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Legal Landscape

GOVERNANCE

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DEVELOPMENT CONTRIBUTION REFORM - SURGERY WITHOUT MAJOR TRAUMA

The Minister of Local Government has taken the knife to development contributions, and has managed not to kill the patient.

There is a little bit for everybody in the proposals recently released under the *Better Local Government* process for improving the development contributions regime. Local authorities should be pleased at the clarification and statutory improvements proposed, and developers at the more clearly delineated scope of development contributions. At the same time the community can be relieved that the funding burden for infrastructure currently supplemented by development contributions will not be transferred to rates.

We commented on the Department of Internal Affairs *Development Contributions Review: Discussion Paper* released in February in an earlier **Legal Landscape**. Not all of the issues noted in that Discussion Paper have been addressed in the current proposals. For example two issues relating to the alleged impact on housing affordability - the timing of development contribution payments and the lack of incentives for small or more affordable housing - have not been addressed. However the proposals do take account of extensive consultation with Government departments and agencies, developers and local government. A provision put forward by Brookfields during consultation concerning the securitisation of private development agreements has also found its way into the proposed statutory amendments.

Having concluded that development contributions should not be removed or capped, the Minister's proposals, now approved by Cabinet, aim to make development contributions "fairer, better focussed, more transparent and more workable."

There can be no argument with this objective. The proposed improvements cover six areas of change, and are designed to address the following issues arising from the current development contributions regime:

- use of development contributions to fund infrastructure types of questionable justification;
- variable practice and transparency in the apportionment of the costs and benefits of infrastructure;
- limited independent mechanisms to challenge development contributions;
- variable territorial authority capacity and stability.

The exact form of the changes will not be clear until the introduction of the Local Government Reform Bill later this year, as part of Phase 2 of the better Local Government programme. However the general nature of those proposals is discussed below under the issues identified in the Minister's paper to Cabinet.

Some development contribution are charged on areas of questionable justification

The assumption here is that the range of infrastructure for which development contributions can be charged is too broad, and that infrastructure that is mainly for the good of the wider community should be funded from general revenue sources such as rates. Examples of some of the types of infrastructure that the Government believes should not be funded by development contributions include: cemeteries; art galleries; botanic gardens, aquatic centres, ports, airfields and storage and archive facilities.

Accordingly, the definition of "community infrastructure" will be replaced by a more narrowly focussed list of the types of infrastructure that service local neighbourhood needs. These include:

- community or neighbourhood halls;
- play equipment located on neighbourhood reserves;
- public toilets.

Notably absent from this list are libraries, which is sure to make for an interesting debate.

It is also proposed to remove the ability for territorial authorities to charge development contributions for reserves on commercial and industrial developments unless these involve the creation of new dwellings. Many territorial authorities already take the view that there is no direct impact on reserves from commercial and industrial development, and do not require reserve development contributions for such developments.

Variable practice and transparency in the apportionment of costs and benefits

Although section 101 of the Local Government Act 2002 requires territorial authorities to consider who benefits from infrastructure when setting development contributions, there seems to be a view that developers are overcharged because development contributions are not fairly apportioned according to who benefits from the infrastructure. Of course that is a matter of perception, and the question of who benefits is only one of the funding considerations under section 101.

It is also suggested that many development contribution policies include insufficient detail of the infrastructure that is being financed from that source, and limited information on how the costs of that infrastructure are apportioned. Accordingly, it is proposed to require a schedule in development contributions policies providing details of projects, project costs, the proportion of the cost financed by development contributions in each case, and the proportion financed from other revenue.

