Before Independent Hearing Commissioners
At Queenstown

I mua ngā Kaikōmihana Whakawā Motuhake
Ki Tāhuna

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 Legal Submissions

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1 Introduction

1.1 The Queenstown-Lakes District Council has notified a variation to its Proposed District Plan to provide for affordable housing through the mechanism of a financial contribution.

1.2 Submitters have challenged the lawfulness of such an approach, questioning generally whether the RMA authorises a financial contribution of this nature.

1.3 These submissions set out the legal case in support of the provisions.

2 Summary of legal case

2.1 Addressing the issue of housing affordability has long been a function of territorial authorities. This has become even more explicit in recent times. Under s 31(1)(aa) of the RMA (inserted in 2017), a territorial authority must ensure "that there is sufficient development capacity in respect of housing". Development capacity means the capacity of land for urban development based on, among other things, the capacity required to meet short, medium and long term requirements. Without intervention, the sustained high price growth in the district means there is an undersupply of affordable housing. Meeting the demand for affordable housing within a district is, at a minimum, a short-term requirement.

2.2 An inclusionary housing policy affects the capacity of land for urban development by effectively increasing the amount of land available for affordable housing. In that way, changing a district plan to incorporate inclusionary housing is a mechanism for ensuring a district has sufficient development capacity and, therefore, is consistent with the functions of a territorial authority.

2.3 Inclusionary housing is consistent with the provisions in Part 2 of the Act. The purpose section of the Act refers to "sustainable management". That term is defined broadly. It refers to managing physical and natural resources in a way which enables "people and communities to provide for their social, economic, and cultural well-being". In addition, the definition

of “sustainable management” refers to “adverse effects of activities on the environment”. The words “effect” and “environment” are also defined very broadly. “Effect” includes any temporary effect, any past, present or future effect and any cumulative effect. “Environment” includes economic conditions which affect natural and physical resources, and ecosystems including people, communities, and future generations. Drawing those threads together, it is open to a territorial authority to:

(a) adopt an approach preventing the occurrence of, or at least mitigating, 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; or

(b) adopt an approach preventing the occurrence of, or at least mitigating, the past, current, and future effects of the development of land (the undersupply of affordable housing) on the economic conditions (increased house prices) which affect people and communities.

2.4 On those bases, inclusionary housing – which attempts to address the undersupply of housing for low-income and low-wealth households that results (at least in part) from the previously less constrained development of land – falls within the definition of “sustainable management”.

2.5 A district plan must “give effect to” a national policy statement, including the National Policy Statement on Urban Development.[1] The requirement to “give effect to” national planning documents is a strong directive, and it means territorial authorities must implement the provisions of the National Policy Statement on Urban Development (**NPS-UD**). Policy 1 requires planning decisions that “contribute to well-functioning urban environments, which are 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”. In addition, certain local authorities are required to prepare a Housing and Business Development Capacity Assessment (HBA) every three years. The purpose of an HBA, amongst other things, is to provide information on the demand and supply of housing and of business land in the relevant urban environment, and the

1 RMA, s 75(3)(a).

impact of planning and infrastructure decisions of the relevant local authorities on that demand and supply. Every HBA must include analysis of how the relevant local authority's planning decisions and provision of infrastructure affect 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. The NPS-UD appears to expressly authorise, even require, a planning approach that ensures houses are built with certain typology or price (ie affordable) characteristics and target different household needs. Inclusionary housing can be used as a tool to provide homes of different types and prices. Thus inclusionary housing can be seen as a mechanism for giving effect to the NPS-UD.

2.6 If the rules governing inclusionary housing require land and/or money to be provided to a territorial authority (or a third party) as a condition of a resource consent for a new development, they constitute a "financial contribution". Providing those plan provisions are valid, financial contributions are a legitimate means to implement an inclusionary housing policy.

3 Housing crisis and inclusionary housing

3.1 New Zealand has a housing crisis. Over the last generation, house prices and rents have risen more rapidly than incomes in New Zealand. Regional house prices have also diverged significantly, with Auckland and Queenstown in particular rising above the rest.

3.2 The question as to the cause of, and solutions for, the housing crisis requires assessment of various factors affecting demand and supply. There is no single factor – on either the demand side or the supply side – that can be pinpointed as the cause of the crisis, at least with any measure of certainty. Instead, it is well recognised that the housing crisis has a number of concurrent causes.[2] That is, different causes for a particular consequence where the evidence is obscure as to the respective contributions, if any, each makes to the final result, but where each could, conceivably, have caused that result without the other being present.

