

IN THE MATTER of the Auckland Regional  
Amenities Funding Act 2008 [The Act]

A N D

IN THE MATTER of an Arbitration under Section  
29 of that Act

BETWEEN                    THE TERRITORIAL LOCAL  
AUTHORITY ELECTORAL  
COLLEGE [The Electoral College]

A N D                         THE AUCKLAND REGIONAL  
AMENITIES FUNDING BOARD  
[The Funding Board]

Counsel:                         Matthew Casey QC for the Electoral College  
Graeme Hall and Anita Birkinshaw for the Funding Board

Date of Hearing:                 21 April 2010

Date of Decision:               26 April 2010

---

## **DECISION OF ARBITRATOR**

---

1. The Auckland Regional Amenities Funding Act 2008 provides for the funding by Auckland region territorial authorities of specified arts, educational, rescue and community organisations.
2. Three bodies are involved in the administration of the Act. The first is the Electoral College, which consists of representatives appointed by the territorial authorities; the second is the Amenities Board, which consists of representatives of the beneficiary amenities; and the third is the Funding Board, which receives and determines applications for funds from the amenity organisations.
3. The sole function of the Amenities Board is to make appointments to the Funding Board. The Funding Board consists of 10 members, six appointed by the Electoral College and four by the Amenities Board. The Electoral College has a wider role; it has a major part to play in the removal of or

addition to the amenities funded under the Act and it has an important role in the approval of each annual funding plan.

4. The annual draft funding plans prepared by the Funding Board undergo a procedure before final approval. First, pursuant to S.26 of the Act, it is necessary for the chairpersons of the Funding Board and the Electoral College to decide jointly whether a meeting of the College is to be held to consider the total levy proposed in the draft funding plan or any other matter in the plan and if the meeting is held, whether it is to be jointly held with the Board or separately from it. S.27 then requires the Funding Board to publicly notify the draft funding plan and to send it to the Electoral College, to specified amenities and to the contributing authorities, the latter being the Auckland territorial authorities. The College, a specified amenity or any other person may make a submission to the Funding Board on the draft plan and a contributing authority may also make a submission. The Board must give a reasonable opportunity to every person who makes a submission to appear and be heard and meetings to hear submissions must be open to the public. Once the board has considered the submissions and made any modifications that it considers appropriate, it must refer the plan to the Electoral College and request the College's approval of the Board's recommendation on the total levy.
5. S.28 then requires the Electoral College to consider the Funding Board's recommendation on the total levy and to decide whether or not to approve the total levy, having regard to the funding principles and it must advise the Funding Board of its decision. If the Electoral College does not approve the levy, the dispute between the College and the Board must be referred to an independent Arbitrator.
6. The Electoral College did not approve the proposed levy and I was jointly appointed by the College and the Funding Board as the Arbitrator.
7. Ss.4 of S.29 requires the Arbitrator in considering and determining the dispute to:

- (a) Take into account the submissions of the Funding Board and the Electoral College; and
  - (b) Take into account the Funding Board's duties; and
  - (c) Decide on the total levy which may not exceed the maximum total levy calculated under S.34.
8. The Arbitrator's decision on the total levy must be used by the Funding Board for the purpose of fixing the individual levies payable by the territorial authorities.
9. Before considering the nature of the dispute and the submissions made to me, it is necessary to refer to other provisions of the Act which are relevant to the matters raised in submissions. S.34 of the Act sets out provisions by which the maximum individual and total levies are determined. The Act itself determined that the levy for the first year would be \$9m.
10. The dispute with which this Decision is concerned is the second financial year in which levies have been made. The maximum total levy for that second year is \$12 million; for the third year it is \$15 million; and for the fourth and each following financial year the maximum amount of the levy is set at 2% of the revenue from rates of all the contributing authorities, adjusted in the manner set out in the Act.
11. S.3 of the Act set out its purpose as follows:

**3 Purposes**

- (1) *The first purpose of this Act is to establish a mechanism to provide adequate, sustainable, and secure funding for specified amenities that, by providing arts, education, rescue, or community facilities for or services to the Auckland region,-*
  - (a) *contribute to the well-being of the region; and*
  - (b) *contribute towards making Auckland a vibrant and attractive place to live in and visit.*
- (2) *The second purpose is to ensure that all the territorial authorities in the Auckland region are part of the mechanism and so contribute towards the funding of the specified amenities.*

