BEFORE THE INDEPENDENT HEARING PANEL
APPOINTED BY HAMILTON CITY COUNCIL

IN THE MATTER	the Resource Management Act 1991 (RMA)
AND	
IN THE MATTER	of hearing submissions on Plan Change 12 to the Hamilton City District Plan
BETWEEN	**THE ADARE COMPANY LIMITED**
	Submitter #243
AND	**HAMILTON CITY COUNCIL**
	Local authority

COUNSEL'S NOTES

11 September 2024

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MAY IT PLEASE THE HEARINGS PANEL

Summary

1. The Adare Company Limited's (**Adare**) case is that the proposed financial contribution regime is uncertain, inefficient, unjustified in relation to greenfield areas (particularly the Peacocke Growth Cell), and unsupported in terms of section 32.

2. If the Panel recommends that the proposed financial contribution regime is retained, I submit that greenfield development (particularly Peacocke), should be excluded.

A problematic regime

3. The financial contribution regime applies to permitted activities and activities authorised by resource consent and is targeted at:

   (a) managing effects from intensification in urban areas on three waters/transport network infrastructure;

   (b) improving and enhancing residential amenity – the intensification of the existing urban environment means that the public amenity of that environment needs to be improved; and

   (c) giving effect to Te Ture Whaimana – including betterment initiatives to improve outcomes for the vision and strategy of the Waikato River.

4. Importantly, and as conceded by Mr Muldowney at the hearing,[1] to impose a financial contribution as a condition of consent there needs to be a "logical connection" between the adverse effect of the proposal (i.e., the development) and the financial contribution sought.[2]

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1 PC12 hearing – 4 September 2024 – Lachlan Muldowney at 2:18:30.

2 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112 at [66].

5. Adare's case is that:

   (a) For residential amenity, there is no logical connection between the reasons the financial contribution is levied and greenfield development where amenity will already be provided for.[3]

   (b) For Te Ture Whaimana, the promulgation of PC5 was underpinned by provisions (including based on integrated catchment management plans) designed to give effect to Te Ture Whaimana. The Council's position through PC5 was explicit that the provisions gave effect to Te Ture Whaimana[4] and the learned Panel's decision on PC5 confirmed the same.[5] The Council's desire to fund other city-wide projects for Te Ture Whaimana purposes is not logically connected to the Peacocke Precinct.

Insufficient section 32 analysis

6. In Appendix 2.1 to the Council's section 32 analysis, financial contributions were identified as issues of high and moderate significance and therefore requiring detailed evaluation.[6] Despite that conclusion, the analysis is lacking.

7. Only one objective has been assessed and in a cursory way.[7] The analysis focused on the revenue benefits of the regime and in an overly simplistic way concluded that the financial cost would be a disbenefit for developers.[8] The assessment of the policies and rules has the same issue, having been assessed as a single package and in a cursory way.[9]

8. What is missing from the section 32 analysis is a genuine assessment of the other reasonably practicable options.[10] The analysis does not consider alternative funding mechanisms, including the typical way to fund growth related activities (development contributions) or the usual method for funding city-wide services (rates). Nor does the analysis

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3 As required by PC5, which enables the development of the MDRS so that amenity will be provided for.

4 Opening Legal Submissions for Hamilton City Council on PC5, at [55].

5 Decision on PC5, at [336].

6 Appendix 2.1, p 10.

7 Objective 24.3.1. See Appendix 2.3, p 104.

8 Appendix 2.3, p 104.

9 Appendix 2.3, p 104 onwards.

10 RMA, s 32(1)(b)(i).

consider different or nuanced financial contribution provisions that link financial contributions to the actual (or even logically connected) effects of intensification. Despite the Council's own submission on PC12 recognising the need for care applying the financial contributions regime to greenfield areas, it did not assess such options in its section 32 report or subsequently.

The particular issues for PC5

9. Mr Muldowney said in the hearing that PC5 was drafted "staring down the headlights of PC12".[11] He also said that it is "a bit cute" for Adare to draw a comparison between PC5 and PC12.[12] I understand his meaning to be that Adare should somehow have anticipated that the Council would pursue a financial contribution regime to address the effects of intensification, including in Peacocke.

10. That submission is not persuasive:

    (a) PC5 was a self-contained plan change that provided for intensification of the Peacocke Growth Cell and implemented the MDRS and Policy 3 and 4 directives for Peacocke. The Peacocke Precinct has distinct chapters for its residential, commercial and open space zones, as well as its own subdivision chapter.

    (b) PC5 contains detailed planning provisions with a focus on amenity outcomes and managing impacts on the Waikato River to give effect to Te Ture Whaimana.[13] It is entirely reasonable for Adare to assume that those provisions addressed the potential effects of development in Peacocke.

    (c) If, at the time PC5 was promulgated, the Council intended to address residential amenity issues and further betterment for the Waikato River through financial contributions, it did an excellent job of keeping that to itself. The section 32 assessment, Council evidence and legal submissions make no mention of residual amenity or Te Ture Whaimana issues that would need to be

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11 PC12 hearing – 4 September 2024 – Lachlan Muldowney at 2:25:45.

12 PC12 hearing – 4 September 2024 – Lachlan Muldowney at 2:25:30.

13 For example, requiring large wetlands to be set aside for stormwater management purposes (a solution not available in brownfields areas).

addressed through a future plan change. The Council was empowered to pursue financial contributions under PC5 but chose not to.

11. In my submission it is "a bit cute" for the Council to now, through an IPI that provides no appeal rights, seek to recover additional money ostensibly to offset the effects of intensification in an area where intensification has been enabled in a way that has been found to achieve the purposes of the RMA and give effect to Te Ture Whaimana.

"Trust us, there is a discount factor"

12. The Council's evidential answer to Adare's concerns about the financial contribution regime is its proposed discount factor provisions.

13. Respectfully, it is entirely unclear how the discount would apply. Commissioner Mark-Brown's questions to Ms Douglas earlier in the hearing (and Ms Douglas' answers) demonstrate that the discount provisions are inherently subjective. Ms Douglas stated that how the discount applies cannot be determined yet as the Long-Term Plan has not yet set the financial contributions required. Ms Douglas' answer was that the Council will need to "develop a policy" once it knows what the exact costs would be.[14]

14. I can only assume that this is intended to be a Local Government Act policy, which would be developed through a separate LGA process and subject to change without a Schedule 1 RMA process. Leaving to one side the appropriateness of driving the interpretation and application of the District Plan through a LGA policy, it is concerning that such an important policy has not yet been prepared, nor have the general contents of that policy been described.

15. I maintain the submission that the discount factor provisions are uncertain and therefore inefficient and ineffective, and provide no answer to Adare's concerns.

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[14] PC12 hearing – 5 September 2024 - Clare Douglas at 2:08:45.

IPIs and the balance of fairness

16. As the Panel will be aware, the ISPP provides no appeal rights. Other than the Council's power to accept or reject recommendations (and the Minister's ultimate decision) there is no process to iron out kinks that may find their way into the Plan. For that reason, I implore the Panel to take this issue seriously and consider its recommendation very carefully.

17. If there is any doubt in the Panel's mind regarding the financial contribution regime, in my submission the most appropriate approach would be to recommend the new regime is deleted, or at the very least it is excluded from applying to greenfield developments like Peacocke.

18. The Council has the ability to revisit it and promulgate a new financial contributions regime through a future Schedule 1 plan change (or explore its other funding tools). The community, however, has no recourse (other than possibly a private plan change under Schedule 1, which is highly unlikely to succeed).

M J Doesburg

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