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2 Peter Nunns *The Causes and Economic Consequences of Rising Regional Housing Prices in New Zealand* (December 2019).

3.3 Despite the lack of clarity as to the respective influence of each contributing factor, it is clear that zoning rules can have an effect on housing supply constraints. In a market where there is an undersupply of housing, amending the zoning rules to stimulate supply is a logical step to take, and indeed the Council is doing so separately in a separate Variation.[3] If supply is responsive to demand, there would be an increase in the supply of housing such that the total supply would increase. Over time, house prices would return to equilibrium and thus affordability issues would be ameliorated.

3.4 All of this assumes that the supply of housing is responsive, however. If, supply is unresponsive (eg, because there is so much demand that supply cannot keep up), new supply is not likely to make any real dent in crisis. And new supply will, as a matter of economic rationality, be near the top end of the market. The corollary is the affordable end of the market remains undersupplied for a long period of time. So while there is an increase in supply, affordability issues endure until supply shortages are resolved.

3.5 In the Queenstown-Lakes District the supply of housing is unresponsive. Therefore, a territorial authority considering how to amend its district plan to address the issue of housing affordability would need to ensure:

(a) any plan change increases the supply of affordable housing; and

(b) any plan change is not likely to inappropriately constrain development capacity in the long-term.

3.6 A mechanism that promotes those ends is inclusionary housing. Inclusionary housing is a planning approach where developers are compelled to deliver a certain proportion of a development as affordable housing. The affordable housing is delivered to the market at less than what the market would otherwise pay and must be "retained" in perpetuity as affordable housing. The reason for the focus on increasing supply to the affordable end of the market is clear. Without retention, the affordable houses will enter the broader market and, there being insufficient supply to meet demand, the price is bid up. Thus the original problem is perpetuated.

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[3] Notified Version of the Urban Intensification Variation (**UIV**) notified 24 August to 5 October 2023.

4 Starting point: the *Infinity* case

4.1 An early marker in the argument as to why inclusionary housing is authorised by the RMA is *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council*.[4] This case arose from the first occasion in which *Queenstown-Lakes District Council* sought to introduce inclusionary housing policies and rules into its district plan (**PC24**).

4.2 Speaking generally, PC24 applied to activity not anticipated in the district plan, which would generate demand for affordable housing. All plan changes, discretionary activities or non-complying activities had to be assessed to determine their impact on the supply of affordable housing. Only the element of the development over and above that anticipated by the district plan had to be assessed. For example, a plan change to "upzone" from the rural residential zone to the low density residential zone could discount those houses provided for in the rural residential zone from any affording housing requirements assessment.

4.3 If the assessment found that any plan change, discretionary activity or non-complying activity would generate a demand for affordable housing over a certain threshold, action would be required to mitigate the effect of the development on housing affordability.

4.4 In the High Court, a number of arguments were advanced by the appellant to challenge the legality of PC24. They all failed. They were:

(a) The Act is a planning or resource management statute, not an instrument for achieving economic or social policy of local authorities via imposition of a subsidy on new development.

(b) The broad powers under the Act to achieve sustainable management are not unfettered and do not embrace regulation to directly interfere in the operation of markets for goods and services.

(c) Territorial authorities are empowered to control the effects of the use, development and protection of land, not the effects of the operation of the market for houses.

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[4] *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2010-425-365, 14 February 2011.

(d) Territorial authorities must not have regard to trade competition of the effects of trade competition, including the effects of such competition on housing prices.

4.5 As a result of those matters, the appellant argued that PC24 constituted an abuse of the power conferred by the Act and the Court should not allow the powers conferred by Parliament to be used in ways that were not intended.

4.6 The Court started its analysis with s 72. That section reads:

> **72 Purpose of district plans**
>
> The purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

4.7 This statutory purpose effectively comprises two components: first, the functions of territorial authorities under s 31; and, secondly, the purpose of the Act under Part 2, particularly s 5.