We note that section 106(3) of the Local Government Act 2002 (**LGA'02**) already requires a local authority to keep available for public inspection "the full methodology that demonstrates how the calculations for those [development] contributions were made". This, combined with the requirements of section 106(2) and 201, means that such information is already effectively available. However, the proposed amendment will perhaps see it more clearly specified within the development contribution

policy itself.
In addition, it is proposed to insert a new purpose statement into the LGA'02, together with a set of guiding principles that must be taken into account when preparing and administering development contribution policies. It is suggested that many territorial authorities will need to review and amend their development contribution policies to bring them in line with these principles, which will be based around:

(a) *Need:* development contributions can only be charged where developments create a need for a new or expanded infrastructure.

(b) *Efficiency:* development contributions should be justified on a whole of life capital cost basis, precluding over recovery of costs.

(c) *Equity:* development contributions should be determined according to, and be proportionate to, who will benefit from the infrastructure, as well as who created the need for the infrastructure.

(d) *Accountability:* development contribution revenue must be spent on the type of infrastructure for which it was collected and in the locality or catchment in which it was collected.

(e) *Transparency:* territorial authorities must make sufficient information available to demonstrate what development contributions are paying for and why.

(f) *Certainty:* development contribution charges should be predictable and in line with the methodology and schedules of the territorial authorities development contribution policy.

Variable Territorial Authority Capacity and Capability

It is suggested that a lack of understanding, capacity and/or capability could be contributing factors to poor practices by some territorial authorities. This would seem to be no more than an extension of the previous issue, but the Minister intends to build an improved capability by supporting the proposed changes with non legislative guidance and training for territorial authority offices.

Limited Independent Mechanisms to Resolve Challenges to Charges

Although many development contribution policies include provision for review of development contributions charged on a particular development, there is no provision to formally challenge those charges other than by way of an application for judicial review or declaratory judgment in the High Court. This is an expensive option, and the Cabinet Paper reports that just five High Court decisions relating to development contributions have been made since they were introduced. Accordingly, it is proposed to introduce a formal review and objection process. A party can request reconsideration of development contribution charges, but if that process does not resolve the matter, there will be a right to lodge an objection with the territorial authority for review by an independent development contribution commissioner.

The grounds for objection will be limited as follows:

(a) failing to properly take into account features of the development that increase or decrease the demands on the territorial authority's infrastructure;

(b) charging the developer for infrastructure that will not be used by persons or parties in the area

being developed by that developer;

(c) incorrectly applying the development contribution policy.

The objection process will not extend to challenging development contribution policies, which will only be possible by way of judicial review. At present it is proposed that the Minister of Local Government keep and maintain a national register of development contributions commissioners. Provision will also be made for a fee to be charged by territorial authorities to cover the cost of this process.

Little Encouragement or Directive for Greater Private Provision of Infrastructure

Although private development contribution agreements are becoming more widespread, they are not specifically catered for in the current legislation. It is proposed to include new provisions to encourage and explicitly provide for such agreements. A quite specific framework for such agreements is proposed, and it should be noted that it will be mandatory for territorial authorities to consider a request for a development agreement. A request may not be declined without reasons, which must be provided to the developer in writing.

Unclear and Out of Date Legislative Provisions

A list of tidy up provisions will be included when the legislation is drafted, described as minor technical changes to the Local Government Act 2002. These amendments will address a number of areas of ambiguity in the current legislation - for example the provisions for calculating costs and benefits over the life of the structural asset beyond the 10 year time horizon of a long term plan. They will also address changes since the legislation was first introduced – for example provision will be made to allow development contributions to be charged upon the issuing of certificates of acceptance under the Building Act 2004, and a consequential amendment to section 208 which relates to enforcement of payments. The majority of these provisions are likely to be welcomed by territorial authorities.

Final comment

Although the extent to which the amendments proposed are justified, on the basis of the impact of development contributions on housing affordability, is questionable, there is no doubt the development contribution regime is overdue for review. On the whole it appears the proposed changes will be beneficial to both territorial authorities and developers, and that both should be looking out for the Bill to ensure that the drafting achieves what is intended. As with all such legislation, the devil is in the detail. Since the impact on funding of infrastructure could be substantial, we expect careful scrutiny through the Select Committee process.

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