

# Memo

**To:** Queenstown Lakes District Council

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**From:** Nick Whittington and Mitchell East

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**Date:** 7 July 2021

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**Subject:** **Affordable housing – alternative mechanisms**

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## Introduction

- 1 Queenstown-Lakes District Council is considering incorporating affordable housing provisions to its proposed district plan.
- 2 You have asked us to provide advice on whether there are any alternative mechanisms that QLDC could use to address housing affordability issues in its district. We have considered whether housing affordability could be addressed via general or targeted rates under the Local Government (Rating) Act 2002 (**Rating Act**), by development contributions under the Local Government Act 2002 (**LGA**), through bylaws, or through partnership arrangements with central government.
- 3 We consider that QLDC would face significant difficulties addressing the district's affordable housing issues through any of these alternative mechanisms.

## QLDC proposal

- 4 The key aspects of QLDC's affordable housing proposal are:
  - (a) QLDC is proposing to introduce district plan provisions with the objective of providing "affordable housing for low to moderate income households in a way and at a rate that assists with providing for social and economic well-being and managing natural and physical resources".
  - (b) Subdivision or development that is proposed to contain residential lots or units and which provides an affordable housing contribution in accordance with certain standards is a permitted activity. Otherwise, subdivision or development is a discretionary activity for which a resource consent is required.
  - (c) There are standards proposed for calculating the amount of an affordable housing contribution. Speaking generally, they require:
    - (i) Residential subdivisions (depending on the size and location) to provide a monetary contribution, calculated as a percentage of the sale value, to QLDC, or to provide a percentage of the serviced lots to QLDC for no consideration.

- (ii) Developments that fall short of creating one new unit – in urban growth boundaries or other Residential Zones outside urban growth boundaries – to provide a monetary contribution (the lesser of two per cent of the estimated sale value or a fixed amount per square metre of the net increase in gross residential floorspace) to QLDC.
  - (iii) Developments that fall short of creating one new unit – in Settlement, Rural-Residential, Resort or Special Zones – to provide a monetary contribution (a fixed amount per square metre of the net increase in gross residential floorspace) to QLDC.
  - (iv) In some instances, residential subdivisions that have made a monetary contribution may have to provide a “top up” monetary contribution to QLDC for residential floorspace.
- (d) The obligation to provide an affordable housing contribution to QLDC does not apply to certain types of specified development, such as any development that will provide more than 10 per cent of dwellings as social or affordable housing delivered by Kāinga Ora or any development that is a managed care unit in a rest home.
- (e) Where a financial contribution is not provided and an alternative is not proposed then the requirement for an affordable housing contribution must be met by the lot or floorspace being to an eligible buyer with a legally enforceable retention mechanism “which is fair, transparent as to its intention and effect and registrable on the title of the property”.

### **General or targeted rates**

- 5 There are two key pieces of legislation relevant to QLDC’s rating decisions. The LGA governs how local authorities make decisions, consult with their communities and manage their finances. The Rating Act determines liability for rates and prescribes a local authority’s ability to set rates.
- 6 Rates are a particularly powerful local authority funding tool:
- (a) The main purpose of the Rating Act is to promote the purpose of local government in the LGA by providing local authorities with flexible powers to set, assess, and collect rates to fund local government activities.<sup>1</sup>
  - (b) Rates typically comprise around 60 per cent of local authorities’ income. It is by far the most dominant revenue stream and the one that local authorities have the most control and certainty over.<sup>2</sup>
  - (c) The Rating Act also seeks to ensure that rates are set in accordance with decisions that are made in a transparent and consultative manner. However, it is very difficult for parties to challenge local authority rating decisions. Courts will not interfere with a local authority rating decision unless the decision is found to be unreasonable, irrational or perverse in defiance of logic, such that Parliament could not have contemplated the decision being made by an elected council.<sup>3</sup>

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<sup>1</sup> Rating Act, s 3.

<sup>2</sup> *Costs and Funding of Local Government Report* Morrison Low for Department of Internal Affairs (July 2018) at page 1.

<sup>3</sup> *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA).

- 7 That the provision of affordable and social housing is within the purpose of local government is supported by the Local Government (Community Wellbeing) Amendment Act 2019 which restored the promotion of “social, economic, environment, and cultural wellbeing” to the statutory purpose of local government.
- 8 We consider that QLDC could use a proportion of its general rate to address affordable housing issues in its district. For example:
- (a) QLDC could fund the provision of affordable housing in its district in the same way, for example, that some councils use rates revenue to purchase or maintain pensioner housing. However, given the shortfall of affordable housing in Queenstown, this would require a significant level of investment.
  - (b) As we understand the problem, there is sufficient residential land available for development within the district but the development community is not using that land to build houses in the affordable bracket. Rather, larger and more expensive dwellings are more profitable. QLDC could use a proportion of its general rates to build, or to subsidise developers through contracts to build, housing in the affordable price bracket to ensure that housing typologies that meet the needs of the district are built.
- 9 The Morrison Low Report into local authority funding identified that there are a range of significant challenges facing local authorities which are driving rates increases.<sup>4</sup> The report identified grave affordability issues with rates for some population groups. Against this background an increase in general rates to fund the provision of affordable housing (or compensate developers for lost profit on affordable housing) may not be palatable politically.
- 10 QLDC also has the power to set a targeted rate for activities or groups of activities if those activities or groups of activities are identified in its funding impact statement as the activities or groups of activities for which the targeted rate is to be set. Targeted rates may be set differentially for different categories of rateable land under s 17 of the Rating Act. The categories of rateable land are defined in terms of matters listed in Schedule 2 of the Rating Act. These relate to various characteristics of the land, the use to which land is put, and how it may be used under the RMA.<sup>5</sup>
- 11 We think that there would be additional difficulties with to levying a targeted rate to address affordable housing. It is unclear to us to whom QLDC would apply a targeted rate (ie to what land and how would this relate to the Schedule 2 matters). It seems to us that applying a targeted rate to residential land would not assist housing affordability and the costs would likely be passed on by developers. Alternatively, QLDC could seek to apply a targeted rate to industrial and commercial land on the basis that it generates employment, which it requires people to meet, and there is a need for housing to be affordable for those people.
- 12 To have either a general or targeted rate QLDC would need to identify the activity that the rates revenue is funding in the long term plan.

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<sup>4</sup> *Costs and Funding of Local Government Report* Morrison Low for Department of Internal Affairs (July 2018). Department of Internal Affairs (the Government’s lead advisor on the Productivity Commission Review) commissioned Morrison Low to provide a picture of local government finances now and into the future.

<sup>5</sup> These are: the use to which the land is put, the activities that are permitted, controlled, or discretionary for the area in which the land is, the area of land within each rating unit, the provision or availability to the land of a service provided by, or on behalf of, the local authority, where the land is situated, the annual value of the land, the capital value of the land, the land value of the land.

## Development contributions

- 13 We have considered whether QLDC could use funding obtained from development contributions to provide or subsidise affordable housing in its district.
- 14 The purpose of development contributions is to enable territorial authorities to recover from those persons undertaking development a fair, equitable and proportionate portion of the total cost of capital expenditure necessary to service growth over the long term.<sup>6</sup> A development contribution must be used for, or towards, the capital expenditure of the reserve, network infrastructure, or community infrastructure for which the contribution was required.<sup>7</sup>
- 15 Network infrastructure means the provision of roads and other transport, water, wastewater and stormwater collection and management.<sup>8</sup> Community infrastructure means land, or development assets on land, owned or controlled by the territorial authority for the purpose of providing public amenities, and includes land that the territorial authority will acquire for that purpose.<sup>9</sup>
- 16 We do not consider that affordable housing comes within the definitions of community infrastructure or network infrastructure. Accordingly QLDC has no power to require development contributions to address housing affordability issues in its district.

## National Policy Statement on Urban Development 2020

- 17 Strictly speaking, the NPSUD is not an alternative mechanism for addressing affordable housing issues. As we set out below, QLDC is legally required to give effect to the NPSUD in preparing and changing its district plan. The NPSUD is designed to improve responsiveness and competitiveness of land development markets. It requires local authorities to open up development capacity to allow more homes to be built in response to demand.
- 18 There are a number of provisions in the NPSUD that, in some way, deal with affordable housing. Indeed, objectives 1 and 2 of the NPSUD directly (and indirectly) refer to affordable housing:
- (a) **Objective 1:** New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.
  - (b) **Objective 2:** Planning decisions improve housing affordability by supporting competitive land and development markets.
- 19 “Well-functioning urban environments” is defined in Policy 1 as including “urban environments that, as a minimum ... have or enable a variety of homes that meet the needs, in terms of type, price, and location, of different households”.
- 20 In addition, subpart 5 of the NPSUD requires certain local authorities to prepare a Housing and Business Development Capacity Assessment (**HBA**) every three years. The purpose of an HBA, among other things, is to provide information on the demand and supply of housing and of business land in the relevant urban environment, and the impact of planning and infrastructure decisions of the relevant local authorities on that demand and supply. Every

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<sup>6</sup> LGA 2002, s 197AA.

<sup>7</sup> LGA 2002, s 204.

<sup>8</sup> LGA 2002, s 197.

<sup>9</sup> LGA 2002, s 197.

HBA must include analysis of how the relevant local authority's planning decisions and provision of infrastructure affects the affordability and competitiveness of the local housing market. In effect, the HBA provides the evidence on which local authorities are expected to make planning decisions about affordable housing in their districts.

- 21 A district plan must "give effect to" a national policy statement, including the NPSUD.<sup>10</sup> The Supreme Court has said that "give effect to" simply means "implement".<sup>11</sup> The phrase is a "strong directive, creating a firm obligation on the part of those subject to it".<sup>12</sup> The effect of this requirement means it is not open to QLDC to simply ignore the terms of the NPSUD, particularly as the NPSUD is expressed in directive terms.
- 22 Our view is that the NPSUD appears to expressly authorise, and perhaps even require, a planning approach that ensures houses are built with certain typology or price (ie affordable) characteristics and which target different household needs. Inclusionary zoning can be used as a tool to provide homes of different types and prices. So inclusionary zoning can be seen as a mechanism for giving effect to the NPSUD.

### **Bylaws**

- 23 Other jurisdictions have regulated affordable housing policies by implementing bylaws. We have considered whether New Zealand legislation would enable QLDC to enact an affordable housing bylaw.
- 24 A number of statutes in New Zealand enable local authorities to make local bylaws in certain circumstances to regulate problems within certain topics or matters. Any new bylaw must be within the scope of the empowering provisions that allow the Council to make the bylaw.
- 25 We do not consider that a bylaw regulating the provision of affordable housing would fit within any of the existing topics or matters for which bylaws are allowed.

### **Partnership with central government**

- 26 We have also considered whether QLDC may be able to address affordable housing issues by partnering with central government or iwi to provide affordable houses in its district.
- 27 The Local Government (Community Wellbeing) Amendment Act 2019 restored the promotion of "social, economic, environmental, and cultural well-being of communities" to the purpose of local government. That purpose also requires a focus on intergenerational interests as it refers to promoting well-being "in the present and for the future".
- 28 Shortly after the introduction of the 2019 Amendment Act, the then Minister of Local Government released a Cabinet Paper titled, "Working with Local Government on Community Well-being".<sup>13</sup> That Paper invited the Minister, working collaboratively with local government, to explore policy, regulatory and non-regulatory options that ensure local authorities and communities set specific priorities for intergenerational well-being and increase the role of community well-being priorities in guiding local authority planning and decision making.

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<sup>10</sup> Resource Management Act 1991, s 75(3)(a).

<sup>11</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593

<sup>12</sup> At [77].

<sup>13</sup> Cabinet Office Paper "Working with Local Government on Community Well-being" (19 August 2019) CAB 19/97.

- 29 There has been little in the way of further development following the Cabinet Paper. By way of example, the Department of Internal Affairs' central-local government partnerships team has not provided any additional policy developments on the topic.
- 30 We suggest that QLDC continues to keep a watching brief on central government policy and partnership opportunities but we doubt that this will be an option before QLDC needs to decide whether to progress the affordable housing provisions.

### **Conclusion**

- 31 Of these identified alternatives, only a rating approach realistically could be implemented. The direction provided by the NPSUD, in our view, makes taking an inclusionary zoning approach to the issue the best of all options.