12. S.21 sets out the funding principles:

**21 Funding principles**

- (i) *The funding principles to which the Funding Board and the Electoral College must have regard under sections 24 and 28 are as follows:*
- (a) *the primary purpose of the funding is to contribute to the expenses that the specified amenity must incur to provide its facilities or services; and*
  - (b) *funding is not available for capital expenditure; and*
  - (c) *funding is not available for any part of facilities or services that the specified amenity provides outside the Auckland region; and*
  - (d) *funding is not available for facilities or services that at any time in the 5 years immediately before the date on which the Funding Board or the Electoral College applies this paragraph have been provided funding by –*
    - (i) *a Crown entity, as defined in section 7(1) of the Crown Entities Act 2004; or*
    - (ii) *a department specified in Schedule 1 of the State Sector Act 1988; and*
  - (e) *funding for the retention and preservation of a specified amenity's library or collection takes priority over the amenity's other expenses; and*
  - (f) *funding is available from other available funding sources; and*
  - (g) *total funding for all specified amenities assessed for a financial year must not exceed the maximum total levy for that year under section 34; and*
  - (h) *any other funding principle that the Electoral College publicly notifies under subsection (3).*
- (2) *The Funding Board may recommend to the Electoral College that it add funding principles to those in subsection (1).*
- (3) *The Electoral College –*
- (a) *may receive a recommendation from the Funding Board ; and*
  - (b) *with or without a recommendation, may add funding principles; and*
  - (c) *must give public notice of the added funding principles.*

12. S.25 sets out the matters which must be included in the draft funding plan:

**25 Funding Board prepares draft funding plan**

- (1) *The Funding Board must prepare a draft funding plan for every financial year.*
- (2) *The draft funding plan must state the following matters for the financial year:*
- (a) *the nature of the facilities or services to be provided by each specified amenity; and*
  - (b) *the funding sought by each specified amenity; and*
  - (c) *the amount of funding that the Funding Board proposes to grant to each specified amenity; and*

- (d) *any conditions that the Funding Board proposes to impose on the provision of funding to a particular specified amenity; and*
  - (e) *the maximum amount of remuneration payable by the Funding Board to its members; and*
  - (f) *the maximum amount of remuneration payable by the Funding Board to its advisory officer; and*
  - (g) *the maximum amount of the Board's reasonable administrative costs; and*
  - (h) *the total levy that the Funding Board proposes, which may not exceed the maximum total levy calculated under section 34; and*
  - (i) *any other information that is necessary to enable an informed assessment of the total levy that the Funding Board proposes.*
- (3) *The draft funding plan must state the matters –*
    - (a) *in particular terms for the financial year to which the plan relates; and*
    - (b) *in general terms for each of the following 2 financial years.*
  - (4) *The Funding Board must include in the draft funding plan an explanation of any significant changes between the total levy it proposes and the levy specified in the plan adopted for the immediately preceding financial year.*

13. There is one other statutory provision which is very relevant. S.30 requires the Funding Board to have a meeting open to the public at which it deliberates on and adopts its funding plan. That meeting must be held no later than the 30<sup>th</sup> April immediately before the start of the financial year to which the plan relates. The plan relates to the 2010-2011 financial year, which means that this Decision must be delivered in time for the Funding Board to consider its content, make any changes to the funding plan resulting from the Decision, and to prepare for the public meeting to be held no later than 30<sup>th</sup> April.

## **THE SUBMISSIONS MADE TO THE ARBITRATOR**

14. The Funding Board provided to the Arbitrator and to counsel for the Electoral College, three Eastlight folders containing all the written information provided in support of the applications by the specified amenities. Each party provided written submissions which were addressed and elaborated upon at the hearing on the 21<sup>st</sup> April 2010. In addition to counsel, members of the Electoral College and the Funding Board attended the hearing.

15. It is common ground that the Funding Board took the following steps before preparing its draft funding plan;
- (1) Prepared and delivered to each of the amenities a questionnaire for completion by the amenities.
  - (2) It received, in addition to the completed questionnaire, extensive application material from each amenity.
  - (3) It held meetings with each amenity at which the content of their application was discussed.
  - (4) Pursuant to S.26, it held a meeting with the Electoral College at which the draft plan was discussed.
  - (5) It called for submissions in terms of S.27. Submissions were received from councils, concerned organisations and some of the beneficiary amenities. Public meetings were held at which submitters were heard. The Electoral College did not make a submission.

### **The Submissions to the Arbitration by the Electoral College**

16. Mr Casey, on behalf of the Electoral College, submitted that it seems from the information in the applications that much of the increase in funding from the previous year is to provide additional services without consideration of the ratepayers, either as consumers or funders. He submitted that the increase did not meet the funding principles of the Act. In this respect, he pointed to ss.(1) (a) of S.21 which provides that the primary purpose of the funding is to contribute to expenses that the amenity must incur to provide its facilities and services (emphasis added). He emphasised that the funding was not available for capital expenditure and pointed to a number of instances where depreciation had been included in the accounts of the amenities. He submitted that the amenities should have been required by the Board to justify increases above the amount received in the previous financial year and, in particular, above an inflation adjusted comparative amount. He noted that ss(4) of S.25 requires the Funding Board to include in its draft plan, an explanation of significant changes between the levy proposed and the levy specified in the plan adopted for the immediately preceding financial year. He acknowledged that there was no plan for the immediately preceding financial year because the levy was set by the

statute. However, he pointed to ss.(2)(i) of S.25 which requires the Board in its plan, to provide *“any other information that is necessary to enable an informed assessment of the total levy that the Funding Board proposes”* and argued that, given the economic difficulties which the country presently faces, this required that reasons for the increased levy should be given.

17. Mr Casey submitted that the Board apparently assumed that it had a mandate to spend up to the \$12 million maximum and that it did not seem to consider that it had any responsibility to ratepayers for the application of the money. He submitted that there had been a lack of rigorous testing of the funding applications and that the setting of the maximum is not an invitation to incur that level of funding. He complained that the College had not been provided with the details of the funding applications received by the Board. He submitted that there was no evidence that ratepayers wanted a greater level of service or that current levels of service were inadequate. He said that the Electoral College considered it appropriate that the total levy should reflect an inflationary adjustment on top of the first financial year level with any further increases to particular amenities being closely scrutinised.
18. He placed emphasis on ss.(2) of S.3 which provides that the second purpose of the Act is to ensure that all the territorial authorities in the Auckland region are part of the mechanism to provide adequate, sustainable and secure funding for the amenities. He argued that the Funding Board should make allowance for contingencies such as new amenities being included or an existing amenity having financial problems.
19. In his submissions in reply, Mr Casey said that the Board had an obligation to provide full information because it is the only one which has it and that that information is necessary for the College and for the submitters.

### **The Submissions on Behalf of the Funding Board**

20. Mr Hall submitted that if the Board properly followed the funding principles it can provide funding up to the maximum set out in the statute. He submitted that there was no requirement to limit increases to the rate of inflation. He

pointed out that the Act enables the College to add funding principles, but it had not taken up that opportunity. He said that the Board had met with each of the amenities and had supplemented the information in the applications. He submitted that the Electoral College had had the opportunity to raise its concerns and address them and indeed seek further information from the Board, but had not done so. Detailed concerns should be raised at an earlier stage of the process and not at the final stage, such as has been done in this case. He submitted that the Act does not envisage that the College and the Board would have the same role, but acknowledged that the consultation provisions indicate that the Board should provide more information to the College if it was requested.

21. In relation to depreciation, he noted that it could not be said that depreciation was funded by the Board. It appeared in the accounts because accounting practice requires that this be done.

#### **CONSIDERATION OF THE ISSUES RAISED**

22. Both parties acknowledged that this being the first year in which a funding plan had been prepared, there was a learning process to be undertaken and they referred to the possibility that this Decision would assist in that respect. It must be remembered that this Decision is prepared under considerable pressure of time but, nevertheless, I will make some observations which I hope may be of assistance in the future.
23. I accept the submission of the Electoral College to the effect that the Board holds all the information and that if the consultation process and the submission process is to be meaningful, the draft plan must contain sufficient information to enable the funding principles to be properly addressed. In this respect, ss.(2) (i) of S.25 is important. The funding plan must contain such information as is necessary to enable an informed assessment of the total levy proposed by the Board. In my view, despite the fact that in ss.(4) on a strict construction did not apply to the current draft funding plan, nevertheless the intention of the legislation is clear and it was at least highly desirable that the Board should have included in the draft funding plan, explanation of significant changes between the original levy and the levy

proposed for the forthcoming financial year. This was not done. Had that information been included, it would have met many of the concerns of the Electoral College. I note too that the funding plan provides, at best, cursory information as to the matters required by S 25 for the following two financial years (see ss (3) (b)). For the reasons set out above care should be taken to ensure that S 25 is fully complied with so that interested parties can properly exercise their submission rights.

24. Having said this, the Electoral College has an important responsibility as well. There is no evidence before me to suggest that it asked for additional information at the consultation stage and indeed, it seems that the issues referred to in submissions were not raised until the proceedings before me. The Electoral College could have asked to see the detailed applications made by each of the amenities. It appears that it did not do so. Much was made of the responsibility of the Electoral College to represent, through the territorial authorities, the ratepayers of the region. If it is to perform that function it must be prepared to request information which it thinks it should have.
  
25. So in the respects outlined above, I consider that both the draft funding plan and the College's approach to the discussion process have been inadequate. Having said that, I have no reason to doubt that the Funding Board has in fact rigorously assessed the applications. Despite Mr Casey's submissions to the contrary, it is my view that the provisions of the statute provide support for the proposition that the legislature considered 2% of the adjusted rate revenue to be an appropriate contribution by ratepayers to the amenities and that the limits set by the statute for years one, two, three were intended to provide a staged movement towards this 2% level. Clearly, the Board is able to provide funding up to the level set in the statute but it should only do so after a rigorous examination of the applications against the funding principles. I can see nothing in the funding principles which would require the Board to limit the grants in times of economic stress. Indeed, one can understand that in such times the amenities might be more reliant on the grants than would otherwise be the case. However, one would expect the Board in such times to apply particular care in assessing the

