IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2010-425-000365

BETWEEN	INFINITY INVESTMENT GROUP HOLDINGS LIMITED First Appellant
AND	WILLOWRIDGE DEVELOPMENTS LIMITED Second Appellant
AND	ORCHARD ROAD HOLDINGS LIMITED Third Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing: 22 November 2010

Appearances: C N Whata and C J Brown for Appellants
G Todd for Respondent

Judgment: 14 February 2011

RESERVED JUDGMENT OF CHISHOLM J

A The appeal is dismissed.

B Costs are to be addressed in terms of [71].

REASONS

Introduction

[1] Queenstown Lakes District Council (QLDC) promulgated Plan Change 24 (PC24) to address issues relating to affordable and community housing within its district. The appellants challenged the legality of the plan change and, having appealed to the Environment Court, asked that Court to determine a number of preliminary issues. This appeal arises from the Environment Court's determination of those preliminary issues.

[2] In its decision delivered on 9 July 2010[1] the Environment Court reached several conclusions: PC24 fell within the scope of the Resource Management Act 1991 (RMA); it was not prohibited by s 74(3)[2] of that Act; the Affordable Housing: Enabling Territorial Authorities Act 2008 (Affordable Housing Act) did not prevent affordable housing being addressed under the RMA; and the proposed rules related to a resource management purpose. The Court also ruled that whether PC24 is a licence, and/or a subsidy, and/or a tax, is a question of fact which could be determined at the substantive hearing.

[3] This appeal pursuant to s 299 of the RMA alleges that the Environment Court erred in law by finding that:

(a) PC24 came within the scope of the RMA;

(b) It did not come within the prohibition of s 74(3); and

(c) The Affordable Housing Act did not prevent affordable housing issues being addressed under the RMA.

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[1] *Infinity Investment Group Holdings Limited & Ors v Queenstown Lakes District Council* Decision No. [2010] NZEnvC 234.

[2] S 74(3) states that in preparing or changing any district plan, a territorial authority must not have regard to trade competition or the effects of trade competition.

As the appellant sees the matter, the central issue for determination is whether the Council is empowered under the RMA to "command" financial contributions from new developments to subsidise a shortfall in affordable housing.

[4] According to the Council PC24 is a legitimate planning instrument that falls within all parameters of the Act. The Council emphasises (and this is not disputed by the appellants) that this appeal does not involve substantive issues which, depending on the outcome of this appeal, are for another day.

[5] The underlying issues are difficult and it appears that there are no earlier decisions directly on point. I am grateful to counsel for the quality of their oral and written submissions.

Background

[6] The Queenstown Lakes district abounds with important landscapes, many of which are of national significance. As a result of these and other constraints, the District Plan has a strong emphasis on urban containment and the Council has signalled its intention to continue and strengthen this philosphy.

[7] Constraints on the supply of land for housing are considered by the Council to be a factor behind the affordability issues that it believes exist within its district. Population growth within the district is expected to remain strong and the Council is concerned that the lack of affordable housing might worsen.

[8] QLDC decided to introduce affordable housing objectives, policies, and rules into its partially operative District Plan by way of PC24. This possibility was first signalled by the council in 2005 and an Issues and Options paper was released in 2006. The proposed change was publicly notified on 25 October 2007.

[9] A hearings panel established by the Council heard submissions, including submissions from the appellants, over a period of three days during August 2008. The panel's recommendations were delivered, and adopted by the Council, in December 2008. Although there were modifications to the proposed change, the

concepts behind the change remained. The proposition that the change was beyond the scope of the RMA was rejected by the hearings panel and the Council.

[10] The appellants' appeal to the Environment Court raised numerous issues. Five preliminary issues of law were heard by Environment Court Judge Whiting sitting alone under s 279 of the RMA. Affidavit evidence from several planners and economists was before the Court.