4.8 The High Court said that, in the context of the case, the key aspects of s 31 were paragraphs (a) and (b) of subsection (1), which provided:

> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
>
> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
>
> (i) the avoidance or mitigation of natural hazards; and
>
> (ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances
>
> (iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

(iii) the maintenance of indigenous biological diversity:

4.9 The Court was of the view that PC24 fitted within both paragraphs (a) and (b). Commenting on paragraph (a), it said:

> [42] On its face, and without going into the merits, PC24 appears to fit within the framework of the function described in s 31(1)(a). It concerns a perceived effect of the future development of land within the district. However, the requirement to provide affordable housing will only arise if the development is construed as having an impact on the issue of affordable housing … . Thus the requisite link between the effects and the instrument used to achieve integrated management exists.

4.10 Similar conclusions were reached in respect of paragraph (b):

> [43] … Under [paragraph (b)] the functions of territorial authorities include the control of any actual or potential effects of the use or development of land. This wide function reflects the sustainable management regime established by the Act. I do not think that the four statutory examples included in paragraph (b) detract from the breath of the function. Consequently if the use or development of land within the Queenstown Lakes district has the effect, or potential effect, of pushing up land prices and thereby impacting on affordable housing within the district, the Council has the power to control those effects through its district plan, subject, of course, to the plan ultimately withstanding scrutiny on its merits.

4.11 Turning to the second component of s 72 – the purpose of the Act under Part 2 – the Court made two relevant observations:

(a) The terms used in s 5 should be interpreted widely and applied in a manner which describes "the sustainable management purpose rather than some other tag".[5]

(b) The statutory concept of sustainable management expressly recognises that the development of physical resources, such as land, might have an effect on the ability of people to provide for their social or economic wellbeing. The concept of social or economic wellbeing is obviously wide enough to include affordable and/or community housing.[6]

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5 *Infinity* at [45].
6 *Infinity* at [46].

4.12 For those, and indeed other, reasons, the Court was satisfied that PC24 fulfilled the second component of the s 72 analysis.

4.13 Consideration was then given to whether "any other sections of the [Act] might require the conclusions" the Court had reached thus far to be revisited.[7] One of those sections was s 74. That section – amongst other things – requires a territorial authority to "prepare and change its district plan in accordance with … its duty under section 32". The Court said that whether the s 32 report prepared by QLDC could "withstand scrutiny can only be properly determined at a substantive hearing".[8] The s 32 argument, accordingly, did not mean PC24 was outside the terms of the Act.

4.14 Section 74(3) also provides that, in preparing or changing a district plan, a territorial authority "must not have regard to trade competition or the effects of trade competition". The Court noted that s 74(3) is "confined to trade competition or the effects of trade competition" and is not a prohibition relating to the market generally.[9]

4.15 The Court rejected the appellant's argument that "it could not have been within Parliament's contemplation that territorial authorities would be able to exercise powers or functions that involved direct interference in the market".[10] It said:[11]

> One way or other district plans are capable of having that effect. As [counsel for the respondent] said, any decision that affects the ability of a person to do, or not do, something is an intervention in the market. That is why Parliament addressed the issue and included s 74(3). Having said that, I accept that the primary objective of a plan must be to achieve an RMA purpose, not interference in the market place. But I am satisfied that, at least in the present context, PC24 has the necessary RMA objective.

4.16 The Court also rejected the (optimistic) submission that "if the necessary power existed it is surprising that it has taken almost 20 years for it to be recognised and exercised".

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7 *Infinity* at [48].
8 *Infinity at [49].*
9 *Infinity at [50].*
10 *Infinity at [51].*
11 *Infinity at [51].*

4.17 The Court then turned to s 108 and, in particular, the ability of territorial authorities to grant resource consents subject to a condition that a financial contribution is made. The Court said:

> … Parliament has clearly entrusted territorial authorities with wide powers to impose financial and development contributions which, by their very nature, involve an element of subsidisation and might conceivably be regarded as a form of tax or charge.

4.18 The Court opined that whether the purpose for which financial contributions had been imposed in this case was lawful "should be determined … with the benefit of evidence at a substantive hearing".[12]

4.19 The Court turned back to consider, in more detail, whether PC24 was within the s 74(3) prohibition. The Court cited *General Distributors v Waipa District Council* for the proposition that "trade competition" means "rivalrous behaviour which can occur between those involved in commerce" and that "planning law should not be used as a means of licensing or regulating competition".[13]

4.20 Importantly, the Court agreed with the observations in *General Distributors* that s 74(3) "does not preclude a territorial authority [when] preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition".[14]

4.21 Applying those principles to PC24, the Court found the proposed plan change did not come within the s 74(3) prohibition; this because "it applies to all developers equally and does not purport to regulate competition between traders of the same kind".[15] As well, QLDC "was entitled to consider the wider socio-economic issue of the impact of future developments on the availability of affordable housing within its district".[16]

4.22 The Court, accordingly, dismissed the appeal. The Court granted leave to appeal to the Court of Appeal. Before the appeal came on for hearing, however, QLDC partially withdrew PC24 for political and economic reasons rather than face the prospect of the issue being further appealed to the Court of Appeal.

