

**Before an Independent Hearing Panel
At Queenstown**

In the matter of the Resource Management Act 1991

**And in the matter of the Inclusionary Housing Variation to
the Queenstown Lakes Proposed District
Plan**

**Memorandum of Counsel for
Queenstown Lakes District Council –
Minute 2**

28 November 2023



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Memorandum of Counsel for Queenstown Lakes District Council – Minute 2

May it please the Commissioners –

- 1 The Independent Hearing Panel has directed that the Council respond to the Joint Memorandum of Counsel for Submitters dated 22 November 2023. In particular, the Council is requested to advise whether it agrees to providing its legal advice on the Variation.
- 2 The Council does not agree to provide its legal advice on the Variation. The Council, as with any litigant, is entitled to maintain legal professional privilege. If this Variation is to be a matter of significant legal challenge, its claim to legal professional privilege is all the stronger for it. I note that draft provisions were released for public consultation in September 2021 and the Variation is part of the Joint Housing Action Plan so the submitters' implication of unfairness is not accepted.
- 3 The Council accepts that the parties are entitled to challenge the lawfulness of the Variation, but the Council does not consider that submitters can seriously be uncertain or doubtful as to Council's approach to that question, or, with respect, that this is a case where the nature of any legal argument might affect the scope of evidence submitters may wish to put forward.
- 4 For the avoidance of doubt, I set out a summary of the Council's position below, and in advance of the filing of legal submissions on behalf of the Council in the usual way and in accordance with the timetable once submitters have filed their evidence.

Summary of Council's legal position

- 5 As a starting point, and as the submitters clearly appreciate,¹ the High Court in *Infinity Investment Group Holdings Ltd v Queenstown-Lakes District Council*² found that inclusionary housing is, in general, permitted under the Resource Management Act. That decision was on a preliminary

¹ Joint Memorandum of Counsel for Submitters dated 22 November 2023 at [9].

² *Infinity Investment Group Holdings Ltd v Queenstown-Lakes District Council* HC Invercargill CIV-2010-425-365, 14 February 2011.

question of law and the Court's decision makes it clear that whether the proposed change was appropriate under s 32 would be a matter for the parties to address at a substantive hearing.³ Regardless, the Court's determination makes the position of submitters somewhat perplexing.

- 6 That is because a number of legal developments since the case was decided have strengthened the argument that inclusionary housing is a legitimate matter to be the subject of regulation in a district plan.
- 7 In particular, the High Court considered that PC24 fitted within both ss 31(1)(a) and 31(1)(b).⁴ Since then, Parliament has inserted s 31(1)(aa) which requires territorial authorities to 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. The combined effect of the definition of "development capacity" and the amendment to s 31 is that it is a function of territorial authorities to address affordable housing issues assessed against short, medium and long-term requirements. Based on the Council's evidence, meeting the demand for affordable housing is urgent and therefore a short term requirement. Inclusionary housing will support this by increasing the amount of land, and therefore the development capacity, used for affordable housing.
- 8 Next, the Council is required to give effect to the National Policy Statement on Urban Development 2020. 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". This expressly authorises, even requires, a planning approach that ensures that a variety of typologies are built with a variety of price characteristics.
- 9 Further, policy UFD-P10 of the Proposed Otago Regional Policy Statement provides:

'Significant development capacity' is provided for where a proposed plan change affecting an urban environment meets all of the following criteria: ...

³ *Infinity* at [49].

⁴ *Infinity* at [42]-[43].

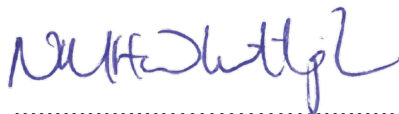
(4) the proposal makes a significant contribution to meeting a need identified in a housing and business development capacity assessment, or a shortage identified in monitoring for:

(a) housing of a particular price range or typology, particularly more affordable housing.

10 Inclusionary housing is consistent with the provisions in Part 2 of the Act.⁵ “Sustainable management” is defined broadly. It makes 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” and “to meet the reasonably foreseeable needs of future generations”. 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 and communities.

11 Drawing those threads together, it is open to a territorial authority to adopt an approach of ameliorating the likely consequences of the development of land (the undersupply of affordable housing) arising from the economic conditions (unresponsive housing supply and increased house prices) which affect the people and communities of Queenstown Lakes District.

Date: 28 November 2023



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Nick Whittington
Counsel for the Queenstown Lakes District Council

⁵ See *Infinity* at [45]-[46].