PC24

[11] A useful summary of PC24 is included in the affidavit of Alison Noble, a planning consultant:

> **What development is Affected by PC24**
>
> 1.7 PC24 levies a requirement on certain development to provide Affordable Housing.
>
> 1.8 It is my understanding that PC24 applies to activity not currently anticipated in the Queenstown Lakes District Plan (District Plan), which will generate demand for Affordable Housing.
>
> 1.9 Specifically this means all Plan Changes, Discretionary Activities (in the Rural Zone) or Non-Complying Activities must be assessed to determine their impact on the supply of Affordable Housing. Only the element of the development over and above that anticipated by the District Plan must be assessed. For example, a plan change to 'upzone' from the Rural Residential Zone to the Low Density Residential Zone can discount those houses provided for in the Rural Residential Zone from any Affordable Housing requirements assessment.
>
> 1.10 If the assessment finds that any Plan Change, Discretionary Activity (in the Rural Zone) or Non-complying Activity will generate a demand for Affordable Housing over a certain threshold, action will be required to mitigate the effect of the development on housing affordability.
>
> **How will PC24 Apply**
>
> 1.11 PC24 has been provided for through objectives, policies, rules and implementation methods in the District Wide Issues section of the District plan (section 4).
>
> 1.12 The objective is to provide a range of opportunities for low and moderate income households and temporary workers to live in the District in accommodation appropriate to their needs.

> 1.13 The policies require the impact of subdivision and development on the supply of Affordable Housing to be assessed to determine whether a contribution is necessary.
>
> 1.14 Implementation methods require that Plan Changes incorporate provisions relating to the supply of Affordable Housing and/or contributions to Community Housing; resource consent conditions are used to identify the number and type of lots/dwellings to be provided and contributions towards Affordable [and] Community Housing and that an Affordable and Community Housing Assessment is prepared as per proposed Appendix 11 of the District Plan.
>
> 1.15 PC24 provides a complex process for determining the demand for Affordable Housing. I understand that the exact process is not an issue for the preliminary questions ...

Environment Court decision

[12] In a succinct decision Judge Whiting resolved each of the questions before him in the following way:

Is the proposed change within the scope of the RMA?

[13] Judge Whiting began his analysis by considering whether PC24 met the purpose of District Plans set out in s 72 of the RMA:

> **72 Purpose of district Plans**
>
> The purpose of ... district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

The Judge concluded that PC24 fell within the functions described in s 31(1)(a) and (b) "as it is a response to constraints on the use and development of land".-[3]

[14] Then he considered whether, in terms of s 72, the change was being carried out to achieve the purpose of the Act. It was the Judge's view that the Council's urban containment policy and the consequent pressure for land had contributes to the Council's decision to prepare PC24 and that, at a broad level, PC24 "promoted the sustainable management of land and housing, enabling people to provide for their

[3] At [12]

wellbeing while also remedying or mitigating the effects of constrained land use on people and communities".[4]

[15] Following that the Judge noted that the Council was obliged to comply with s 74(1):

> **74 Matters to be considered by territorial authority**
>
> (1) A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

Having already accepted that the Council was acting within its functions and in accordance with the purpose of the Act, the Judge considered whether the Plan Change was in accordance with the Council's duty under s 32. He noted that there was no suggestion that the Council had failed to carry out a s 32 evaluation before publicly notifying the change and that in any event the substantive hearing was the appropriate forum for any s 32 arguments.

[16] The Judge was therefore satisfied, subject to the remaining issues, that PC24 was within the scope of the RMA.

Does the proposed Plan Change come within the prohibition of s 74(3)?

[17] As earlier noted,[5] s 74(3) states that in preparing or changing any district plan a territorial authority must not have regard to trade competition. The Judge noted (and this is not disputed) that PC24 had to be determined as if Part 11A of the RMA had not been inserted into the Act.

[18] In the Judge's view the mischief aimed at by s 74(3) was "competition between traders of the same kind", not "the operation of markets, be they He concluded that the words "trade competition" refer to "rivalrous behaviour which can occur between those involved in commerce"[6] and "that planning law should not

[4] At [13] above
[5] See footnote 2
[6] At [82]

be used as a means of licensing or regulating competition".[7] Wylie J saidEven if that conclusion was incorrect, said the Judge, "other effects beyond those ordinarily associated with trade competition may also be produced".[8] Relying on G*eneral Distributors Limited v Waipa District Council*[9] the Judge concluded that s 74(3) does not preclude a territorial authority preparing or changing its district plan from considering wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. He considered that the Council's urban containment policy and the consequent pressure for land had contributed to the Council's decision to prepare PC24.

[19] For either or both of those reasons the Judge concluded that the Council had complied with s 74(3).