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12 *Infinity at [56].*
13 *Infinity at [60].*
14 *General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 (HC) at [93].*
15 *Infinity at [61].*
16 *Infinity* at [62].

5 Developments following *Infinity*

5.1 Developments following *Infinity* have reinforced the Court's conclusion that inclusionary housing is a legitimate and lawful planning tool in New Zealand.

King Salmon

5.2 The Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* made a number of observations about Part 2 of the Act, in particular s 5.[17] The Court's treatment of Part 2 is important when considering the legality of inclusionary housing.

5.3 Section 5(1) sets out that the purpose of the Act is to "promote the sustainable management of natural and physical resources". Section 5(2) defines "sustainable management" in the following way:

> In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

5.4 There are two important definitions of words used in s 5(2). First, the word "effect" is broadly defined to include any positive or adverse effect, any temporary or permanent effect, any past, present or future effect and any cumulative effect. Secondly, the word "environment" is defined, also broadly, in this way:

> **environment** includes—
>
> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and

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[17] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

5.5 Subparagraph (d) incorporates an element of reciprocity. It includes the "social, economic, aesthetic and cultural conditions" which *affect* the matters listed in paragraphs (a) to (c). It also includes the social, economic, aesthetic, and cultural conditions which *are affected by* the matters listed in paragraphs (a) to (c).

5.6 The term "amenity values" in paragraph (c) of the definition is itself defined widely to mean "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes". Accordingly, aesthetic considerations constitute an element of the environment.

5.7 The Supreme Court made the following points about the definition of sustainable management:[18]

(a) First, the definition is broadly framed. Given that it states the objective that is sought to be achieved, the definition's language is necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the Act rather than a specifically worded purpose intended more as an aid to interpretation.

(b) Second, in the sequence "avoiding, remedying, or mitigating" in sub-para (c), "avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of". The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition. The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance, but it carries the risk that the first part of the definition will be seen as addressing one set of

[18] *King Salmon at [24].*

interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). The definition should not be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in sub paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development and protection of natural and physical resources so as to meet the stated interests – social, economic and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b) which, given the issue the variation is seeking to solve, are important interests for the Panel to consider. The use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

Resource Legislation Amendment Act 2017

5.8 In 2015, the Resource Legislation Amendment Bill 2015 (101-1) was introduced. The proposals contained in the Bill were "aimed at delivering substantive, system-wide improvements to the resource management system".[19]

5.9 The explanatory note to the Bill contained a heading titled "National Direction". The following commentary appeared under that heading:[20]

> … amend sections 30 and 31 of the RMA to make it a function of regional councils and territorial authorities to ensure sufficient residential and business development capacity to meet long-term demand. This is designed to enable better provision of residential and business development capacity, and therefore improved housing affordability outcomes.

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19 *Resource Legislation Amendment Bill 2015 (101-1) (explanatory note) at 2.*

20 *Resource Legislation Amendment Bill 2015 (101-1) (explanatory note) at 3.*

5.10 The specific amendment to s 31 – which, as will be remembered, provides for the functions of territorial authorities – was in these terms:

> **12 Section 31 amended (Functions of territorial authorities under this Act)**
>
> (1) After section 31(1)(a), insert:
>
> (aa) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of residential and business land to meet the expected long-term demands of the district:
>
> (2) Repeal section 31(1)(b)(ii).

5.11 At risk of stating the obvious, the proposed amendment to s 31 was designed to make it clear that improving housing affordability was a local authority function *under the RMA*. A definition of "development capacity" was also included.[21]

5.12 The Bill also proposed amending s 74 to include a requirement that, when preparing and changing a district plan, territorial authorities do so in accordance with "a national policy statement, a New Zealand coastal policy statement, and the national planning template".[22]

5.13 Reporting back on the Bill, the Select Committee made the following comments on the definition of "development capacity", a term used in the amendment to s 31:[23]

> We recommend amending the definition of "development capacity" in clause 11(4), new section 30(5) of the RMA. Our amendments would clarify that this term only applies to urban areas, and that sufficient development capacity must be provided to meet short-term and medium-term demand, in addition to long-term demand.

