BEFORE THE CENTRAL OTAGO DISTRICT COUNCIL

Under	the Resource Management Act 1991
In the Matter	of the hearing of submissions on the Central Otago District Plan – Proposed Plan Change 19

Memorandum on behalf of **Lowburn Viticulture Limited** (Submitter 123) on previous contributions for infrastructure upgrades

Dated: 2 June 2023

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MAY IT PLEASE THE PANEL

1. Lowburn Viticulture Limited (**LVL**) (Submitter 123) made a submission on PC19 seeking the rezoning of land at Lowburn. LVL presented its case in support of the rezoning on Thursday 25 May, in Cromwell.

2. The evidence and submissions filed in advance of the hearing raised the issue of contributions made by LVL through previous consents for the purpose of wastewater infrastructure upgrades at Lowburn.

3. In particular, Mr van der Velden stated in his evidence:[1]

"23. For the last development I undertook in Lowburn (the Turner Terrace stage, being the final stage on the existing zoned area and located immediately adjacent to the Site) I paid a development contribution of $73,000, which I was advised by Council was required to upgrade the Lowburn wastewater pump station. I have since made enquiries with the Council as to whether the monies have been applied to the purposes for which they were undertaken (the upgrade) and have been advised that the monies "<u>will be</u> used for Wastewater improvements required to accommodate growth such as storage capacity at Lowburn ". I have attached this correspondence. To me, this response suggests that the monies have not yet been applied to undertake the upgrade. Ms White's and Ms Muir's reports suggest the same."

24. Given I have previously paid a significant development contribution for the express purpose of upgrading the wastewater infrastructure so as <u>to accommodate growth and storage capacity at Lowburn</u>, it is frustrating and highly unfair in my view to now have the Council reject LVL's submission on the basis that these upgrades have not been undertaken (despite my payment)."

4. A similar point was made in the legal submissions presented at the hearing:[2]

"57. When undertaking the final stage of the existing residential development at Lowburn (Turner Terrace), LVL was required to and in 2018 did pay a development contribution of $73,000. The contribution was required for the purpose of

[1] Mr Van der Velden's evidence dated 16 May 2023.
[2] Dated 25 May 2023.

upgrading the Lowburn wastewater pump station to accommodate growth at Lowburn.

58. From correspondence with the Council and on the basis of Ms Muir's report it appears that, some five years on, this contribution has not yet been applied for the purpose for which it was taken. It further appears that CODC's decision not to apply the development contribution and undertake the upgrade works is the primary reason why LVL's submission is not supported now.

59. Issues of fairness arise."

5. At the hearing, the Panel Chair recorded his understanding that development contributions are not required on the basis that they will be applied to a specific project, but go instead into a 'general council pot', with expenditure to be applied within the district (for example in relation to infrastructure upgrades) as the Council sees fit/as necessary. The Chair indicated he would investigate why Council staff had advised Mr Van der Velden that the contributions paid in relation to his previous subdivision at Lowburn were to be applied to the specific purpose of upgrading wastewater infrastructure at Lowburn, intimating that they were wrong to do so.

6. Further investigations into this matter since the hearing shed further light on the contributions previously paid and may assist the Panel in their understanding of this matter and their deliberations.

7. These investigations reveal that the contribution paid by Mr Van der Velden in 2018 was not a development contribution, but a *financial contribution*.[3] The **attached** notice of demand and invoice confirm this, and also indicate that the amount paid was $84,145.50 (GST inclusive).

8. As the Panel may be aware, financial contributions can be required as a condition of a resource consent (including a subdivision consent[4]) under section 108 of the Resource Management Act, where there is provision for such in the District Plan,

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[3] It is understood that the Council has since changed its development/financial contributions policy, such that financial contributions are only required for reserves, however, at the time of the 2018 payment, the applicable policy provided for financial contributions for wastewater infrastructure at Lowburn.
[4] RMA s220(1).

and in accordance with the purposes stated in the District Plan. In addition, the quantum of the contribution must be determined in the manner described in the District Plan. [5]

9. Here, Chapter 15 of the Operative District Plan provides for the levying of financial contributions for subdivision and development that increases the use of and demand on infrastructure.[6]

10. As a condition on a resource consent, any condition requiring a financial contribution must be valid at law, and in this regard, it must:

    (a) be for a resource management purpose;

    (b) fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and

    (c) be fair and reasonable on the merits.

11. These are known as the *Newbury* tests, and apply to all conditions on resource consents, including any condition requiring a financial contribution. These tests apply in addition to the requirements under section 108 (i.e. that the District Plan must specify the purpose of the financial contribution and how it is to be calculated).

12. In addition to and expanding on the *Newbury*[7] tests, any condition requiring a financial contribution must be *logically connected* to the development to which it relates. However, a district plan can go further than requiring a logical connection between the financial contribution and the development for which it is required.[8] The Central Otago District Plan does so, in that it provides for the payment of financial contributions for the upgrading of services and infrastructure that is *necessitated*[9] and *directly caused*[10] by the development. That is, the District Plan requires there to be direct link or causal nexus between the development and any financial contribution that can be lawfully required.

[5] RMA section 108(2)(2), (9) and (10)).
[6] CODC Operative District Plan, chapter 15, issue 15.2.1.
[7] *Newbury DC v Secretary of State for the Environment* [1981] AC 578,
[8] *McNally v Manukau CC* W019/07, at [5].
[9] Chapter 15, Obj 15.3.2. See also Obj 15.3.2which addresses effects arising as a *consequence* of development.
[10] Chapter 15, policy 15.4.3 and policy 15.4.13..

13. Against this backdrop and applicable legal framework[11] it can be understood why and it is indeed correct and appropriate that Council staff advised Mr van der Velden that the $84,145.50 financial contribution required and paid in association with his previous Lowburn subdivision would be applied for a specific purpose, namely *upgrading the Lowburn wastewater pump station to accommodate growth at Lowburn,* because unlike development contributions, financial contributions must be taken for a specific purpose that must be connected to the consent under which they are required.

14. A more general approach to requiring the contribution, such as the district wide 'council pot' approach suggested by the Chair during the course of the hearing, may be appropriate for development contributions, but it would not conform with the requirements for financial contributions under section 108 of the Act, and it would be unlawful.

15. For the avoidance of doubt, a financial contribution cannot be required for a particular development only to then go into the general 'council pot' for use as it sees fit elsewhere in the district, albeit it would seem that that is what has occurred with Mr Van der Velden's 2018 financial contribution payment.

16. In the circumstances and taking account of the law, it would be improper for the Council to decline LVL's rezoning submission on the basis that wastewater infrastructure must first be upgraded where Mr Van der Velden, as director of LVL, has already paid monies for the specific upgrades required. A decision made on this basis would, in effect, be 'double dipping' on the wastewater infrastructure matter. It would also be unreasonable, and reviewable at law (i.e., subject to judicial review), where the Council would be liable for the costs of any adverse review finding.

17. It is noted that these circumstances may not arise for other submitters seeking rezonings at Lowburn, unless other submitters have also paid monies for specific infrastructure upgrades that have not occurred and are now cited as a reason counting against those rezonings.

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[11] Putting aside any questions regarding the lawfulness of that contribution requirement, and in this regard, whether there was a sufficient (or, per the requirements of the District Plan, direct) connection between the particular subdivision and upgrades to cater for future subdivisions.

18. In conclusion, as stated in the evidence and submissions presented at the hearing, wastewater infrastructure upgrades are not a proper (or lawful) basis to decline LVL's rezoning submission.

Dated this 2nd day of June 2023

R Wolt

Counsel for Lowburn Viticulture Limited

LOCAL GOVERNMENT ACT 2002
AND
RESOURCE MANAGEMENT ACT 1991
DEVELOPMENT/FINANCIAL CONTRIBUTION DEMAND

Application Reference: RC160414

Name: Lowburn Terraces Ltd

Site: Lowburn Valley Road, Lowburn

Description of proposal: Subdivision of one RRA (5) title into 19 residential allotments.

This demand has been issued in accordance with Council's Policy on Development and Financial Contributions adopted on 30 June 2015.

This demand is an indication of the amount payable by the Applicant should the consent proceed in its current form.

Calculations:

Note: A "dwelling equivalent" (DE) is a typical residential dwelling that is used as a base unit of demand for comparing non-residential land uses. Non residential activities, such as accommodation and commercial, can be converted into DE's using land use differentials.

All calculation costs are quoted exclusive of GST

(1) Water Supply

Asset Contributing Area	Development Contribution per DE	Financial Contribution per DE
Outer Cromwell	*$4,471*	

Calculation Notes: Credit for one existing title.

Contribution = (19 proposed residential lots – one title credit) x $4,471
= $80,478

Payment due = $80,478.00 + GST

(2) Wastewater

Asset Contributing Area	Development Contribution per DE	Financial Contribution per DE
Lowburn		*$4,065*

Created on 22 November 2016

Calculation Notes:

a) *Credit for one existing title.*

Contribution = (19 proposed residential lots – one title credit) x $4,065
= $73,170

Payment due = $73,170.00 + GST

(3) Reserves

Contributing Area	Development Contribution per DE	Financial Contribution per DE
District Wide		*$1,826*

Calculation Notes: Credit for one existing title.

Contribution = (19 proposed residential lots – one title credit) x $1,826
= $32,868

Payment due = $32,868.00 + GST

(4) Roading

Asset Contributing Area	Development Contribution per DE	Financial Contribution per DE
District Wide	*$1,577*	

Calculation Notes: Credit for one existing title.

Contribution = (19 proposed residential lots – one title credit) x $1,577
= $28,386

Payment due = $28,386.00 + GST

Summary of payments due:

Activity	**Payment**
Water Supply	$80,478.00 +GST
Waste Water	$73,170.00 +GST
Reserves	$32,868.00 +GST
Roading	$28,386.00 +GST
Total	**$214,902.00 +GST**

Payment:

> **Subdivision consents** – Contributions are payable prior to the issue of 224c certification should work commence under the consent. An invoice will be generated by the Central Otago District Council after payment has been received.
>
> **Land use consents –** Contributions are payable prior to the commencement of the consent, except where a building consent is required (as below). The onus is on the developer to make payment when the consent is given effect to and an invoice will be generated by the Council after payment has been received. Council may also issue an invoice if it becomes aware that the consent has been given effect to.
>
> **Building consents –** Contributions are payable 90 days from granting the building consent or prior to the issue of the code of compliance certificate, whichever comes first. Council will issue an invoice as appropriate to the development process, and this may either be before or after payment has been received.

If the required Development and Financial Contributions have not been paid the Council may withhold a certificate under section 224c of the Resource Management Act 1991, and/or a certificate of code compliance under the Building Act 2004. This is pursuant to Section 208 of the Local Government Act 2002 and Section 15.5.1 of the CODC District Plan,

A development contribution may be generated when granting a resource consent, building consent or service connection and a financial contribution may be generated when granting a resource consent. Where one development requires different types of consent and these are processed concurrently, more than one invoice may be generated for the same contribution, however a contribution only needs to be paid once.

If on a subsequent application more detailed information reveals that a proposal will generate more demand than initially assessed a higher contribution may be required. If a payment has been made in the interim a further payment of the balance will be required.

Address for Service:

Invoices will be sent to the following address for service:

Landpro Ltd
PO Box 302
Cromwell 9342

If you have any queries or would like to discuss any aspect of this notice please contact:

Neville Jelley
MWH New Zealand Ltd

Ph: 03 448 5454
Email: neville.l.jelley@mwhglobal.com

CENTRAL OTAGO DISTRICT COUNCIL

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1 Dunorling Street, Alexandra 9320
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EML info@codc.govt.nz
WEB www.codc.govt.nz

Lowburn Terraces Limited
C/-Landpro Limited
PO Box 302
Cromwell 9342

Tax Invoice:	101496
Debtor No:	RC160414
Date:	4/09/18
GST Number:	51-442-970

Resource Consent Application - Lowburn Terraces, Lowburn

Qty	Description	Rate	Amount	
	Lowburn Financial Contribution		84,145.50	*
	Roading Contributions		32,643.90	*
	Cromwell RR & RRA Water Development Contribution		92,549.70	*

GST (* Incl GST $27,305.10)

Total Incl GST $209,339.10

Payment due on or before the 20th of the month following.
Internet Bank A/C 02-0916-0081744-00. Reference=Debtor No.

CENTRAL OTAGO DISTRICT COUNCIL - REMITTANCE ADVICE SLIP
Please detach and return this portion with your payment.

Lowburn Terraces Limited
C/-Landpro Limited
PO Box 302
Cromwell 9342

Amount Due:	$209,339.10
Invoice No.:	101496
Debtor No.:	RC160414

Central Otago District Council, PO Box 122, 1 Dunorling Street, Alexandra
Tel 64-3-440 0056, email info@codc.govt.nz