Does the Affordable Housing Act prevent affordable housing being addressed under the RMA?

[20] The Judge decided that the Affordable Housing Act dealt specifically with the narrow subject matter of affordable housing and that this did not prevent a territorial authority from addressing housing needs when carrying out its functions under the more general RMA. He was satisfied that in this case the provision for affordable housing was capable of promoting the sustainable management of land and housing, thereby enabling people to provide for their wellbeing while also remedying or mitigating the effects of constrained land use on people and communities.

[21] In addition the Judge noted that s 29 of the Affordable Housing Act expressly contemplated that conflicts could arise between a territorial authority's affordable housing policy and its district plan. By providing for resolution of such conflicts "the Affordable Housing Act identifies the potential for overlap with the RMA and enables effect to be given to both statutes".[10]

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[7] At [84]
[8] At [19]
[9] *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59
[10] At [25]

Do the proposed rules relate to a resource management purpose?

[22] It was Judge Whiting's view that "[i]n order to achieve the purpose of the RMA, the rules proposed in Plan Change seek to assist the Council in controlling the effects of land use constraints arising out of its own plan provisions".[11] While he acknowledged that the objectives, policies and rules of PC24 are in contention, he was not prepared at a preliminary stage to hold that the rules "fail to be necessary in achieving the Act's purpose".[12]

Is PC24 a licence, subsidy or tax?

[23] In the absence of economic evidence Judge Whiting was not prepared to determine that PC24 amounted to a licence, and/or a subsidy, and/or a tax. He considered that these were questions of fact to be determined at the substantive hearing.

First ground of appeal - Whether PC24 is within the scope of the RMA

Appellant's argument

[24] This appeal is not about whether PC24 achieves a resource management purpose. Almost any rule or policy could be said to serve such a purpose. But the Council's argument wrongly conflates the general purpose of the Act with the specific functions of Councils under the Act. In effect the Council has illegitimately adopted an end justifies the means approach.

[25] The primary error of the Environment Court was its failure to answer the question before it: whether the Council was empowered to subsidise goods and services, through financial contributions, to make them more affordable. Instead it inquired about whether PC24 performed a resource management purpose.

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[11] At [27]
[12] At [27]

[26] Parliament did not confer on territorial authorities a power or function to directly interfere in the operation of the housing market. Contrary to the finding of the Environment Court:

> - The RMA remains essentially a planning or resource management statute, not an instrument for achieving economic or social policy of local authorities via imposition of a subsidy on new development.
>
> - The broad powers under the RMA to achieve sustainable management are not unfettered and do not embrace regulation to directly interfere in the operation of markets for goods and services.
>
> - Councils are empowered to control the effects of the use, development and protection of land, not the effects of the operation of the market for houses.
>
> - The Council must not have regard to trade competition of the effects of trade competition, including the effects of such competition on housing prices.

Thus PC24 constitutes an abuse of the power conferred by the RMA and the Court should not allow the powers conferred by Parliament to be used in ways that were not intended.

[27] Any power to directly interfere in the market through financial contributions must be express. Nowhere in the Act is there a specific power to interfere directly in the market in the way contemplated by PC24. It amounts to a subsidy or a levy. There is no power to transfer wealth from one sector of the economy to make goods and services more affordable to another sector of the community. Once that door is opened there is no sensible stopping point. The public law principle that no tax or charge can be levied without the proper authority of Parliament applies.

[28] Those arguments were supported by a detailed analysis of the RMA and relevant authorities. Mr Whata emphasised that the RMA represented a clear departure from the previous "direct and control" regime towards a more permissive system of management of resources, focused on the control of the adverse effects of land use activities on the environment. On his analysis there was no express power or function in the RMA to allow the direct intervention contemplated by PC24.

[29] Finally, it should be recorded that the appellants are not suggesting that affordable housing can never be addressed by the Council. They accept that under the RMA the Council could utilise orthodox measures to enable developers to provide affordable housing by providing some form of incentive. Alternatively, zoning rules could be altered to allow for more housing.

Council's response

[30] QLDC faces issues peculiar to its district, in particular the need to strike a balance between the protection of natural landscapes and the social and economic wellbeing of the community. One of the adverse effects of its urban containment policy is the potential for land values to rise and the resulting impact on the social and economic wellbeing of the district by virtue of reduced housing affordability.

[31] To date affordable and community housing have been achieved by individual "stakeholder agreements" negotiated with land owners during the plan change preparation process prior to notification of a plan change. PC24 will provide a more transparent and consistent process for future developments.

[32] Management of socio-economic issues falls within the purpose of the RMA. The use and development of housing involves the use of natural and physical resources (land and buildings) and is capable of management under the Act in a way that enables people to provide for their social and economic wellbeing alongside, and perhaps in competition with, other considerations. Section 6(b) (protection of outstanding landscapes) provides an example of the other considerations that might become relevant.

[33] The Act does not rule out making provision for affordable housing in the District Plan. The critical issue is how it is done, and whether the particular provisions of PC24 pass the various tests for inclusion in a District Plan, starting with s 32. That necessarily involves consideration of the evidence at a substantive hearing of the appeals.

[34] PC24 is not a subsidy in the true sense of the word. It is designed to meet an identified need directly attributable to developments. It is not designed to address any historical shortage of affordable housing or to provide for the demand created by others. In essence any intervention in the market arising from PC24 is similar to those that might occur as the result of a zoning change allowing for more housing.

Discussion

[35] In many respects the appellants' application to the Environment Court for determination of preliminary issues is similar to a strike out application. If those issues are determined in favour of the appellants it is virtually inevitable that PC24, at least in its present form, will be struck down without a substantive hearing. Under those circumstances the Court must have very sound grounds before cutting short the statutory appeal process envisaged by Parliament in relation to public documents.

[36] The issue for determination by this Court is whether PC24 falls within the scope of the RMA or, put another way, whether the Act confers the necessary jurisdiction. If it does, then, subject to determination of the other two grounds of appeal, the matter should proceed to a substantive hearing before the Environment Court so that the merits of the change can be examined by that Court. At this preliminary stage it is not appropriate for the Court to become involved in the merits.

[37] Not surprisingly both parties framed their arguments in a fashion that was most likely to advance their cause. For example, whereas the appellants have tended to frame their analysis in economic terms, the Council has downplayed that aspect and concentrated on the RMA concepts and language utilised in PC24. However, in the present context a refined analysis of the proposed change is unnecessary. The critical question remains whether, regardless of its merits, PC24 comes within the intended scope of the RMA.

[38] Given that this case is about a district plan I agree with Judge Whiting that s 72 is the logical starting point. That section specifically relates to district plans and specifies that the purpose of such plans

> ... is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

This statutory purpose effectively comprises two components: first, the functions of territorial authorities under s 31; and, secondly, the purpose of the Act under Part 2, particularly s 5.

[39] I begin by considering the functions of territorial authorities as described in s 31:

> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
>
> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
>
> (i) the avoidance or mitigation of natural hazards; and
>
> (ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
>
> (iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:
>
> (iii) the maintenance of indigenous biological diversity:
>
> (c) Repealed.
>
> (d) The control of the emission of noise and the mitigation of the effects of noise:
>
> (e) The control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:
>
> (f) Any other functions specified in this Act.

> (2) The methods used to carry out any functions under subsection (1) may include the control of subdivision.

For present purposes paragraphs (a) and (b) of subsection (1) are of potential relevance. Before addressing those paragraphs it is appropriate to make an observation that applies to both paragraphs.

[40] Those paragraphs illustrate the comments of Greig J in *NZ Rail Limited v Marlborough District Council* that there is:[13]

> ... a deliberate openness about the language, its meanings and its connotations which ... is intended to allow the application of policy in a general and broad way.

These comments have been endorsed on numerous occasions. I cannot see any justification for reading down the scope of the functions that a literal reading of the two paragraphs would indicate.

[41] A literal reading of s 31(1)(a) indicates that one of the functions of a territorial authority is to establish objectives, policies and methods to achieve integrated management of the effects of the use or development of land within its district for the purpose of giving effect to the Act. It goes without saying that there must be a link between the effects of the use or development of the land and the objectives, policies and methods that are established to achieve integrated management. Moreover, that the purpose must be to give effect to the Act.

[42] On its face, and without going into the merits, PC24 appears to fit within the framework of the function described in s 31(1)(a). It concerns a perceived effect of the future development of land within the district. However, the requirement to provide affordable housing will only arise if the development is construed as having an impact on the issue of affordable housing (in terms of an assessment under Appendix 11). Thus the requisite link between the effects and the instrument used to achieve integrated management exist. And for reasons that will follow, its purpose is to give effect to the Act.

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[13] *NZ Rail Limited v Marlborough District Council* [1994] NZRMA 70 (HC) at 86

[43] Similar conclusions can be reached with reference to s 31(1)(b). Under that paragraph the functions of territorial authorities include the control of any actual or potential effects of the use or development of land. This wide function reflects the sustainable management regime established by the Act. I do not think that the four statutory examples included in paragraph (b) detract from the breath of the function. Consequently if the use or development of land within the Queenstown Lakes district has the effect, or potential effect, of pushing up land prices and thereby impacting on affordable housing within the district, the Council has the power to control those effects through its district plan, subject, of course, to the plan ultimately withstanding scrutiny on its merits.

[44] I therefore agree with the conclusion reached by Judge Whiting that PC24 is within the scope of the functions of territorial authorities specified in s 31. In other words, the first component of s 72 is satisfied.

[45] The second component of s 72 revolves around s 5. Although the conclusion reached by Judge Whiting is not challenged, I will make a few observations. Section 5 provides:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Again it is important to take into account the wide meaning of the words used (*NZ Rail Limited*) and the desirability of applying the words used by Parliament to

describe the sustainable management purpose rather than some other tag (*Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*[14]).

[46] Judge Whiting decided that at a broad level PC24 promotes the sustainable management of land and housing, enabling people to provide for their wellbeing while also remedying or mitigating the effects of constrained land use. In other words, he was satisfied that PC24 came within the statutory concept of sustainable management. Significantly in the present context, the statutory concept of sustainable management expressly recognises that the development of physical resources, such as land, might have an effect on the ability of people to provide for their social or economic wellbeing. The concept of social or economic wellbeing is obviously wide enough to include affordable and/or community housing.

[47] I do not accept the appellants' allegation that the Council's argument (and presumably Judge Whiting's reasoning) wrongly conflates the general purpose of the Act with the particular purposes of territorial authorities. While I accept that a district plan or a change to such a plan must satisfy each of the components mentioned at [38] above, as I see it PC24 is capable of satisfying that requirement. In particular, the analysis in [39]-[45] above confirms that the first component relating to the functions of territorial authorities is capable of standing on its own feet.

[48] Now I consider whether any other sections of the RMA might require the conclusions that I have reached so far to be revisited.

[49] Although there are many sections relating to district plans, it is only necessary to mention s 74(1) and (3):

> **74 Matters to be considered by territorial authority**
>
> (1) A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, [a direction given under section 25A(2),] its duty under section 32, and any regulations.

[14] *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562 at [50]

...

(3) In preparing or changing any district plan, a territorial authority must not have regard to trade competition or the effects of trade competition.

As to subsection (1) I agree with Judge Whiting's analysis[15]. There was a s 32 analysis and whether it can withstand scrutiny can only be properly determined at a substantive hearing.

[50] On the other hand, subsection (3) is highly relevant to the intention of Parliament in relation to the interaction between the preparation or changing of district plans and the market place. It can be inferred that Parliament considered that issue. Its response was to include s 74(3) which is confined to trade competition or the effects of trade competition.[16] A wider prohibition, for example one relating to the market generally, was not imposed.

[51] I reject the appellants' proposition that it could not have been within Parliament's contemplation that territorial authorities would be able to exercise powers or functions that involved direct interference in the market place. One way or other district plans are capable of having that effect. As Mr Todd said, any decision that affects the ability of a person to do, or not do, something is an intervention in the market. That is why Parliament addressed the issue and included s 74(3). Having said that, I accept that the primary objective of a plan must be to achieve an RMA purpose, not interference in the market place. But I am satisfied that, at least in the present context, PC24 has the necessary RMA objective.

[52] These conclusions do not mean that the floodgates will open. Like any other proposed plan or change, those concerned about PC24 had the opportunity to challenge it by way of submission and ultimately appeal to the Environment Court where the merits can be examined. In this respect PC24 is no different from any other innovative plan.

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[15] See [15] above.
[16] A similar provision appears in s 104(3)(a)(i) in relation to resource consents.

[53] This brings me to another point raised by the appellants, namely, that if the necessary power existed it is surprising that it has taken almost 20 years for it to be recognised and exercised. I do not accept that this justifies the conclusion that the necessary power does not exist. As this Court said in *Meridian Energy Limited v Central Otago District Council*,[17] it can take many years for a statute to be fully understood and it is not an error of law to adopt a novel approach. I might also add, although I do not place any weight on this because I am not aware of the detail, that Mr Todd informed me from the bar that Auckland City, North Shore City, and Waitakere City have objectives and policies in their plans relating to affordable housing.

[54] Now I consider whether the power to impose "financial contributions" under s 108 provides any guidance as to Parliament's intention. Section 108 relevantly provides:

> **108 Conditions of resource consents**
>
> (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).
>
> (2) A resource consent may include any one or more of the following conditions:
>
> (a) Subject to subsection (10), a condition requiring that a financial contribution be made:
>
> ...
>
> (9) In this section, financial contribution means a contribution of—
>
> (a) Money; or
>
> (b) Land, including an esplanade reserve or esplanade strip (other than in relation to a subdivision consent), but excluding Maori land within the meaning of the Maori Land Act 1993 unless that Act provides otherwise; or
>
> (c) A combination of money and land.

[17] *Meridian Energy Limited v Central Otago District Council* CIV 2009 412 000980 at [96]

> (10) A 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 or proposed 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 or proposed plan.

In addition a territorial authority may require a development contribution under the Local Government Act 2002 when a resource consent is granted under the RMA for a development within its district.[18]

[55] I accept, of course, that the potential reach of these powers needs to be assessed against the constraints described by the Supreme Court in *Waitakere City Council v Estate Houses Ltd*:[19]

> [61] ... In order for that requirement to be validly imposed it had to meet any relevant statutory stipulations, and also general common law requirements that control the exercise of public powers. Under these general requirements of administrative law, conditions must be imposed for a planning purpose, rather than one outside the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.

But even taking into account for those constraints, Parliament has clearly entrusted territorial authorities with wide powers to impose financial and development contributions which, by their very nature, involve an element of subsidisation and might conceivably be regarded as a form of tax or charge.

[56] Mr Whata sought to demonstrate by way of diagrammatic analysis that PC24 was beyond the range of purposes for which financial contributions could be lawfully imposed. I am not confident that the line he drew reflects the limit of purposes for which financial contributions can be lawfully imposed. But that is a matter that should be determined by the Environment Court with the benefit of evidence at a substantive hearing. In any event I doubt that a conclusion to the effect

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[18] See ss 198-211 of the Local Government Act
[19] *Waitakere City Council v Estate Houses Limited* [2007] 2 NZLR 149 (SC)

that PC24 does not come within s 108(1) would necessarily be fatal to the proposed change.

[57] Finally, I should respond to the appellants' submission based on the public law principle that no tax or charge should be levied without the proper authority of Parliament. Particular reliance was placed on *Harness Racing New Zealand v Kotzikas* in which the Court said: [20]

> [95] We are of the view that the fundamental principle in delegation cases is put on a sounder basis by the House of Lords in the *McCarthy & Stone* case than it was by the divided Court in *Campbell v MacDonald.* That is: a power to levy may arise by express words or necessary implication in the sense of that term as given by Lords Lowry and Hobhouse.

If PC24 is to be properly regarded as giving rise to a "power to levy" then it is my view that the express language that Parliament has used in the RMA shows that the statute must have intended an instrument like PC24 to have been within its scope (subject to scrutiny on the merits). In other words, it is included by necessary implication. Any other interpretation would undermine the full range of powers that Parliament intended to confer on territorial authorities in relation to district plans.

Conclusion

[58] I am satisfied that PC24 comes within the scope of the RMA. This ground of appeal fails.

Second ground of appeal – Whether PC24 comes within the s 74(3) prohibition

[59] As already mentioned, s 74(3) prohibits a territorial authority from having regard to trade competition or the effects of trade competition when preparing or changing its district plan. The expression "trade competition" is not defined in the Act.

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[20] *Harness Racing New Zealand v Kotzikas* [2005] 268 NZAR (CA)

[60] Section 74(3) was considered by Wylie J in *General Distributors v Waipa District Council*.[21] He concluded that the words "trade competition" refer to "rivalrous behaviour which can occur between those involved in commerce"[22] and "that planning law should not be used as a means of licensing or regulating competition".[23] Wylie J said:

> [87] The Courts have striven to give effect to the statutory prohibition, and to the wider purposes and principles of the Act, by making it clear that it is only trade competition and those effects ordinarily associated with trade competition, which are required to be ignored under s 104(3)(a), and which cannot be had regard to when preparing or changing a district plan under s 74(3). Effects may however go beyond trade competition and become an effect on people and communities, on their social, economic and cultural wellbeing, on amenity values and on the environment. In such situations the effects can properly be regarded as being more than the effects ordinarily associated with trade competition.
>
> ...
>
> [93] It follows that s 74(3) does not preclude a territorial authority preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. Indeed it is obliged to do so in terms of s 74(1).

I agree with those observations which were applied by Judge Whiting.

[61] In my view Judge Whiting was right when he reached the conclusion that the proposed plan change does not come within the s 74(3) prohibition. As he said, it applies to all developers equally and does not purport to regulate competition between traders of the same kind. In other words, it does not constitute "trade competition" for the purposes of s 74(3) in the sense explained by Wylie J.

[62] I also agree with Judge Whiting's alternative reasoning that when preparing PC24 QLDC was entitled to consider the wider socio-economic issue of the impact of future developments on the availability of affordable housing within its district. As he reasoned, that did not require the Council to have regard to trade competition or the effects thereof.

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[21] *General Distributors v Waipa District Council* (2008) 15 ELRNZ 59 (HC)
[22] At [82]
[23] At [84]

[63] This ground of appeal fails.

Third ground of appeal – Whether the Affordable Housing Act prevented the issue of affordable housing being addressed under the RMA

[64] PC24 was publicly notified almost a year before the Affordable Housing Act became law on 16 September 2008. So QLDC was well ahead of Parliament when it came to specifically addressing the issue of affordable housing. The Affordable Housing Act was repealed between the time this appeal was lodged and the time that it was heard by this Court.

[65] Two points were made by the appellants in relation to the Affordable Housing Act:

- If it were still in existence this could present difficulties and conflict of policy implementation. This point is somewhat diluted with the repeal of the Act.
- The AHA is the type of form of legislation to be expected to enable local authorities to subsidise housing through new development.

The second point was also relied on to illustrate that when Parliament intends to allow a subsidy or a tax it does so in express terms with detailed provision for checks and balances.

[66] Now that the Affordable Housing Act has been repealed it is academic except to the extent that its enactment might throw some light on the intended scope of the RMA. Having reflected on that issue it seems to me that, if anything, the enactment of the Affordable Housing Act supports, rather than counts against, the interpretation that PC24 is within the scope of the RMA.

[67] One of the purposes expressed in s 5 of the Affordable Housing Act was to enable a territorial authority, in consultation with its community, to require persons undertaking developments to facilitate the provision of affordable housing. In other words, Parliament recognised the connection between developments and affordable housing and that territorial authorities had an important role to play in that regard.

[68] Beyond that, s 6(6) stated that territorial authorities had powers under the RMA as well as the Affordable Housing Act. Conflicts between a territorial authority's affordable housing policy and its district plan were to be resolved by the Environment Court: s 29. When resolving such conflicts the Court was to take into account, amongst other matters, Part 2 and s 74 of the RMA. And for the purpose of resolving a conflict the Court could amend the Council's policy under the Affordable Housing Act *and/or* the district plan. There are many other references to the RMA.

[69] These provisions would have been illogical if Parliament had not contemplated that affordable housing issues might also arise under the RMA. While I accept that when the Act was in force there might have been conflicts in relation to policy implementation, the Act expressly armed the Environment Court with the necessary power to resolve those conflicts. Resolution might have resulted in either the RMA or the Affordable Housing Act prevailing.

[70] I do not see any significance in the repeal of the Affordable Housing Act. This followed a change of government. Nothing in Hansard (and I am grateful to counsel for obtaining this) indicates that the repeal was intended to have implications for the RMA.

Outcome

[71] The appeal is dismissed. My preliminary view is that the Council should receive costs on a 2B basis. However, if either side wishes to contest the issue of costs memoranda not exceeding three pages should be submitted within one month of the release of this decision.

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