5.14 The amendments to the definition were intended to "align with the proposed functions and definitions in the National Policy Statement on Urban Development Capacity 2016".[24]

5.15 The revised definition provided as follows:

> **development capacity**, in relation to housing and business land in urban areas, means the capacity of land for urban development, based on—

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21 Resource Legislation Amendment Bill 2015 (101-1), cl 11.
22 Resource Legislation Amendment Bill 2015 (101-1, cl 202.
23 Resource Legislation Amendment Bill 2015 (101-2) (select committee report) at 3.
24 Resource Legislation Amendment Bill 2015 (101-2) (select committee report) at 3.

(a) the zoning, objectives, policies, rules, and overlays that apply to the land under the relevant proposed and operative regional policy statements, regional plans, and district plans; and

(b) the capacity required to meet—

(i) the expected short and medium term requirements; and

(ii) the long term requirements; and

(c) the provision of adequate development infrastructure to support the development of the land

5.16 The proposed amendment to s 31 was tweaked slightly to remove the reference to "long term demands" in order to align with the revised definition of "development capacity" and its focus on short, medium and long term requirements.

5.17 If any debate remained about whether inclusionary housing falls with the functions of territorial authorities under the RMA following *Infinity*, it is settled by the enactment of s 31(1)(aa). That provision was clearly drafted with issues of housing affordability in mind. The explanatory note to the Bill which introduced the provision clearly states that the provision was intended to "improve housing affordability outcomes".

5.18 Under s 31(1)(aa), a territorial authority must ensure "that there is sufficient development capacity in respect of housing". Development capacity means the capacity of land for urban development based on, amongst other things, the capacity required to meet short, medium and long term requirements. Without intervention, the housing crisis means there is limited capacity to meet a requirement of supplying houses to low income and low-wealth citizens. And inclusionary housing affects the capacity of land for urban development by effectively increasing the amount of land available for affordable housing. By requiring developers to set aside a portion of new development for affordable housing, or make a contribution to this outcome, territorial authorities are (in practical terms) increasing the capacity of land which will become affordable housing.

5.19 Submitters may argue that the definition of development capacity does not contemplate such targeted measures. That is, it is a function of territorial authorities to ensure there is a sufficient capacity of land for urban development generally. But that the function does not extend to ensuring

there is sufficient capacity of land for a specific type of urban development, namely affordable housing.

5.20 Two points can be made in response. First, the definition of "development capacity" includes short, medium and long term requirements. The delineation of these terms suggests that different approaches may be required to address different demand conditions. Thus the definition of development capacity allows for, and expressly contemplates, a targeted approach to address differing requirements. Secondly, s 31(1)(aa) refers to "the expected demands of the district". That phrase indicates that the demands of districts may differ. The corollary is that territorial authorities are expected to ensure that the development capacity of the district is sufficient to meet the particular demands of the district. So, adopting a targeted approach (by reference to the particular needs of the district) to ensure sufficient development capacity is practically inevitable. If a district is facing high demand for affordable housing, it would not be consistent with the drift of the provision to simply allow for more houses to be built if the supply of houses in the market is unresponsive. In the situation just postulated, the effect of encouraging more housing supply – at least in the short term – would tend to favour larger and more expensive homes. In turn, that would mean the affordable end of the market remains undersupplied for a long period of time – until supply shortages are largely resolved. Such an approach can hardly be said to be meeting the expected demands of the district.

5.21 Finally, it is worth noting that s 31(1)(aa) was enacted following the decision in *Infinity*. If Parliament disagreed with the outcome of that case, one would have expected an amendment effectively overruling the decision. Instead, Parliament took the opposite approach and explicitly made it a function of territorial authorities under the Act to address issues of housing supply. All of this reinforces the view that inclusionary housing fits comfortably within s 31(1)(aa).

National Policy Statement on Urban Development 2020 (updated 2022)

5.22 The NPS-UD is designed to improve responsiveness and competitiveness of land development markets by, in particular, requiring local authorities to open up development capacity to allow more homes to be built in response to demand. The NPS-UD, as a whole, is consistent with the view that planning decisions have an effect on the housing market.

5.23 There are a number of sections in the NPS-UD that address affordable housing:

(a) Objective 2: Planning decisions improve housing affordability by supporting competitive land and development markets.

(b) Policy 1: Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum

(i) have or enable a variety of homes that:

(ii) meet the needs, in terms of type, price, and location, of different households; and

(iii) enable Māori to express their cultural traditions and norms; and

(iv) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and

(v) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and

(vi) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and

(vii) support reductions in greenhouse gas emissions; and

(viii) are resilient to the likely current and future effects of climate change.

(c) Policy 2: Local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term.

5.24 Subpart 3, which deals with evidence-based decision-making, imposes a requirement on local authorities to monitor, every quarter, housing affordability in their district and the prices of, and rents for, dwellings.

5.25 Subpart 5 is concerned with HBAs. Tier 1 and 2 local authorities are required to prepare an HBA every three years (Queenstown-Lakes is tier 2). The purpose of an HBA, amongst 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. Under cl 3.23, every 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.

5.26 As will be apparent, the presence of these sections in the NPS-UD supports the view that:

(a) addressing issues of affordable housing is a function of territorial authorities;

(b) planning decisions can have an impact on dealing with housing affordability; and

(c) territorial authorities are expected to prepare and change district plans in a manner that improves housing affordability.

6 Drawing the threads together

6.1 Section 31(1) sets out that territorial authorities have the functions listed in that provision "for the purpose of giving effect to this Act in its district". Although not explicit, the legislative assumption appears to be that fulfilment of the functions will assist territorial authorities to achieve the purpose of the Act. To put this a slightly different way, it would be an odd result if Parliament charged territorial authorities with functions, the satisfaction of which led to outcomes that were inconsistent with the purpose of the Act. Having found that inclusionary housing falls within the functions of territorial authorities, it should be self-evident that inclusionary

housing is consistent with Part 2 of the Act. This approach is broadly consistent with the Supreme Court's decision in *King Salmon*, where it was said:

> Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective.

6.2 However, adopting s 5 as a yardstick, it is open to a territorial authority to:

(a) adopt an approach preventing the occurrence of, or at least mitigating, 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; or

(b) adopt an approach preventing the occurrence of, or at least mitigating, the past, current, and future effects of the development of land (the undersupply of affordable housing) on the economic conditions (increased house prices) which affect people and communities.

6.3 On those bases, inclusionary housing – which attempts to address the undersupply of housing for low income and low-wealth households that results (at least in part) from the previously less constrained development of land – falls within the definition of "sustainable management". Moreover, it does not matter that the undersupply of affordable housing has concurrent causes. The definition of effect includes any cumulative effect and thus is broad enough to capture the multifaceted issue of the housing crisis.

6.4 That conclusion is buttressed by the reference to managing physical and natural resources in a way which enables "people and communities to provide for their social, economic, and cultural well-being". It is not a strained interpretation to say that adopting inclusionary housing, which allows land to be managed in a way that gives more people access to housing, enables them to provide for their social and economic well-being. The Council will offer evidence of social impacts of inclusionary housing through its expert witness, Charlotte Lee.

6.5 In times like the present, where the supply of housing is terribly unresponsive and the affordable end of the market is undersupplied, inclusionary housing would, to use the language of Policy 1, enable a "variety of homes that meet the needs … of different households". And inclusionary housing can provide the vehicle to supply affordable housing when the market in the prevailing regulatory and commercial environment does not, and will not within a reasonable time, provide enough housing for everyone. So, consistently with Policy 2, inclusionary housing may assist a territorial authority to provide sufficient development capacity to meet expected demand for housing over (at least) the short term. All of this aligns with Objective 2, which requires planning decisions to improve housing affordability by supporting competitive land and development markets.

7 Legal parameters of financial contributions

7.1 Section 108(10) prohibits financial contribution conditions unless the purpose of such contributions is specified in the plan and the level of contribution is determined in a manner described in the plan or proposed plan.

7.2 There are a few principles, established by the case law, which warrant mention:

(a) Subsection 10(a) does not require the condition to be imposed in accordance with the objectives and policies of the plan; rather, it requires that the condition be imposed in accordance with the "purposes specified in the plan".

(b) Some particularisation is required, and a plan cannot state some general purposes but imply that some financial contributions may be required without a purpose.

(c) To meet the requirements of s 108(10)(b) a plan or proposed plan must in some way — either broadly descriptive or narrowly prescriptive — specify the method (in a non-technical sense) in which a financial contribution can be determined.

(d) A plan which provides a method for determining the maximum contribution which can be imposed but which also provides that a

lesser level can be imposed at the discretion of the local authority is within the contemplation of s 108.

(e) Rules, which include a formula for calculating financial contributions, must be interpreted as fixing the maximum levels at which contributions can be imposed, rather than operating prescriptively.

7.3 These are not exacting requirements. The proposed provisions appropriately specify (a) the purpose of the financial contribution; and (b) the level of contribution.

8 Auckland Unitary Plan

8.1 Submitters have cited the decision by the IHP for Auckland's Unitary Plan not to adopt an inclusionary housing policy as a justification for not adopting it for Queenstown-Lakes.

8.2 In doing so, the IHP did not rule on the legal position. It assumed that such a proposal could be implemented but found that the Council's evidence did not justify the proposal.

8.3 It said:

> Auckland Council submitted that affordable housing provisions are able to be imposed legally through the Unitary Plan and that this intervention is justified on the basis that a number of other provisions in the Plan place upward price pressure on the housing market. It was submitted that this upward price pressure then generates a corresponding adverse effect on the social and economic well-being of the community that permits avoidance, remediation or mitigation through price control provisions implemented under the Resource Management Act 1991 (via the Unitary Plan).
>
> Assuming that there is jurisdiction to include such price controls in the Unitary Plan to address price effects arising from other provisions of the Unitary Plan, the Council did not clarify how the Plan-based price effects would (or could) be distinguished from price effects from other sources (e.g. from immigration, monetary, or tax policies, or from price variations due to location or building quality). Without such a distinction there is no certainty that any price controls imposed through the Unitary Plan would address only the price effects arising from other provisions of the Unitary Plan, rather than being a price-control mechanism with general application. In the Panel's view the Resource Management Act 1991 and plans promulgated pursuant to it are not intended to include general price-control mechanisms.
>
> The Panel was persuaded by the submissions of the Ministry for Business, Innovation and Employment and Housing New

> Zealand Corporation, among others, that the affordable housing provisions as proposed by the Council would likely reduce the efficiency of the housing market due to effectively being a tax on the supply of dwellings and be redistributional in their effect. The Panel is of the view that the imposition of land use controls under the Resource Management Act 1991 is not an appropriate method for such redistributional assessments and policies.

8.4 Some comments on this reasoning:

(a) The purported distinction between plan-based price effects and other-source price effects is meaningless. The other-source price effects are an adverse effect that the RMA could in theory also seek to control. Whether that is appropriate is a different question from whether it is lawful. And whether it is appropriate comes down to the s 32 assessment.

(b) At the time of the AUP, MBIE and HNZC's (now Kāinga Ora) focus was on addressing housing costs through more flexible supply. The AUP has substantially increased supply, and this may have slowed the increase in land price, but only compared to the counterfactual. In fact, housing remains deeply unaffordable in Auckland. The submission from MBIE/MfE on QLDC's draft proposal may reflect this more complicated picture of supply and demand.

(c) The Panel's recommendations predated the NPS-UD which, as explained above, authorise, if not direct, councils to provide specific measures dealing with unaffordability in the short term including by ensuring that dwellings are provided at different price points.

(d) There is nothing objectionable in a resource management policy being redistributional. Policies are redistributional, intentionally or otherwise, all the time. For example, "reverse sensitivity" is often used as a conceptual tool to justify restricting incompatible land use adjacent to infrastructure. But absent some compensation payable by the infrastructure provider to the landowner, that involves the landowner subsidising the operation of the infrastructure. That is redistributional – it transfers a portion of the

operating cost of the infrastructure to nearby landowners disproportionately to the benefit.[25]

8.5 The AUP's decision is a matter the Haring Panel may consider, but it is not especially persuasive, and it does not follow that a decision based on evidence relating to Auckland several years ago, pre-NPS-UD, has any bearing on the housing situation in Queenstown-Lakes.

9 Alleged retrospectivity

9.1 There is no retrospectivity. The provisions will apply prospectively once they have legal effect.

9.2 There is a suggestion in some submissions that parties may have purchased land at a price that has not factored in the possible application of inclusionary housing. To that, the answer is that this variation has been very well signalled. It was the subject of formal consultation under the Local Government Act before notification under the RMA. Parties were free to obtain resource consents for developments prior to notification (and still are today). Certificates of compliance could have been sought for any permitted developments which would have immunised any developments from inclusionary housing.

10 Approach to proposed plan changes

10.1 Turning now to how the Panel must approach its consideration of the variation, the Environment Court recently provided the following guidance:[26]

> [29] In summary, therefore, the relevant statutory requirements for the plan change provisions include:
>
> "(e) whether they are designed to accord with and assist the Council to carry out its functions for the purpose of giving effect to the RMA;
>
> (f) whether they accord with Part 2 of the RMA;

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25 Pardy and Kerr "Reverse Sensitivity -The Common Law Giveth, and the RMA Taketh Away" (1999) New Zealand Journal of Environmental Law 93, at 99-100.

26 *Middle Hill Limited v Auckland Council* [2022] NZEnvC 162. This summary is considered helpful even though the Judge reached an incorrect conclusion about the extent to which the NPS-UD applied to the decision-making. The Judge incorrectly followed the Environment Court's decision in *Eden-Epsom Residential Protection Society Inc v Auckland Council* [2021] NZEnvC 82, which was later overturned by the High Court on the basis that the Environment Court had misinterpreted the NPS-UD (*Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948).

(g) whether they give effect to the regional policy statement;

(h) whether they give effect to a national policy statement;

(i) whether they have regard to [relevant strategies prepared under another Act]; and

(j) whether the rules have regard to the actual or potential effects on the environment including, in particular, any adverse effects.

[30] Under s 32 of the Act we must also consider whether the provisions are the most appropriate way to achieve the purpose of the plan change and the objectives of the Auckland Unitary Plan by:

(a) identifying other reasonably practicable options for achieving the objectives; and

(b) assessing the efficiency and effectiveness of the provisions in achieving the objectives, including by:

i. identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for:

- economic growth that are anticipated to be provided or reduced; and

- employment that are anticipated to be provided or reduced; and

ii. if practicable, quantifying the benefits and costs; and

iii. assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

[Footnotes omitted.]

10.2 One of the reasonably practicable alternatives considered by the Council has been use of the rating system under the Local Government (Rating) Act. Some submitters have placed great store in this approach.

10.3 It is questionable whether this is an available approach, let alone a reasonably practicable one. Rating is quintessentially a matter with high policy and political content in respect of which the Court defer to the political judgement of those elected.[27] Those elected in this district have been advised of the availability of this alternative and have chosen to notify the Variation. It is not for the Panel to second-guess that

[27] *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537.

assessment. In considering the reasonably practicable alternatives, it is not the Panel's role to determine the "best" alternative.

10.4 There is an irony in submitters opposing the Variation on the basis that it may add cost to development, but apparently supporting an alternative which will also add a layer of cost, applied more widely (potentially), and at a time where the signalling of rates rises has been met with public outcry.

11 Evidence

11.1 The above are the main matters of legal dispute apparent from the submissions and evidence filed.

11.2 The Council is calling four witnesses:

(a) Amy Bowbyes as to corporate and planning;

(b) Charlotte Lee as to social impact;

(c) Shamubeel Eaqub as to economics; and

(d) David Mead as to s 42A report and planning.

11.3 Ms Bowbyes traces the history of inclusionary housing policies within the Queenstown-Lakes District. This is helpful because, uniquely in New Zealand planning, the Council has a track record of inclusionary housing. This track record shows that the sky does not fall in when developers are required to contribute land or cash by way of contribution to solving the housing issues in the district. She also covers the HBA and complementary steps the Council is taking to address the housing crisis.

11.4 Ms Lee's evidence covers the adverse effects posed to those living at the sharp edge of the housing crisis, including those without stable housing. Her impact assessment addresses the impacts on the community including on community vibrancy, services and facilities. The district will struggle to achieve its social, economic and environmental obligations if key workers (nurses, teachers, healthcare professionals) are finding it difficult to find and retain accommodation.

11.5 Mr Eaqub's evidence highlights that the Queenstown-Lakes housing market faces pressures additional to those applying nationally, meaning

the adverse effects are felt more acutely and intensely here. Broad market failure means that supply increases have not led, and will not lead, to more housing for the lower parts of the housing continuum. A moderate inclusionary housing policy, broadly applied, will at least channel some much needed housing to the affordable end of the market. In his view, increasing supply alone will not do so.

11.6 Mr Mead's evidence addresses the formulation of the Variation, puts the proposed provisions in the context of the planning framework, including the NPS-UD, and addresses all s 32 matters.

Date: 23 February 2024

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