

Review of Financial Contributions & Development Contributions

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1 Introduction

- 1.1 This paper reviews the respective regimes for requiring financial contributions and development contributions. It is intended to provide a general guide to both local authorities and resource users on the availability and scope of these contributions as at the date of writing.
- 1.2 Financial contributions are governed by the Resource Management Act 1991 (RMA). They can only be required as a condition of resource consent granted under the RMA. Development contributions are governed by the Local Government Act 2002 (LGA). They too can be imposed as a result of granting resource consent, although not as a condition of consent. Development contributions may also be imposed in conjunction with granting building consent under the Building Act 2004 (Building Act) or when an authorisation for a service connection is granted. As a relatively new charging regime, there is limited judicial guidance on the permissible scope of imposing development contributions. However, the High Court has helpfully provided direction by way of setting out the principles for imposing these contributions.
- 1.3 Financial contributions and development contributions provide local authorities with dual charging regimes, which are not necessarily alternatives. A person may be levied for both types of contribution, so long as the purposes to which the respective contributions are put are different. The most significant differences between the two regimes are their respective scopes and processes for implementation and avenues for challenge. Having regard to these differences, this report concludes with analysis of the merits of the respective regimes from both the perspective of local authorities and resource users.
- 1.4 In the next section of this report the merits of the respective regimes are considered. The report then goes into more detail about the two regimes in sections 3 and 4.

2 Merits of respective regimes

- 2.1 Both contribution regimes have advantages and disadvantages for local authorities and resource users alike. The extent of these is, of course, dependent on the particular area, development and whether one is the charger or chargee.
- 2.2 Clearly, territorial authorities saw significant advantage in the development contributions powers and processes, reflected by their lobbying of Central Government in the formulation of the LGA in support of an alternative funding power to that which had been provided by the RMA for some 10 years at that time. On the other hand, resource users may see the financial contributions regime as providing a fairer system for managing environmental effects.
- 2.3 The two main differences between the respective contribution systems are the respective processes and ambit (both in terms of what may be funded, and the level of funding). Although imposing development contributions is subject to extremely prescriptive consultation and documentation requirements, the process for finalising policies is significantly less time consuming than that for financial contributions. The comparison is between months as opposed to years.
- 2.4 However, the length of time of the respective processes should not, in the writers' view, be determinative of which regime to adopt. Indeed, the differences in the scope

and types of contribution that can be required under the RMA and LGA respectively may result in a need to adopt both regimes. For instance, in the case of reserves, and the provision of land generally, only financial contributions can require resource users to provide this form of contribution. Utilising both regimes would provide local authorities with flexibility to determine the appropriate type of contribution on a case-by-case basis. The statutory prohibition on double dipping protects against this occurring should both regimes be adopted.

- 2.5 In terms of the ability to challenge contributions, there is less scope to mount challenges to development contributions as compared with financial contributions. While this may be seen as attractive to certain local authorities, it would not be appropriate for development contributions to be favoured on the basis that Councils can more easily 'get away with it'. There are wider issues at play, and the community's wellbeing, which of course includes developers, should be the paramount consideration. Although development contributions can only be challenged by way of judicial review, as the *Neil Construction* case indicates, the High Court will intervene where the Council has exceeded its powers. In the only other case in which development contributions were challenged (*Ballintoy Developments Ltd & Anor v Tauranga City Council*, High Court, Allen J, CIV 2007-470-410, 12 February 2008) the Court upheld the plaintiffs' challenge to the Tauranga City Council's development contributions policy. Particularly where there are significant sums of money involved, which is likely to be the case for major developments, resorting to the High Court may not be seen as a significant hurdle for disgruntled developers.
- 2.6 An appropriate 'middle ground' for accommodating legitimate concerns regarding development contribution impositions might be to provide for a process for making and considering objections to development contributions, between the Council and the person charged. This would allow differences to at least be discussed without resort to the Courts, and the process would also allow additional information to be considered specific to the particular development when reconsidering a contribution levied.
- 2.7 The benefits of continuing with financial contribution regimes are that it provides for a more inclusive opportunity for public participation through the RMA planning process. Although there are firm obligations to consult under the LGA, the RMA process provides more of an opportunity for interested parties to put their case through the RMA submission process, and where appropriate through the Environment Court appeal process. The historic concerns regarding delays in finalising financial contribution provisions are somewhat allayed by the 2003 amendment to the RMA allowing financial contributions to be based on proposed plan provisions.
- 2.8 An observation that can be made is that many local authorities have moved away from using financial contributions, presumably because they consider that the development contribution regime is superior. However, development contributions are only one of the funding tools available and local authorities and developers alike ought not be quick to dismiss financial contributions.
- 2.9 One problem that faces both regimes but perhaps is more acute for development contributions is that the financial information can quickly become out of date. The writer has observed on a number of occasions that local authorities are annually

amending their development contribution policies to update the financial information on a regular basis.

- 2.10 Another tool that is becoming more common is the use of development agreements. These agreements are generally initiated by a developer who wants to have a code for development and financial contributions. Often they are generated in the context of a plan change or variation and the agreement then sets out the framework for the plan change or variation as well as operating as a code for development and financial contributions that then prevails over any provisions in plans and policies. The benefit of such agreements is that they can be tailor-made for the particular development they relate to. Some development contribution policies specifically provide for such agreements to be entered into. In this context the agreements are usually remission type agreements whereby the developer agrees to do certain things and is then given some relief in terms of the amount of money that needs to be paid.
- 2.11 There is a place for both financial and development contributions to operate simultaneously. Development contributions are focussed on paying for the effects that a development may have on infrastructure due to the growth component that the development brings to bear. Whereas financial contributions are concerned with the actual effects (ie on-site or localised effects) that a development has. In the writer's view to focus on one regime and not the other can have the potential of cutting off an important funding source for infrastructure.
- 2.12 In summary, it is not a case of necessarily choosing between financial and development contributions for local authorities, but rather to determine which aspects of each are the most appropriate for the particular local authority and their respective communities.

3 Financial Contributions

Overview

- 3.1 Financial contributions can only be imposed as a condition of resource consent granted under the RMA. Accordingly, permitted activities do not attract financial contributions, although as discussed below some Councils effectively require financial contributions for permitted activities by imposing them as development or performance standards with which an activity must comply in order to retain permitted status.
- 3.2 Financial contributions are founded in planning provisions, which in turn determine their applicability, type, scope and level. The requirements and issues associated with preparing planning provisions therefore apply to them. The ability to seek redress from the Environment Court on financial contributions provisions, and their imposition through the resource consent process, is in part a reason why development contributions, which are not subject to the same process, are an attractive additional funding tool for local authorities.
- 3.3 However, development contributions are not necessarily an alternative to a financial contributions regime. They can be used in tandem, and indeed apply to the same activity, so long as the purpose to which development contributions are put are different to the corresponding purpose to which financial contributions are put. For this reason, although there has been a significant take-up of development contribution

policies by local authorities, many Councils have retained financial contributions regimes under their district plans.

- 3.4 Prior to the arrival of the development contributions regime, local authorities could only rely on financial contributions to finance or otherwise manage environmental effects from developers specifically. As a result, all local authorities would have been heavily involved in financial contributions through their respective planning processes.

Legislative history and governance

- 3.5 The legislative history of the financial contributions regime can be found in Appendix 1.

Imposing financial contributions

Scope

- 3.6 Section 108, which applies to all resource consents, allows contributions to be imposed as conditions of consent in the form of money, land or a combination of the two. Subsection (9) reads:

(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.

- 3.7 The principal prerequisite to requiring financial contributions is supporting planning provisions. Subsection (10) of section 108 provides a clear requirement for plans (proposed or operative) to authorise the imposition of financial contributions and to specify the purposes for which they are to be taken and the quantum. This provision reads:

(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.

- 3.8 Accordingly, a key requirement for the lawfulness of a financial contribution condition is that the relevant planning instrument expressly allows it. In many disputes regarding contributions, the courts have undertaken a thorough analysis of the empowering plan provisions.

- 3.9 The ability to require financial contributions to provide for positive effects cannot go beyond those which off-set relevant adverse effects. This does not necessarily extend to 'environmental compensation', which is often voluntarily offered by a consent applicant, and which can go further than off-setting specific and connected adverse effects.

- 3.10 The ability to require contributions under both operative and proposed planning provisions would, it seems, allow Councils to choose between the respective

provisions on a case by case basis. However, it would not be lawful for separate contributions to be taken in respect of the same development under both an operative and proposed provision for the same purpose, which would amount to double-dipping. In the opinion of the author whether the local authority relies on the operative or proposed plan will come down to the weight that can be given to the proposed plan.

Process

- 3.11 The financial contributions regime is subject to increased process than its predecessor under the LGA 1974. RMA planning instruments are now the empowering documents for contributions. Operative and proposed planning provisions must contain a clear statement of the purposes in respect of which contributions are imposed and the method for calculating the level of contribution payable. It is important that the purposes are clearly set out in the plan without ambiguity, and the courts have emphasised the need for transparent and workable methods for calculating contributions.
- 3.12 A further point on process is the need for local authorities to include a policy on financial contributions in its funding and financial policies. These policies form part of a Long Term Council Community Plan (LTCCP). In their revenue and financing policies, local authorities must state the extent to which financial contributions are to respectively fund the operating expenses and capital expenditure incurred. The policy on development and financial contributions must state the proportion of the capital expenditure to be funded by, amongst other things, financial contributions. It must also identify each activity or groups of activities for which contributions will be required and the total amount of funding to be sought in respect of each activity or group.

Limits to financial contributions

- 3.13 As a type of consent condition, financial contributions are subject to the same limitations in scope as apply to all conditions. These limits have been progressively developed by the Courts in the context of 'town planning' legislation. The leading authority is the House of Lords decision in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, which has recently been modified by the Supreme Court. The Newbury decision set out the broad fundamental requirements for valid conditions (known as the 'Newbury tests'), confirming that the power to impose conditions on a planning consent is not unlimited. The Newbury tests require that, to be valid at law, a condition must:
- (a) Be for a resource management purpose, not for an ulterior one;
 - (b) Fairly and reasonably relate to the development authorised by the consent to which the condition is attached;
 - (c) Not be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it.
- 3.14 The Supreme Court revisited the application of the Newbury tests in its judgement in *Waitakere City Council v Estate Homes Ltd* ([2006] NZSC 112). The case concerned the provision of a road by a subdivider, particularly the type of road to be provided (collector versus arterial road). In arriving at its decision, the Supreme Court reviewed the applicability of the Newbury tests to the RMA, and relaxed the necessary connection between the effects of development and contribution that may

be imposed. Overall, it required a 'logical connection' between the two. The Court summarised the position as follows:

The majority in the Court of Appeal appears to have decided that, in combination, s 104 and common law principles required that there be a causal link between conditions that might be imposed and effects of the proposed subdivision. We see nothing, however, in the requirement under s 104 to have regard to effects on the environment that would restrict imposition of conditions of consent to circumstances where they would ameliorate the effects of the proposed development. Such a narrow approach would be contrary to the breadth with which the power under s 108(2)(c) to impose conditions is expressed.

...

We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not, for example, relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so.

- 3.15 Accordingly, Councils must ensure that there is a sufficient 'effects' link with the type and level of contribution imposed.

Enforcing financial contributions

- 3.16 As the vehicle for imposing financial contributions is a condition of resource consent, should a consent holder fail to provide the contribution, the normal remedies for failing to comply with a condition of consent would apply. However, for plans which purport to require 'financial contributions' as a performance or development standard in order for an activity to retain permitted activity status, the issue is less clear in terms of enforcement. Indeed, technically, these are not 'financial contributions' under the RMA. The solution for local authorities in these cases would appear to be to simply ensure the contribution is made, either as a noted 'condition' to a certificate of compliance or generally as a permitted activity standard. If a resource user does not comply with the standard, the Council could require that consent be obtained for the activity (which would no longer be permitted), if necessary through the issuing of an abatement notice or an application for enforcement order.
- 3.17 A failure to comply with the condition of consent requiring a financial contribution can be enforced through either of these enforcement methods. Abatement notices may require the consented activity to stop if it contravenes a resource consent (and conditions), and/or to comply with the condition, where that is necessary to avoid, remedy or mitigate environmental effects. However, there may be situations where the provision of a contribution which otherwise meets the validity requirements for financial contributions may not be necessary to specifically avoid, remedy or mitigate a particular adverse effect caused by the resource user. This is because, as discussed above, the link required between the financial contribution purposes and the effects of a development is not as strict as it is in the case of abatement notices requiring action (i.e. compliance with the condition). The more defensible course for

a local authority might therefore be to simply abate the entire activity on the basis that it contravenes the resource consent, or at least require this as an alternative to positive action.

- 3.18 Enforcement orders are also available to enforce the provision of financial contributions. On application, a Court could order a consent holder to stop work for contravening a resource consent, or to provide the contribution in order to ensure compliance with a resource consent or otherwise to avoid, remedy or mitigate adverse effects.
- 3.19 As a final remedy, in situations where there is uncertainty as to the financial contribution condition (for example timing of payment/vesting or the level of contribution), a declaration could be sought from the Environment Court as to the correct interpretation of the condition. This remedy is unlikely to be commonly required on the basis that most financial contribution conditions would specify with particularity either the fixed monetary contribution or precise area of land, or interest in it, to be vested.

Challenging financial contributions

- 3.20 The imposition of financial contributions can be challenged through the planning process, by objecting to or appealing the consent condition or through a declaration to the Environment Court. The planning process is, of course, the first opportunity to bring a challenge, and many such challenges occurred throughout the 1990s as contribution regimes were introduced. However, for many developers the importance of a financial contribution provision may not be known until given effect to through a condition of consent. Challenges therefore often occur in the context of a resource consent application.
- 3.21 When financial contribution provisions are challenged, the overall test is whether they are the most appropriate way to achieve the plan's objectives and policies, assist the Council to carry out its functions and are in accordance with the purpose and principles of the RMA. This brings into play the link between the type and level of contribution proposed and the likely effects of the types of activity to be levied. However, given the generality of the issues when a plan provision is considered without the benefit of a particular development or contribution, challenges are more likely to be successful in the context of a particular proposal.
- 3.22 Challenging resource consent conditions occurs through either an objection to the Council (for non-notified and non-served applications, or those which attracted no submissions or where submissions were withdrawn), or directly to the Environment Court in an appeal under section 120 of the RMA. Should an appeal be made which is limited to a financial contribution condition, the consent holder could apply to the Court to commence the activity authorised, despite the outstanding appeal, so long as that would not prejudice the outcome of the appeal and is otherwise in accordance with the RMA's purpose. However, where it can be shown that adverse environmental effects are likely to result from commencing an activity where the contribution is not provided, this would be a good reason not to allow early commencement.
- 3.23 As noted in the context of enforcement options, an application for a declaration to confirm the interpretation or effect of a financial contribution can also be made. The Court has a wide discretion in making declarations, and it will not necessarily be fatal

to a consent holder if it did not appeal the condition at the time it was imposed but later effectively sought to challenge at least its interpretation through this process.

4 Development contributions

Overview

- 4.1 Development contributions are the most recent funding method provided to local authorities and are targeted at specific resource users. They can only be used by territorial authorities.
- 4.2 Development contributions are governed by the LGA, and are no exception to the strict procedural requirements of that legislation. As covered below, decisions to require contributions need to be well documented and consulted on. However, compliance with the procedural requirements is but one aspect of lawful contributions, the scope of which is also limited by the overall purpose of local government as reflected in the LGA and in particular the demands of developments to which they apply and the community benefits resulting from using the contributions.
- 4.3 Development contributions can be distinguished from financial contributions on a number of levels. Apart from the distinct legislative governance, there are differences in the processes for imposing them, the purposes to which they may be put and the circumstances in which they can be required. As a result, local authorities may utilise both regimes as alternative sources of funding. In particular, the same development could be levied for both types of contribution subject to the prohibition on 'double-dipping'.
- 4.4 Since their enactment in 2002, there has been a remarkably high take-up by local authorities of development contributions as a tool for funding growth. The authors' research indicates that as at the date of writing, every territorial authority in New Zealand (including the Chatham Islands Council) uses development contributions. This is perhaps indicative of the benefits local authorities see in the development contributions system, including how it can be used in tandem with financial contributions, and as a way in which the burden on general rates can be lightened. The ability for development contribution policies to be amended or updated through the annual plan process may also be seen as a particular benefit of the system.

Legislative history and governance

- 4.5 The legislative history of the financial contributions regime can be found in Appendix 2.

Imposing development contributions

Scope

- 4.6 Development contributions are monetary contributions. The power to take land for reserve purposes is a feature of financial contributions, although monies obtained through development contributions may be specifically used for reserve purposes.
- 4.7 There are three purposes to which development contributions may be put: community infrastructure, network infrastructure and reserves. The first two terms are defined in the LGA as follows:

community infrastructure means—

- (a) land, or development assets on land, owned or controlled by the territorial authority to provide public amenities; and
 - (b) includes land that the territorial authority will acquire for that purpose
- network infrastructure means the provision of roads and other transport, water, wastewater, and stormwater collection and management

4.8 In respect of reserves, contributions can be put to a wide range of reserve purposes, including for reserves outside of a territorial authority's district. Section 205 sets out the various reserve purposes to which contributions can be put in a territorial authority's district, as follows:

A territorial authority must use a development contribution received for reserves purposes for the purchase or development of reserves within its district, which may include—

- (a) the development of community or recreational facilities associated with the use of a reserve:
- (b) the provision or improvement of recreational facilities at a school established or about to be established under Part 12 of the Education Act 1989, if—
 - (i) a licence has been granted under section 6A of the Education Lands Act 1949 [or section 70B of the Education Act 1989] in relation to the use or occupation of the community recreational facilities; and
 - (ii) the Minister for Sport and Recreation has notified the local authority in writing that he or she is satisfied that the licence provides for the reasonable use of the community recreational facilities by members of the public:
- (c) the purchase of land or an interest in land—
 - (i) to be held for conservation purposes under the Reserves Act 1977:
 - (ii) that is, or will be, subject to a conservation covenant under section 77 of the Reserves Act 1977:
- (d) payment, on terms and conditions the territorial authority thinks fit, to—
 - (i) another local authority or public body in which land in the district is vested to enlarge, enhance, or develop the land for public recreation purposes:
 - (ii) the administering body of a reserve held under the Reserves Act 1977 to enlarge, enhance, or develop the reserve:
 - (iii) the trustees or body corporate in whom is vested a Maori reservation to which section 340 of Te Ture Whenua Maori Act 1993 applies, to enhance the reservation for cultural or other purposes:
 - (iv) any person, to secure an appropriate interest in perpetuity in land for conservation purposes.

4.9 Where a territorial authority considers that there are adequate reserves in its district or that it is otherwise impracticable to develop reserves in that area, the contribution

may be put to land held for public recreation purposes outside of the district (refer section 206). However, it may only do so if the Council considers that this would benefit the residents of the district in which the subject development is situated.

- 4.10 In addition to the three purposes of development contributions, there are further significant limitations to a Council's ability to require development contributions. Contributions can only be used for capital expenditure for reserves and infrastructure, and cannot be used for the general maintenance of those assets. Moreover, as discussed below, a Council can only require contributions where the development/s levied result in a requirement for new assets or assets of increased capacity which in turn results in capital expenditure.

Process

- 4.11 In order to impose development contributions, territorial authorities must first adopt a development contributions policy (DCP). DCP's are funding and financial policies under the LGA. Preparing a DCP is part of the LTCCP process. The Council must use the LGA special consultative procedure in adopting a LTCCP and DCP. The special consultative procedure is governed by a number of guiding principles that require affected communities to have access to relevant information and to be provided opportunities to express their views on decisions. The special consultative procedure for DCPs is more rigorous than the consultation process for financial contribution policies. For example, the special consultative procedure requires the preparation and summary of statements of proposals, which are to be made available and advertised, and in respect of which public submissions are to be invited. Submitters are also to be given an opportunity to be heard, and meetings at which proposals are to be considered are to be open to the public. LTCCPs can be updated at any time, and DCPs can therefore be regularly updated (in practice annually at most) to take into account changed expectations as to a local authority's likely expenditure.
- 4.12 The LGA does not allow objections or appeals to the Environment Court regarding development contributions. The process for challenging development contributions is outlined below.
- 4.13 The DCP must contain a number of statements and information, including the proportion of the Council's capital expenditure that will be funded by development contributions, as compared with other sources of funding. More particularly, DCPs must contain the following information:
- (a) an explanation of, and justification for, the way each development contribution in the schedule required by the DCP is calculated;
 - (b) the significant assumptions underlying the calculation of the schedule of development contributions, including an estimate of the potential effects, if there is a significant level of uncertainty as to the scope and nature of the effects;
 - (c) the conditions and criteria (if any) that will apply in relation to the remission, postponement, or refund of development contributions, or the return of land; and
 - (d) the basis on which the value of additional allotments or land is assessed for the purposes of reserve contributions.

- 4.14 DCPs must also contain a schedule of development contributions, which are to contain the following specifications:
- (a) the development contributions payable in each district, calculated in accordance with the methodology in respect of reserves, network infrastructure, and community infrastructure;
 - (b) the events that will give rise to a requirement for a development contribution under section 198, namely whether upon granting:
 - a resource consent under the RMA;
 - a building consent under the Building Act;
 - an authorisation for a service connection.
- 4.15 The specifications required above must be given separately in relation to each activity or group of activities for which separate development contributions are required.
- 4.16 The development contributions methodology is also strictly prescribed in the LGA. This methodology is to be used for calculating the maximum development contribution, and requires a calculation of the likely total capital expenditure costs resulting from growth, and a division of those costs across what are termed 'units of demand' to be levied. Schedule 13 sets out the methodology as follows:

1 Methodology for relating cost of community facilities to units of demand

In order to calculate the maximum development contribution in respect of a community facility or an activity or group of activities for which a separate development contribution is to be required, a territorial authority must first—

- (a) identify the total cost of the capital expenditure that the local authority expects to incur in respect of the community facility, or activity or group of activities, to meet increased demand resulting from growth within the district, or part of the district, as the case may be, as set out in the long-term council community plan in accordance with section 106(2)(a); and
- (b) identify the share of that expenditure attributable to each unit of demand, using the units of demand for the community facility or for separate activities or groups of activities, as the case may be, by which the impact of growth has been assessed.

- 4.17 'Community facilities' are the reserves, network infrastructure or community infrastructure for which development contributions may be required.

Timing of imposition of development contributions

- 4.18 There are three events for imposing development contributions, namely when:
- (a) a resource consent is granted for a development within the subject district;
 - (b) a building consent is granted for building work situated in the subject district;
 - (c) an authorisation for a service connection is granted, being a physical connection to a service provided by, or on behalf of, a territorial authority.
- 4.19 Some developments will require all three of the above authorisations, and most commonly both a building and resource consent. The granting of these authorisations may occur at different stages of development. In such cases, the

development could be subject to three separate assessments of development contributions, so long as that is authorised by the DCP. It would not be appropriate to use all three events to double-dip (or indeed to triple-dip) by requiring contributions for the same demand in respect of the same capital expenditure. However, there may be circumstances when it is appropriate to reassess the adequacy of contributions made at an earlier stage where, for instance, a Council's DCP has been amended requiring an additional or different contribution or where the Council's predicted expenditure has increased (and the DCP allows flexibility in the assessment of the contribution level). Whether or not this may occur should be clearly spelt out in a DCP to ensure certainty for Councils and developers.

Limits to development contributions

- 4.20 The two principal limitations on development contributions are the need for a 'development' as defined in the LGA, and the incurrence of capital expenditure by the Council resulting from the demands of the development levied. As noted, there is also a prohibition on double-dipping, and a requirement to remit or refund contributions in certain circumstances.

Need for 'development'

- 4.21 Section 199 of the LGA specifically empowers Councils to require development contributions. In doing so, it uses the term 'developments' as the first prerequisite to imposing contributions. The term 'development' is defined as follows:

development means—

- (a) any subdivision or other development that generates a demand for reserves, network infrastructure, or community infrastructure; but
- (b) does not include the pipes or lines of a network utility operator

- 4.22 The key phrase in the definition is the need for the development levied to 'generate a demand' for reserves or infrastructure. In the *Neil Construction* judgement, the Court focused on the definition of 'development', and held that the main trigger for the charging of a contribution was not the granting of a resource or building consent or service connection authorisation, but rather the need for there to be a 'development'. This is therefore the first enquiry to be undertaken by a Council when formulating DCPs and levying developers. To qualify as a development, the Court emphasised the need for a clear link between a development and the demand for infrastructure. The Court concluded its analysis of this issue as follows:

I conclude the Act requires that before a development contribution may be required by the Council, there must be a "development" and a direct causal nexus between that "development" and the demand for infrastructure it, either alone or jointly with another development, generates. This necessarily requires the Council to determine a preliminary point, on a case by case basis, whether a particular project is a "development" as defined in s 197.

- 4.23 The main example of the Council's expenditure for which contributions were taken in the *Neil Construction* case was the Northern Busway Project (a proposal for bus lanes and stations along the northern motorway). Over 90% of the funding for that project was to come from development contributions, and the plaintiffs' complaint was that the developments levied did not place that level of demand on infrastructure

resulting in this level of need for the Busway project. The Court agreed that the proportion of development contribution funding for this project was out of step with the demands resulting from the developments levied.

4.24 In this connection, the Court analysed the appropriateness of the Council's approach in considering who should pay for reserves and infrastructure under its DCP. The issue was the extent to which the Council should have considered the benefactors to reserves and infrastructure funded by development contributions when apportioning costs between developers and general ratepayers. The Northern Busway Project example was a case on point, where the plaintiffs argued that developers were effectively subsidising existing residents who would also benefit from the proposal, and that developers were being asked to remedy a pre-existing demand for increased roading and public transport capacity. The Court held in that case it was not appropriate for the Council to adopt an 'exacerbator-pays approach' to funding growth, and needed to have more regard to the distribution of benefits between the community as a whole in imposing contributions. The Court relied in particular on the requirements of section 101 of the LGA, which requires consideration of the following factors when deciding on sources of funding:

- (a) The community outcomes to which the activity primarily contributes.
- (b) The distribution of benefits between the community as a whole, any identifiable part of the community, and individuals.
- (c) The period in or over which those benefits are expected to occur.
- (d) The extent to which the actions or inaction of particular individuals or a group contribute to the need to undertake the activity.
- (e) The costs and benefits of funding the activity distinctly from other activities.

4.25 The Court adopted the description of the above five factors as a 'critical filter' for considering funding sources. Once the Council considers the critical filters, in the Court's words it must then:

...stand back and consider the overall impact of any allocation of liability on the current and future well-being of the community, from social, economic, environmental and cultural perspectives.

4.26 The Court also described the need to assess the distribution of benefits and consider all available options, as follows:

The distribution of benefits between the community as a whole, any identifiable part of the community, and individuals, is a factor the Council must consider in relation to each activity...

[The Council] should have regard to the views of all of its communities, and in its decision-making take account of the interests of future as well as current communities... the Council must seek to identify all reasonably practicable options for achieving the objectives and to assess those options by considering the costs and benefits of each option in terms of the four well-beings and the extent to which community outcomes would be integrated or achieved in an integrated and efficient manner.

Need for expenditure

4.27 Not only do developments levied need to place a demand on reserves or infrastructure, the Council needs to incur capital expenditure as a consequence, as a

further requirement for imposing development contributions. Section 199 provides that Councils must, as a result of development demand, have required new or additional assets or assets of increased capacity and, as a consequence, incurred capital expenditure to provide for reserves or infrastructure. The capital expenditure incurred can be based on the cumulative effects of the development levied and other developments. However, Councils can require contributions to pay for expenditure already incurred in anticipation of the subject development.

Levels of contribution

- 4.28 The LGA sets maximum levels for development contributions, and provides for separate formulae for reserves and network/community infrastructure. For reserves, contributions cannot exceed the greater of the following:
- (a) 7.5% of the value of the additional allotments created by a subdivision;
 - (b) the value equivalent of 20 square metres of land for each additional household unit created by the development.
- 4.29 The 7.5% maximum for reserve contributions is the same as that which applied under the LGA 1974 for residential subdivisions, as is the 20 square metres per additional household unit calculation vis-à-vis commercial or industrial developments.
- 4.30 In the authors' experience, the practice of Councils is to simply include without amendment the statutory reserve contribution maxima in their DCPs. The adoption of these maxima was at issue in the *Neil Construction* litigation, where the plaintiffs argued this was an arbitrary and unreasonable approach, particularly by failing to differentiate between residential and non-residential developments and to adequately assess the connection between the development and provision of reserves. The Court noted that the Council's decision on the amount of expenditure appropriate for reserves was a matter of Council policy, which is not capable of precise determination. Because the Council took into account all relevant matters when arriving at the reserves contribution formula (despite applying the statutory maxima), the Court declined to intervene. It can be taken from that judgment that the provision of reserves, as a matter of a particular Council's policy for its district, can more easily justify imposing the level of contributions for those payments than is the case for network or community infrastructure.
- 4.31 The LGA also provides a formula for determining the maximum contribution for network or community infrastructure. The statutory directive reads as follows:
- Development contributions for network infrastructure or community infrastructure must not exceed the amount calculated by multiplying the cost of the relevant unit of demand calculated under clause 1 of Schedule 13 by the number of units of demand assessed for a development or type of development, as provided for in clause 2 of Schedule 13.
- 4.32 Clause 1 of Schedule 13 requires a Council to first identify the likely capital expenditure required to meet increased demand resulting from growth, and then apportion that cost amongst 'units of demand'. Under clause 2 of Schedule 13, units of demand are to be attributed to particular categories of development on a consistent and equitable basis. Subject to that qualification, Councils have a wide discretion in

deciding what units of demands to adopt. Many Councils use household units (or their equivalent) as a unit of demand. While this is clearly apt for residential development involving additional dwellings, attributing household units of demand to non-residential development categories can be more difficult. In any event, despite the strict formula for determining maximum contributions for network and community infrastructure, the discretion in determining a unit of demand provides Councils with a relatively wide scope in setting a maximum. Of course, there remains a fundamental requirement that there be a sufficiently direct causal nexus between the developments levied and the demand for infrastructure.

Prohibition on 'double dipping'

- 4.33 When the development contributions regime was first mooted, one concern was the overlap between those levies and the existing financial contribution powers under the RMA. The LGA expressly prevents 'double dipping' under the RMA and LGA powers, and where the relevant funding is provided through other means. Section 200 sets out these limitations as follows:

200 Limitations applying to requirement for development contribution

(1) A territorial authority must not require a development contribution for a reserve, network infrastructure, or community infrastructure if, and to the extent that—

(a) it has, under section 108(2)(a) of the Resource Management Act 1991, imposed a condition on a resource consent in relation to the same development for the same purpose; or

(b) the developer will fund or otherwise provide for the same reserve, network infrastructure, or community infrastructure; or

(c) the territorial authority has received or will receive funding from a third party.

(2) This subpart does not prevent a territorial authority from accepting from a person, with that person's agreement, additional contributions for reserves, network infrastructures, or community infrastructures.

- 4.34 In respect of financial contributions, there remains an ability to levy the same development for both financial and development contributions where the respective purposes of the contributions are different. Accordingly, additional purposes for which contributions are required would allow Councils to utilise both sets of powers.
- 4.35 Development agreements are becoming increasingly common as an alternative to applying a DCP. The advantages of these agreements is that they better facilitate opportunities for negotiation between the developer and Council (without resort to the Courts) and can allow for increased certainty. They also allow the developer to provide reserves or infrastructure directly, rather than contributing financially to those assets. Third party funding may also avoid the need to impose development contributions, and will in the main apply where government agencies fund the relevant asset as part of their statutory responsibilities.

