APPENDIX V

Decision of Hearing Panel – Variation 1 and Officers Report 49

RESOURCE MANAGEMENT ACT 1991

PROPOSED SELWYN DISTRICT PLAN

HEARINGS OF SUBMISSIONS

RECOMMENDATIONS OF HEARING PANEL

REFERENCE NUMBER:	49
HEARING DATE:	March 8 & 9, 2004
TOPIC / SUB TOPIC:	**Financial contributions**
HEARING PANEL:	Crs J Pearcy and D Hasson, and J Milligan.

RECOMMENDATIONS OF HEARING PANEL

Appearances

- Ian Dalton, to present s42A reports prepared by himself and by Lynda Weastell and Ray Anderson

Legal background

The term 'financial contribution' as used in the Act means (s108(9))

> a contribution of -
> (a) Money; or
> (b) Land,…; or
> (c) A combination of money and land.

The primary expression of the power to require financial contributions is to be found in that part of the Act that identifies the kinds of conditions that may be imposed on a resource consent. Accordingly that power is constrained by the principles laid down *in Newbury D.C. v Secretary of State for the Environment* [1980] 1 All ER 731, namely:

1. The condition must be for a resource management purpose not for an ulterior one;

2. The condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and

3. The condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.

As the statute now stands, these principles are supplemented by the requirements of s108(10) of the Act, namely:

> 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.

The definition of 'permitted activity' in s 2 of the Act extends the ability to require financial contributions to cases in which a resource consent is not required. It does this by including compliance with "any conditions in relation to any matter described in s108 … specified in the plan" as a precondition to permitted activity status. As a result, financial contributions may be required of any activity so long as the requirement (a) conforms to the *Newbury* principles (particularly the first and second) and (b) is supported by provisions in a plan that comply with s 108(1), modified as necessary to meet the changed context.

Submissions to the Proposed Plan

As notified, the Townships and Rural Volumes of the Proposed District Plan made somewhat different provisions regarding financial contributions. Variation 1, however, amended the Townships Volume so as to bring it in to line with the (later notified) Rural Volume. As a consequence of the three opportunities thus created the Council received a significant number of submissions and further submissions. These are considered in OR 49. The recommendations of that report are that many of the submissions should be accepted. Significantly, however, the report recommends rejection of a group of submissions seeking the inclusion of (typically) "methods for defining with certainty the method for determining with certainty the form of the contribution and the method for calculating the amount of the cash contribution." The submissions do not seek to supply the supposed deficiency and most accept that this can only be done by way of variation. Rejection of these submissions is recommended on the basis that the provisions of the Proposed Plan comply with the requirements of the Act.

The hearing panel convened on 8 March. No submitters sought to be heard. As its discussions proceeded the panel began to entertain doubts as to whether the view taken in the report was correct as a matter of law. We will set out those doubts below. The next day the panel was fortunate enough to be able to continue its discussion with the assistance of Mr Kerry Smith, a partner in the firm of Buddle Findlay, the Council's solicitors. Its purpose in doing so was to make Mr Smith aware of the precise nature of the panel's concerns so that he could provide legal advice to the Council. He has now done so – his opinion is dated 16 April 2004.

The panel's concerns

The Proposed Plan approaches the issue of financial contributions firstly by grouping them in to three broad types – 'Roads and other utilities', 'Reserves and recreational areas and facilities' and 'Damage to the environment'. For each of those types there are columns setting out what is said to be the 'purpose', 'form' and 'method to determine' the

contributions required. Many of the provisions in the last column begin with words such as "up to 100% of the costs…" Others specify "the maximum contribution payable".

Later provisions seek to specify the way in which 'the costs' are to be ascertained. The purpose of these provisions is to provide some certainty as to the standard (and thus direct cost) of work required and to bring in to account elements of indirect cost – overheads, interest, holding charges and the like. The point that, for the moment, concerns us is whether or not the Proposed Plan can be said to describe the *manner* by which the *level* of contribution is to be *determined.*

We have been referred to the decision of the Environment Court in *Remarkables Park Ltd v Queenstown Lakes District Council* C161/03. That provides a useful discussion of the relevant legislation and of cases determined under it. At paragraph [37] of that decision the Court indicates an attraction to the view *firstly* that 'financial contributions' are (usually, if not solely) directed to the provision of "services off-site", that is, from the site's boundary radiating outwards", and *secondly* that the very term "suggests that only a contribution not the full cost of such services needs to be paid by the landowner/developer. On that way of looking at things the requirement that the plan specify a manner for determining a level of contribution, when coupled with the requirement that a condition (whether in a plan or attached to a consent) have sufficient specificity, seems to imply:

1. A requirement that the plan contain a sufficient mechanism through which the required contribution is to be determined (this need not be by way of formulae – *Remarkables*, above); and

2. That the end result should be expressed as an identified area of land or sum of money, not left the subject of a further assessment or calculation (ie, as *x*% of a value yet to be determined).

It was the first of these issues that particularly concerned the panel. We thought that the requirement that contributions be "up to" some "maximum" involves two steps – (a) the calculation of maxima in relation to some subdivision or development and (b) the adoption of a methodology for determining what part of those maxima is to be borne by the subdivider or developer. In our view s108(10) requires a sufficient description of both steps, but that the Proposed Plan is wholly deficient so far as the last is concerned.

The legal opinion

Mr Smith comes to a similar conclusion in his opinion of 16 April. He says (his paras 16 and 17)

> Although section 108(10) allows considerable flexibility for the ways in which financial contributions will be required and what they might be, in my opinion there is a clear direction in s 108(10)(b) that the method by which the financial contribution is to be calculated needs to be reasonably clear in the plan….
>
> …there is a balance to be struck between providing the context within which a financial contribution might be taken and what appears to be an open ended assessment. Where I consider the draft rules to be inadequate is they give no more than a general framework. *Any potential applicant is not able to assess from these rules what the potential contribution might be.* [our emphasis]

Conclusion

Mr Smith's view (his para 22) is that given the Council's desire to "have financial contributions in the plan rather than to rely on development contributions under the Local Government Act 2003 … there is little alternative other than to promptly vary the proposed plan." We agree and propose to recommend accordingly. Given the interrelated nature of all issues relating to financial contributions we think it would be unwise for us to express any opinion as to the fate of any of the submissions presently before us. In the event of a variation these will become, in effect, submissions to that document.

Recommendation 49.1

For the foregoing reasons we recommend that the Council

(a) ***Reconsider*** **the 'financial contributions' provisions of its Proposed Plan with a view to the promulgation of a Variation; and**

(b) ***Defer*** **further consideration of the submissions identified in OR 49 until submissions to that Variation are heard.**