal against decisions of the Environment Court in respect to a determination as to whether reserve contribution and other financial contributions could be levied in respect to two properties containing multiple household units which Housing NZ Ltd wished to subdivide into separate titles. The Environment Court had held that the reserve contribution was payable (see A015/00, 5 NZED 291).

The case was principally determined under s407 RMA. The Court first considered the question of whether there is a legal power to impose a reserve contribution in circumstances where the subdivision by itself, creates no additional demand for reserves. In looking at s285 LGA, the Court accepted that there is a requirement in subsection (1) that the allotments are in the future used the residential purposes. However, this says nothing about the use before this point. The Court rejected the argument that there needs to be a causal nexus between the subdivision and the need for reserves. This can be

contrasted with the provisions relating to financial contributions or services which do require a causal nexus.

The Court rejected a submission that in s104(1)(a) "any actual or potential effects on the environment of allowing the activity" meant that only subdivisions that create additional demand can have reserve contributions attached. The Court held that s104(1)(a) is merely one of a series of relevant considerations, and were there no effects, the consent authority would merely be released from any duties with respect to that particular provision. It is also stretching a purposive analysis to suggest that s104(1)(a) can colour the setting of conditions under the transitional provisions. There is nothing in s407 RMA that points to s104, the only reference being s285 LGA. Section 285 is to be read on its own terms. The Court held that the Environment Court was correct in finding that a reserve contribution could be payable upon the subdivision of existing household units.

As to whether the Court should have exercised its discretion to levy a reserve contribution, there was evidence before the Environment Court of an inadequacy of reserves in the area and the Court had not taken into account the relevant considerations. The Court held that it was open to the Environment Court to have regard to past shortfalls relating to the site in question, even if it was not strictly related to the subdivisional activity. In this case the property had been developed for multiple household units.

Where a Council has either not, or only taken a partial contribution for the original development, it will still be open for the Council or Court to impose a contribution equal to the difference between the possible development contribution and one which could be required on the subdivision. This is a matter which needs to be determined on the facts.
Appeal dismissed.



**RESOURCE CONSENT DECISION
(INCORPORATING CHANGES MADE ON NOVEMBER 2007 PURSUANT TO
DECISION UNDER SECTION 357D OF THE RESOURCE MANAGEMENT ACT 1991)**

Resource Consent Number: RM060688

Pursuant to Section 104B of the Resource Management Act 1991 ("the Act"), the Tasman District Council ("the Council") hereby grants resource consent to:

Nelson Diocesan Trust
(hereafter referred to as "the Consent Holder")

Activity Authorised by this Resource Consent: To subdivide Lot 1 DP 20491 (CT NL 13C/734) into five allotments as shown on the resource consent application plan RM060688 dated April 2006 and referred to as Plan "A" attached to this consent.

Location Details:

Address of property: 9 Selwyn Street, Motueka
Legal description: Lot 1 DP 20491
Certificate of title: NL 13C/734
Valuation number: 1955011600

This consent is issued subject to the following conditions:

Conditions

General Accordance

1. That the proposal shall be in general accordance with the Jones & Associates Plan No 2377 dated April 2006 submitted to Council as part of the application.

Easements

2. Easements are to be created over any services located outside the boundaries of the allotments that they serve.

Reference to easements is to be included in the Council resolution on the title plan.

Financial Contribution

3. Financial contributions are required on four allotments. The following shall apply:

Reserves and Community Services

Payment of a Financial Contribution for Reserves and Community Services assessed at 3.5% of four allotments (land value only). Valuation shall be by way of a special

valuation undertaken by a registered valuer at the Consent Holder's request and cost.

The reserves levy that was paid as part of the land use and building consents for the dwellings (\$1,450 in total) will credit against the reserves levy payable for the subdivision.

Advice Note: Reserves and Community Services

Amended following decision on section 357 objection.

- a) Correction to typographical error in the first line of condition 3 by changing 'one' allotment to 'four' allotments
- b) Financial Contribution for Reserves and Community Services amended to reduce from 5.5% to 3.25%

Advice Note – Development Contributions

Deleted following decision on section 357 objection

REASONS FOR THE DECISION

Activity Status

1. The property is in a Residential Zone and the subdivision proposal is a discretionary activity under the Proposed Tasman Resource Management Plan (PTRMP). The proposal is a discretionary activity as it does not meet the relevant standards as a controlled activity under Rule 16.3.3.

Non-Notification

2. The adverse effects on the environment and on neighbouring properties are no more than minor. The subdivision is simply to provide separate titles for a five dwelling comprehensive development previously approved under RM040293. Therefore, it was considered appropriate to process the application on a non-notified basis under delegated authority.

Part II of the RMA

3. It is considered that the proposed subdivision is not contrary to Part II of the Resource Management Act 1991 in that the proposal will allow for efficient use and sustainable management of the urban land resource in allowing for in-fill development instead of taking up productive land through urban expansion.

Objectives and Policies

4. The proposal was assessed against the objectives and policies in Chapters 5 and 6 of the PTRMP, which seek to provide a reasonable level of amenity in urban residential environments. It is considered that this subdivision is in accordance with these objectives and policies.

Environmental Effects

5. The nature of the activity is such that subject to the consent conditions, any actual and potential adverse effects of the proposal will be no more than minor.

Residential Amenity

6. Even though the allotments are small in area, in light of the specific purpose of the comprehensive residential development, it is considered that each allotment has an adequate amount of open space.

Servicing Matters

7. Each of the proposed allotments will be individually serviced for water, stormwater and sewage.

Reserve Contribution

8. A reserve contribution is required for all subdivisions that result in the creation of additional allotments.

Engineering Requirements

9. Each of the allotments is already fully serviced, so no additional servicing conditions are required.

Conclusion

10. The proposal is not contrary to the purpose and principles of the Resource Management Act 1991 or the provisions of the Proposed Tasman Resource Management Plan. The adverse environmental effects generated by the proposal are considered to be no more than minor.

This consent is granted on **31 August 2006** under delegated authority from the Tasman District Council by:

M D Morris
Senior Consent Planner, Subdivision

Date Confirmed:

Chair: