Before Independent Hearing Commissioners
At Queenstown

I mua ngā Kaikōmihana Whakawā Motuhake
Ki Tahuna

In the matter of **the hearing of submissions and further submissions on Variation to Queenstown-Lakes District Council's Proposed District Plan**

Inclusionary Housing Variation Council's Closing Legal Submissions

28 March 2024

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Inclusionary Housing Variation
Council's Legal Submissions

1 Matters addressed

1.1 These submissions address the following matters, raised either by submitters or the Panel, during the course of the hearing:

(a) Questions relating to the statutory framework, including:

(i) Consideration of "non-RMA" options under s 32;

(ii) The requirement, if any, of a "link", noted in *Infinity*; and

(iii) The breadth of s 77E in authorising financial contributions of this nature.

(b) Questions relating to the application and significance of the NPS-UD, including the significance, if any, of references to land supply or a distinction between land and housing supply.

(c) Questions relating to the mechanics of the proposed financial contribution; including

(i) Whether the involvement of a third party (ie, the QLCHT) is problematic;

(ii) How the relevant statutory framework relating to the imposition of conditions applies, and the relevance of the *Newbury* tests;

1.2 Finally, there are some concluding remarks.

2 Statutory framework

2.1 The Council's opening submissions identified in some detail the statutory framework relevant to demonstrating that the affordability of housing is a legitimate resource management issue which a local authority may choose to address in its district plan by adopting inclusionary housing objectives, policies and rules. As noted, the *Infinity* case is a clear marker of that position and amendments to the RMA since then have only strengthened that position.

2.2 This is the answer to Mr Mitchell's submission that the affordability of housing is a political issue requiring a political response. That may or may not be true, but the same can be said of almost any other resource management issue, let alone one that engages a conflict between the interests of property developers and other interests. That the affordability of housing may have a political dimension does not mean it is not also a resource management issue with a legitimate resource management response.

Assessing non-RMA options under s 32

2.3 That this issue can be seen through different lenses is a useful starting point to the discussion about alternative policy responses. Submitters, and the Panel, were interested in the alternative approach of using a rating-based model to fund affordable housing through the QLCHT. The question was raised to what extent a non-RMA option is required to be considered under s 32.

2.4 The Council's opening submissions contained some guidance about the application of s 32 at [10.1]-[10.4].

2.5 The requirement to identify other means for achieving the objectives of the plan has always been part of s 32, but the words "reasonably practicable" first appeared in a 2013 amendment.[1] The term is not defined in the Act, but the Environment Court in *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* held that the term "reasonably" acts as a qualifier, allowing some tolerance in the assessment of the practicability of the options.[2] The Court also considered other legislative definitions of the term, finding them consistent with well-established case law that the meaning of "reasonably practicable" means something narrower than "physically possible."[3]

2.6 Whether an alternative is reasonably practicable is assessed in relation to the achievement of the objectives of the proposal.

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1 Resource Management Amendment Act 2013, s 70.

2 *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [48].

3 *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [51].

2.7 The Council has not been able to find any previous cases which discuss specifically the question of how non-RMA options might be assessed, compared to an option which is proposed to be included in a district plan. Nonetheless the Council accepts that non-RMA options must in principle be relevant – s 32 cannot reasonably be read as providing only for the assessment of alternative sets of plan provisions. A Ministry for the Environment s 32 guidance document is not an admissible aid to statutory interpretation (so the Council disagrees with Mr Minhinnick's suggestion that this is a helpful document, at least on the interpretation issue). Nonetheless, the Council would accept that both regulatory and non-regulatory options must be relevant.

2.8 There must, however, be some limitations on how non-RMA options may be assessed. There is not before the Panel a defined rating proposal. The highest the matter can be put is that funding affordable housing could in principle occur through some form of general or targeted rate. At what level, or on whom the rate might be struck, are simply not matters that the Panel can realistically assess in any detail. That is because all matters relevant to a decision to strike such a rate, including how it is balanced with other rates being struck, are not in evidence before the IHP (and nor should they be, given their highly political nature).

2.9 This leaves the Panel being limited to making any comparison in a broad-textured way, for example by comparing any rationale for or against raising funds to deliver higher levels of affordable housing from one group of people (eg, those developing housing) instead of another (eg, the wider population of ratepayers).

2.10 It is important to note that if the Panel considers there is some merit in the exploration of a rating-based approach, that approach may be additional to, instead of alternative to, inclusionary housing. That is consistent with the Council's explicit policy, in the form of the Joint Housing Action Plan 2023-2028, which makes it clear that, in addition to inclusionary housing, which is a central plank in its housing plan, it will also "explore options to bring forward the development of vacant zoned land". One of those options will necessarily be a rating option.

2.11 So the potential availability of a rating option which could assist in achieving the objective is not, by itself, a satisfactory basis to recommend the rejection of the proposed provisions.

Returning to *Infinity* – need for a "link"

2.12 The Council does not agree with Mr Gardner-Hopkins' submission purporting to distinguish *Infinity* factually. Further, while it considers it clear that there is a "link" between the effects of the use or development of land and the objectives, policies and methods of the proposed inclusionary housing provisions, nor does it consider that demonstrating a "link" is in fact necessary.

2.13 It is to be remembered that, as Mr Mead explained when giving oral evidence before the Panel, PC24, which *Infinity* was about, was an example of "linkage zoning", rather than inclusionary zoning. In that sense, the High Court's reference to the Council demonstrating a "link" is perhaps not surprising. The key point is that the Council has never said that *Infinity* is "on all fours". That does not mean it is irrelevant. The Council's opening submissions made it clear that *Infinity* is helpful because it puts beyond argument any suggestion that housing affordability is not a resource management issue, or that inclusionary housing is ultra vires the RMA. The issue is whether it is justifiable under s 32 in the particular circumstances of the district.

2.14 But in any event, there is a clear link. The Joint Witness Statement (Economics) indicates unanimous agreement that the district has a shortage of all types of housing but particularly affordable housing. This is clearly a result of a historical undersupply of affordable housing relative to demand – whatever the myriad causes of that. And as the economists also agree, the "underlying fundamentals of the problem are unlikely to change, at least in the short or medium terms." In other words, the undersupply will subsist for many years yet. Supply, or in this case undersupply, of affordable housing is a form of land use that the Council is seeking through this policy to affect.

2.15 The link may therefore be seen as expressed in the Council's opening submissions at [2.3]. The Council is seeking to prevent the occurrence of, or at least to mitigate, the past, current, and future effects of the development of land (the undersupply of affordable housing) on the economic conditions (unresponsive housing supply) which affect the availability of housing by requiring a proportion of housing constructed to be provided on an affordable basis.

2.16 However, the Council goes further and says that a "link" is not actually necessary.

2.17 Section 76(1) provides that rules may be included by a territorial authority for the purpose of carrying out its functions and achieving objectives and policies of the plan. Section 76(3) provides:

> In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.

2.18 It is well established in the RMA context that "have regard to" means "give genuine attention and thought".[4] Notably s 76(3) does not say that rules may only be made to address adverse effects of a particular land use. The statutory language is permissive and does not require there to be an effects-based rationale, or a link between the content of a rule or provision and the effects that it seeks to manage or promote.[5]

2.19 This is even more clear in respect of financial contributions. The Environment Court has held that the purpose of financial contributions under the RMA is to compensate for remote effects where the exact degree of cause and effect is not known. Therefore the RMA enables contributions to be determined in accordance with the terms of the plan, to avoid having to assess, with impossible accuracy, proof of the causal relationship and scale of effects.[6]

2.20 Accordingly, for financial contributions under the RMA there is no requirement for there to be clear linkage between the subject matter of a provision and the effects that it addresses.

Section 77E

2.21 That conclusion is reinforced by the new provisions enabling financial contributions. Section 77E paints financial contributions in very broad terms: financial contributions may be made for any class of activity other than a prohibited activity. And to make it clear that s 77E is not limited to value capture when upzoning through Intensification Planning Instruments (as Mr Minhinnick appeared to suggest), s 77E(4) makes it clear that "*in*

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4 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [59]-[63].

5 *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC).

6 *Wensley Developments Ltd v Queenstown Lakes District Council* EnvC C133/04, 27 September 2004 at [37].

this section …, financial contribution has the same meaning as in s 108(9). In other words, it is not so limited.

2.22 Section 77E was express parliamentary recognition that local authorities needed more tools to fund infrastructure – in that sense, a bipartisan adoption of financial contributions as a funding tool. It is a tool that is appropriately deployed in this situation because affordable housing may be seen as necessary infrastructure in the district.

3 NPS-UD

3.1 As is apparent from the Council's opening submissions, the NPS-UD can be seen as generally supporting the Council's case. Like the legislative amendments that have taken place since *Infinity*, the NPS-UD makes dealing with housing affordability a core local authority function.

3.2 The Panel was interested in a possible distinction between the NPS-UD's focus being on land supply, as opposed to housing. If I understood the questions correctly, I simply do not agree that the NPS-UD makes such a distinction, or, if it does, that it has any significance for this variation.

3.3 Objective 1 of the NPS-UD focuses on well-functioning urban environments. An urban environment is an area of land that is predominantly urban in character and is, or is intended to be, part of a housing and labour market of specified size. Land and housing are thereby connected. Likewise, the definition of "development capacity" expressly draws a direct connection between land and housing.

3.4 Objective 2 is that planning decisions improve *housing* affordability by supporting competitive land *and development* markets.

3.5 Objective 4 and policy 6 cannot sensibly be read as being limited to decisions about land, as opposed to housing. Even more clearly, the definition of well-functioning urban environment in policy 1 expressly includes the enabling of a variety of *homes*, that meet the needs in terms of *price* of different households. The document cannot sensibly be construed as being only about land supply.

3.6 As the Council has explained, it has notified a separate variation which is intended to more directly give effect to the NPS-UD. While the Council considers that the NPS-UD generally supports its inclusionary housing

variation, this variation is not intended as a direct means of giving effect to the NPS-UD. Accordingly, the Panel need only be satisfied that the inclusionary housing variation is not so materially inconsistent with the NPS-UD that the Council cannot both give effect to the NPS-UD and have an inclusionary housing policy.

3.7 In that regard, the Council notes that the NPS-UD does not seek to limit local authorities to certain regulatory steps such as imposing certain height limits adjacent to centres and within walkable catchments of transport nodes. If the NPS-UD did have that effect, a local authority could not, for example, seek to regulate residential visitor accommodation, as the Council has sought to do. It is entirely appropriate for a local authority to continue to seek to regulate housing related issues in its district, including inclusionary housing to address a massive historical undersupply for affordable housing in the district.

4 Mechanics of the proposed financial contribution

4.1 A number of issues were raised relating to the mechanics of the proposed financial contribution. The first, raised by the Panel, was whether there was any legal significance in the financial contribution being passed on by the Council to a third party to achieve the purpose for which it has been levied. The second relates to resource consent conditions and the applicability or otherwise of the *Newbury* tests.

QLCHT is a third party

4.2 As noted in response to this question at the hearing, there are limited prescriptions in the RMA controlling the use of financial contributions. Any resource consent condition requiring the contribution must be imposed in accordance with the purposes specified in the plan or proposed plan, and the level of contribution must be determined in the manner described in that plan.[7]

4.3 As the Panel also noted, s 111 provides that where a consent authority has received a cash contribution, the authority shall deal with that money in reasonable accordance with the purposes for which the money was received. It might be thought odd that this is limited to cash contributions but it clearly is.

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7 RMA, s 108(10).

4.4 It is clear that the contribution must be paid to the Council, as opposed to being paid directly to a third party. The Environment Court in *Central Otago District Council v Otago Regional Council* considered whether a resource consent condition could stipulate that money be paid out directly to a party other than the consent authority.[8] It found that it could not, noting, "it is implicit from the use of the words "receive" in section 111 and "retain" in section 110 that payment is to be made to the consent authority."[9] The Court went on to say, "What happens when they are in a consent authority's hands is up to it, subject to the constraints in section 110 and 111 of the Act."[10] The Court found that it was not for the Court to state how and for whom financial contributions were to be spent because it would be fettering the Council's discretion.[11]

4.5 Other than ss 110 and 111, there is nothing in the statutory framework that precludes the Council passing any land or cash contributions to a third party for the achievement of the purposes for which it was received. Relevantly:

(a) Decisions about carrying out local authority functions, whether in-house, or by contracting third parties, are governed generally by the Local Government Act 2002. There is nothing inherently inappropriate or unexpected about the provision of funding to a third party to achieve a purpose considered important by the local authority. It would therefore be surprising to find any provision in the RMA addressing directly the question of how a local authority may go about contracting for the achievement of the relevant purposes. And, to the extent that the RMA has addressed that question, it has provided a substantial degree of tolerance to the local authority through s 111.

(b) The express purposes of the inclusionary housing variation anticipate the provision of funding to third parties, not only the QLCHT, but possibly other registered CHPs from time to time. So to the extent that the expressed purposes are legally significant, that does not preclude the Council's proposed approach.

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8 *Central Otago District Council v Otago Regional Council* EnvC Christchurch C204/04, 23 December 2004.
9 At [12].
10 At [31].
11 At [33]-[34].

(c) At some point, third parties will always be used in the achievement of a purpose for which a financial contribution has been levied. There is no qualitative difference between the Council contracting a construction company to build affordable housing, and the Council working with the QLCHT and it (ie, the QLCHT) contracting with a construction company to build affordable housing.

(d) The Council has put in place clear contractual controls on the QLCHT through the Relationship Framework Agreement. The RFA is attached to Amy Bowbyes' evidence and she provides some additional comment on that document in her reply evidence. Of particular significance:

(i) QLCHT cannot materially vary its objects and purpose without the consent of QLDC (cl 3.1).

(ii) QLCHT must maintain its status as a registered CHP and meet performance standards and guidelines prescribed by the Community Housing Regulatory Authority (cl 3.6);

(iii) If QLCHT is wound up or liquidated, any land owned by QLCHT provided by QLDC under the Agreement and/or a written protocol shall be distributed back to QLDC (cl 3.7). Written protocols or other agreements are anticipated to be entered into whenever a contribution is transferred to the QLCHT (cls 5.3, 6.1 – and see the Secure Home Protocol at Schedule 1), and may be subject to an encumbrance in favour of QLDC (cl 6.4).

(iv) Contributions must be used exclusively by QLCHT for the purposes for which land and/or funding is provided.

4.6 Relevant to this issue also is Ms Scott's evidence on behalf of the QLCHT. Her view, with which the Council agrees, is that the CHP model is more effective and financially feasible for local government to achieve affordable housing goals (at [3]). This conflicts with Mr Yule's evidence questioning whether CHPs are well-governed. I note that Mr Yule's evidence does not record any knowledge or expertise in how CHPs are monitored. He relies on the fact that local government financial

statements are audited, but so too must registered CHPs' financial statements be.[12]

4.7 So long as the Council can ensure that financial contributions can be refunded if the consented works do not proceed, there does not appear to be any restriction on their passing the contributions to a third party to administer the affordable housing building project.

How the relevant statutory framework applies – s 108, 108AA

4.8 Financial contributions, once established in a plan, are levied by imposition of resource consent conditions. Section 108(2)(a) provides that subject to subsection (10) a resource consent may include a condition requiring that a financial contribution be made. Subsection (10) relevantly provides that the condition must be imposed in accordance with the purposes specified in the plan or proposed plan, and the level of contribution must be determined in the manner described in that plan.[13] For completeness, subsection (9) defines a financial contribution as money, land, or a combination.

4.9 Some submitters (particularly those represented by Ms Baker-Galloway) have sought to apply the *Newbury* tests to any condition that may be imposed. There are a number of problems with the approach of these submitters.

4.10 The submitters' position appears to be that the introduction of s 108AA into the RMA did not intend to have any effect on the *Newbury* tests, which continue to apply. On the contrary, s 108AA was clearly intended to affect the application of *Newbury* to resource consent conditions, as *Cable Bay Wine Limited v Auckland Council*,[14] cited by the submitters, demonstrates.

4.11 It is always to be remembered that *Newbury* simply confirms the entirely orthodox, indeed obvious, position that general principles of administrative law apply to the exercise of statutory power to impose conditions on planning permissions. Accordingly, as noted in Cable Bay at [88]:

(a) Conditions must be imposed for a planning purpose;

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12 See Community Housing Regulatory Authority *Annual Monitoring and Reporting Framework 2023/24* at para [12], linked in Reply Evidence of Amy Bowbyes.
13 RMA, s 108(10).
14 *Cable Bay Wine Limited v Auckland Council* [2021] NZHC 2596.

(b) Conditions must fairly and reasonably relate to the proposed activities; and

(c) Conditions may not be so unreasonable that no reasonable consent authority could have imposed them.

4.12 Each limb is a reflection of a general administrative law principle (albeit with some overlap): lawful purpose in the case of the first limb, lawful purpose and taking account of only relevant considerations for the second limb, and *Wednesbury* reasonableness in the case of the third. Given the nature of a financial contribution, a condition imposing one in accordance with a plan will always meet these limbs. That is because whether a financial contribution is justifiable as a matter of policy will have been determined at the plan-making stage. Whether it has a legitimate planning purpose, what activities it may reasonably relate to, and its inherent reasonableness will have been addressed.

4.13 In *Cable Bay*,[15] Campbell J discussed the Supreme Court decision in *Waitakere City Council v Estate Homes Limited*,[16] noting that the Supreme Court had addressed the second limb of the *Newbury* test and determined that a condition will fairly and reasonable relate to a proposed activity if there is a logical connection between them.[17] Campbell J was clear that the Supreme Court "explicitly rejected the proposition that the conditions must ameliorate the effects of the proposed activities".[18]

4.14 Section 108AA has recently been enacted. It provides four clear and alternative bases on which conditions may be imposed:

(a) First, where the applicant agrees (ie, an *Augier* condition); or

(b) Second, where the condition is directly connected to an adverse effect of the activity; or

(c) Third, where the condition is directly connected to (relevantly in this case) an applicable district rule; or

(d) Fourth, where the condition relates to essential administrative matters.

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15 *Cable Bay Wine Limited v Auckland Council* [2021] NZHC 2596 at [89]-[92].
16 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.
17 *Cable Bay Wine Limited v Auckland Council* [2021] NZHC 2596 at [91].
18 *Cable Bay Wine Limited v Auckland Council* [2021] NZHC 2596 at [91]-[92].

4.15 If s 108AA applies, as Ms Baker-Galloway submits, then assuming the Panel recommends that the variation is adopted, it will be clear that the condition will be imposed under (c) – it will be imposed in reliance on a district rule. No issue arises.

4.16 However, Ms Baker-Galloway's submissions sideline s 108AA(5), which expressly makes clear that nothing in s 108AA affects s 108(2)(a) relating to financial contributions. That exclusion is significant. Given that a financial contribution will clearly be able to be imposed under (c) – in reliance on a district rule – it might appear unnecessary. But the exclusion reflects the fact that, as noted above, there is no need for further debate at the resource consent stage as to the imposition of a financial contribution. Whether a financial contribution is justifiable, and if so, for what purpose it may be imposed, and how it may be determined, are matters to be debated at the plan-making stage. If the plan provides for them, there is no further debate to be had. Any condition will plainly fairly and reasonably relate to the activity, because the plan will have already recognised that.[19]

4.17 The issue raised by the submitters as to the scope of s 108AA and *Newbury* is a distraction. So too, it will be apparent, is the point that follows it, about inclusionary housing being a "tax". Whether it is a tax or not, the levying of financial contributions is expressly authorised by the RMA. No legal issue arises.

5 Concluding remarks

5.1 In the evidence lodged on behalf of submitters, there was nothing resisting the substantial social cost that the lack of affordable housing causes and the significant risk the issue poses for the district in terms of attracting and keeping key workers. Independently of the Council, it is worth noting:

(a) Ms Scott's evidence as to the beneficial approach of CHPs has been noted above. Just as importantly, she provided on-the-ground and personal experience of the tangible social cost of the housing crisis which the Council is trying to ameliorate through

[19] This is a similar point to that made above at paras [2.17]-[2.20].

inclusionary housing. Her evidence supported the social impact evidence provided by Ms Lee.

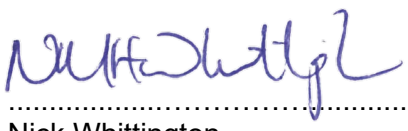
(b) Mr Glaudel on behalf of Community Housing Aotearoa also highlighted the stringent regulatory requirements on registered CHPs. He noted that other local authorities have followed QLDC's lead in pursuing inclusionary housing through district plan changes, whereas he was not aware of any local authority pursuing a rating approach.

5.2 The evidence from the development community was at least consistent that they do not consider that this proposal is the solution. But there was no satisfactory evidence, only bare assertion, that it would make development uneconomic. No one seriously contested Mr Eaqub's evidence that following an initial period of market recalibration the housing market will continue as before. That is likely because, unlike other areas in New Zealand, this Council is able to point to a proven track record of inclusionary housing being informally, but successfully, implemented through stakeholder and HASHAA deeds.

5.3 As Mr Minhinnick responsibly put it, the sky will not fall in. That being the case, inclusionary housing should be allowed to play out. When making a s 32 assessment, as much as the costs of acting are important, so too are the costs of not acting. Given the existing state of the housing market in the district – as described in the JWS (Economics) – it cannot be said that inclusionary housing will make that market materially worse.

5.4 The Council has not suggested that inclusionary housing is the only solution. It is intended to be one of a number of steps taken or explored. Nonetheless, to stop inclusionary housing in its tracks at this stage will represent a missed opportunity.

Date: 28 March 2024



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