Refunding, postponing and remitting development contributions

- 4.36 A mandatory requirement of DCPs is that they include the circumstances that will apply to the remission, postponement, or refund of development contributions, or the

return of land. The LGA also prescribes circumstances when development contributions are to be refunded. These circumstances are:

- (a) Where a resource consent lapses or is surrendered.
- (b) Where a building consent lapses.
- (c) Where the development levied does not proceed.
- (d) Where the Council does not provide the reserve or infrastructure for which the contribution was originally required.

4.37 However, the Council is entitled to retain portions of contributions to cover its costs in relation to the development and its discontinuance.

4.38 In relation to reserves, money is to be refunded if not put to the relevant reserve purpose within 10 years after payment of the contribution, or otherwise as specified in the DCP. Where land is acquired for the specified reserve purpose, but is not used for that purpose within 10 years, the land is to be returned. Again, the Council may retain the portion of the money or land taken for reserve purposes to cover its costs in refunding the money or returning the land.

Challenging development contributions

4.39 To cater for the concerns regarding challenges to financial contributions, the LGA does not allow objections or appeals to the Environment Court regarding development contributions. Indeed, section 198 of the LGA specifically records that development contributions are not resource consent conditions that give rise to any right of objection or appeal, and that there is no right to apply for a determination under the Building Act. Accordingly, unless the DCP itself allows scope for some level of challenge to contributions imposed, the sole remedy for those levied is to apply for judicial review or a declaration to the High Court. The grounds for challenge on judicial review are relatively limited, and essentially relate to whether correct legal tests were applied, whether all (and only) relevant considerations were taken into account and the overall 'reasonableness' of the decision challenged. Outside of these considerations, the High Court will not reconsider the merits of the decision made by the Council. This process is expensive, difficult and relatively uncertain in outcome (particularly given the High Court's overall discretion to grant relief even where an error has occurred), and may not be the most satisfactory way to resolve disputes. Declaration applications, in which the Court is asked to rule on a legal position, are also limited in their scope for challenging the merits of a Council's decision.

4.40 Accordingly, one option for accommodating disputes in a less formal and adversarial way is for DCPs to contain a process for reconsidering levies imposed, for instance as an additional circumstance in which remissions will be considered.

Enforcing development contributions

4.41 Territorial authorities are given strong powers to extract development contributions from developers. Essentially, the LGA empowers a Council to prevent the activity in respect of which the contribution was required from occurring unless and until the contribution is paid.

Until a development contribution is paid, a Council may take any of the following actions:

- for resource consents, to withhold a section 224(c) certificate for subdivision consents or prevent the commencement of the consent
- for building consent, to withhold a code compliance certificate
- for contributions required for service connections, to withhold a service connection to the development
- in all cases, to register the development contribution as a charge on the title of the subject land.

4.42 Of note, the power to 'prevent the commencement' of a resource consent is not reflected in the corresponding provision of the RMA (section 116). Enforcing this power outside of the standard RMA enforcement powers may therefore be not as simple as the LGA provisions suggest. Although it is an offence under the LGA to fail to comply with a direction given under that Act, this in itself may not have the effect of preventing commencement of the resource consent. There may also be difficulties in endeavours to require contributions as a specific condition of a resource consent as there may not be the necessary resource management purpose for imposing such a condition. Nevertheless, in most cases there are likely to be overriding incentives for consent holders to provide the contributions required.

Appendix 1

Legislative history and governance - Financial Contributions

The financial contribution regime was introduced when the RMA was originally enacted in 1991. In line with the overall philosophy of the RMA, the regime was intended to provide local authorities with a further method to avoid, remedy and mitigate adverse environmental effects.

The original regime empowered local authorities to require financial contributions in the form of either or a combination of cash, land, works or services. As part of the 1997 amendments to the RMA, the provision of works or services was removed from the definition of financial contributions. This made it easier to impose such conditions. Financial contributions are now limited to money and land. Another feature of the original financial contributions system was that the empowering plan provisions needed to be in an operative plan. In 2003 the RMA was amended to provide that local authorities can, if they so resolve to, require financial contributions in the proposed plan stage. The purpose of this amendment was to enable Councils to rely on its most recent direction for contributions and, more particularly, to overcome the problems associated with lengthy delays in proposed plan provisions becoming operative. In its report on the 2003 amendments, the Select Committee described the issue in this way:

Officials have advised us that there have been attempts to block financial contributions provisions coming into force, through the submission and appeal processes. The appeals take a particularly long time to resolve, and are often the only outstanding matters stopping proposed plans becoming operative. This has imposed considerable costs on local authorities and slowed the full transition to plans made under the Act. The change to the effect of proposed plans in the bill as introduced would have enabled local authorities to take financial contributions under proposed plans from the time they are notified.

However, recognising inoperative financial contribution rules may raise concerns where the rule has only recently been notified, is challenged and arguably inappropriate, and therefore a tenuous basis on which to compel resource users to part with their money or land. This was recognised by the Select Committee in its 2003 report, perhaps cynically given the use of the term 'theory', when it noted:

The theory is that before imposing pecuniary measures there should be a submission period allowing full debate on the provisions.

Although the Environment Court can be resorted to by way of appeal of conditions imposed on resource consents based on proposed planning rules, the challenged condition would still have the sanction of the proposed plan. Accordingly, weighting issues aside, the only avenue for challenge would be the application of those provisions and overall reasonableness of the condition in the context of the effects of the activity levied.

Section 108 of the RMA provides the predominant power for requiring financial contributions, and sets out a consent authority's powers to impose conditions of consents. In respect of subdivision consents, section 220 empowers consent authorities to require a vesting of land or an interest in land for esplanade strips, esplanade reserves, and in respect of land in the coastal marine area, lakes or rivers. These are additional powers to those in section 108, which empowers the taking of other reserve land.

To cater for the original requirement that only operative plans empowered financial contribution conditions, and scenarios where plans were silent on the issue, the RMA contained transitional provisions to preserve the Local Government Act 1974 (**LGA 1974**) financial contribution

powers. Prior to the RMA, development levies were governed by the LGA 1974. Unlike the RMA system, developments were levied under the direct authority of the provisions of the legislation and it was not necessary for district schemes to authorise financial contributions. The types and levels of contributions that could be taken under the LGA 1974 provisions included:

- (a) Contributions to upgrading public water supply, drainage, electricity supply or gas supply systems.
- (b) Reserve contributions for residential subdivisions, or payments in lieu of reserves. The value of such contributions could not exceed 7.5% of the value of the allotments to be subdivided for residential purposes.
- (c) Reserve contributions for commercial or industrial subdivisions, or payments in lieu of the provision of land for reserves where such payments were not to exceed 10% of the value of the allotments.
- (d) For administrative, commercial or industrial developments not exceeding \$50M in value, reserves contributions to the maximum of 0.5% of the value of the development, or to otherwise set aside land for reserve purposes of a value equal to the monetary contribution which would otherwise apply.
- (e) For residential developments, to set aside land for reserve purposes to a maximum area equating to 20m² for certain household units, or to pay cash in lieu of an amount sufficient to purchase the equivalent land which would otherwise be set aside.
- (f) To contribute to road works as a condition of subdivision consent, where those works serve the subdivision. Land could also be taken for the purpose of road widening, so long as the value of the land taken did not exceed the maximum contribution that would otherwise be required to contribute to the fair and reasonable costs of road works. Alternatively, by agreement, the Council could undertake the road works itself in return for the owner vesting in the Council the necessary land.

Under the transitional provisions, subdivision consents and general development consents would only be subject to financial contributions under the LGA 1974 where there was either no district plan applicable to the land, or where the district plan did not include financial contribution provisions contemplated by sections 108 or 220 of the RMA. Accordingly, given the passage of time since the financial contribution regime was introduced, it is unlikely that these transitional provisions have any currency. They do however illustrate the differences between the pre and post RMA powers, and of interest between the LGA 1974 powers and the development contribution powers under the LGA 2002.

The financial contributions regime accords with, and should be applied having regard to, the purpose of the RMA. While there are some similarities with the corresponding powers under the LGA 1974, the RMA provisions provide more flexibility for consent authorities in the circumstances in which contributions will be levied and the level of contribution, and therefore there is increased transparency and public involvement in formulating financial contribution rules. Key aspects of the RMA's purpose are to avoid, remedy and mitigate environmental effects and sustain resources for future use, and the purpose of contributions to mitigate or offset adverse environmental effects aligns with these goals.

Appendix 2

Legislative history and governance - Development Contributions

Development contributions are part of the amended local government regime of the LGA. This legislation provided local authorities with a wider and more general scope to undertake and regulate activities (sometimes referred to as the 'power of general competence'), while at the same time increasing the accountability and transparency in the decision-making process. Transparency is given effect to by strict and public processes for decision-making, including increased requirements for community consultation.

Development contributions were primarily introduced to allow local authorities to fund infrastructure such as roads and the three waters (stormwater, wastewater and water supply), rather than manage environmental effects.

The development contributions regime was introduced in part as a result of local authority frustrations at the lengthy process of resolving disputes over financial contributions under the RMA. Unlike financial contributions, there is no avenue for appeal to the Environment Court to resolve disputes, and challenges are limited to judicial review or declaration applications in the High Court. Accordingly, development contributions can be viewed as a more effective and efficient funding method given the cost and relative difficulties in successfully challenging charges imposed.

Development contributions are part of the LGA's provisions concerning financial management of local authorities (subpart 3 of Part 6 (Planning, Decision-making and Accountability) of the Act), are subject to the decision-making and public consultation obligations (subpart 1 of Part 6 of the Act) and are specifically governed by sections 197-211 of the LGA (subpart 5 of Part 8 (Regulatory, Enforcement and Coercive Powers of Local Authorities)). As part of the LGA, development contributions are governed by the purpose and principles of local government, the former being:

- (a) To enable democratic local decision-making and action by, and on behalf of, communities; and
- (b) To promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

The role of local authorities is to give effect to the above purpose and the duties conferred by the LGA. Of the principles in respect of which local authorities must act, the requirement on local authorities to conduct their business in an open, transparent and democratically accountable manner, and to have regard to the views of communities, is particularly reflected in the development contributions provisions. This was recognised by the High Court in the first case in which development contributions were challenged (*Neil Construction Limited & Ors v North Shore City Council* (Potter J, High Court, Auckland, CIV-2005-404-4690, 21 March 2007), in which Her Honour summarised the new regime as follows:

The enactment in the Act of Subpart 5 of Part 8, relating to Development Contributions provided councils with a valuable and economically efficient funding tool in addition to the traditional funding sources such as general rates. There is no right of appeal from councils' determinations in relation to development contributions and the review process is limited (refer [95]). Any challenge by developers has to be mounted by way of judicial review. In exercise of their discretions, given the greater flexibility in decision-making conferred on councils by the Act, it is therefore necessary and important that councils carefully observe the purpose and principles of the Act and the role of local authorities, that they ensure both openness in their decision-making



processes, and the ability of sectors of the community affected by their decisions, to participate in those processes.