Before the Independent Hearings Panel

Under	the Resource Management Act 1991
In the matter of	submissions on the Inclusionary Housing Variation to the Queenstown Lakes Proposed District Plan

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Synopsis of legal submissions

1 March 2024

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May it please the Panel

Introduction

1 These legal submissions are prepared on behalf of the following submitters:

(a) Glendhu Bay Trustees Limited

(b) Glendhu Station Properties Limited

(c) Henley Downs Land Holdings Limited

(d) Jacks Point Land Limited

(e) Jacks Point Village Holdings No 2 Limited

(f) Jacks Point Village Phase 2 Limited

(g) Peninsula Hill Farm Limited

(h) Willow Pond Farm Limited

(i) Mt Christina Limited

(j) Jacks Point Village Holdings Limited[1]

(k) Mount Cardrona Station Village Limited

(l) Glenpanel Development Limited and Tory Trust

(m) Maryhill Limited and others[2]

(n) The Station at Waitiri Limited

(o) Silverlight Studios Limited

(p) Gibbston Highway Limited

(q) MacFarlane Investments Limited and John Thompson

(collectively, **Submitters**)

[1]The above submitter group come under the umbrella Darby Partners Limited Partnership (DPLP)

[2] Grant Stalker Trust, K & E Stalker Partnership, Gravestalker Trust No 2 and Shotover Country No 2 Limited.

2 The above submitter entities are also part of the Residential Land Development Consortium, being a group of submitters who have jointly engaged the following expert witnesses:

(a) Philip Osborne (economics);

(b) Lawrence Yule (local government);

(c) David Serjeant (planning and economics);

(d) Christopher Ferguson (planning and statutory assessment).

3 In addition to the Residential Development Consortium evidence, Glenpanel Development Limited has engaged expert evidence from Mr Robin Oliver (tax specialist).

4 Representatives for the above submitters have also prepared lay / corporate evidence, as follows:

(a) Ted Ries (DPLP);

(b) Berin Smith (DPLP);

(c) Kristan Stalker (Maryhill Limited);

(d) Mark Tylden (Glenpanel Development Ltd).

5 It is misleading to characterise the Variation as "Inclusionary Zoning". As shown by Mr Sergeant's research, the typical characteristics of Inclusionary Zoning include an on-site contribution of land and/or housing within the proposed development or payment in lieu; actual incentives (i.e. windfall gain/planning and value uplift) compared to 'business as usual' development rights; and delivery of a proportion of affordable housing within the particular jurisdiction.[3] This Variation does not contain methods that will have the direct result of delivering a proportion of affordable housing in the targeted developments.

6 Care therefore needs to be taken when referencing the previous attempt at Inclusionary Zoning in the district, namely PC 24, as being in support of the Variation. PC 24 was closer on the spectrum to Inclusionary Zoning than the Variation. Its focus was on development proposals over and above that anticipated by the district plan (aka 'planning/value uplift'), and it focused on mitigating the effects of each development proposal on affordable

[3] Evidence of Mr Sergeant, a [14] and [21] – [24]

housing needs. The Variation has neither of these Inclusionary Zoning characteristics.

Executive summary

7 The Submitters agree that methods to increase the provision of affordable housing are necessary in this District. Equally, the work of the Queenstown Lakes Community Housing Trust (**Housing Trust**) is to be commended.

8 However, the Submitters consider the Variation, as a mechanism to deliver an increased provision of affordable housing,[4] will not be effective, is inequitable and is contrary to the NPS-UD and therefore oppose it.

9 The Submitters are particularly disappointed with the Council's lack of quantified economic analysis underpinning the Variation and its failure to properly consider reasonably practicable alternatives which will more equitably, effectively and efficiently address affordable housing supply issues.

10 Based on the evidence it is submitted the Variation, most particularly its methods, should be rejected on its merits:

(a) The Variation will not increase the supply of affordable land or housing – its methods are disconnected from that objective and provides no certainty or lever to ensure that outcome.

(b) There has been an inadequate assessment of the reasonably practicable alternatives that could more efficiently, effectively and equitably achieve the objective of the Variation.

(c) Those subject to the Variation tax[5] comprises a very small group - proponents of new residential land development and subdivision in a subset of zones in the PDP;

(d) The high-level, economic analysis that the Council has provided cannot be relied upon to support the Variation, because it relies on international examples which include a related planning windfall gain

[4] New Strategic Objective SO 3.2.1.10 and 40.2.1 seek that affordable housing choices are provided, and the provision of affordable housing for low to moderate income households, respectively.

[5] Interchangeably in these submissions counsel refers to the Variation financial contribution regime as a tax on the basis of the conclusions set out in Mr Oliver's evidence, and as referred to in Mr Colegrave's evidence at [36], referring to the contributions as effectively a form of 'distortionary tax'.

or uplift, however no such gain windfall or uplift is provided through the Variation;

(e) The Variation will disincentivise some PDP-zoned, residential 'developers' in the District, who are part of the solution to the problem of a lack of supply of affordable housing. Rather than incentivizing increased supply of housing to market, the Variation will, at best, create a transfer of wealth to the Housing Trust, and at worst, result in a significant net economic cost to ratepayers and push up the cost of new houses.[6]

(f) The practical application of the Variation provisions is uncertain and inefficient.

11 The key issues addressed in these submissions are:

(a) Likely failure of the methods to address the problem;

(b) Failure to give effect/contrary to the NPS-UD;

(c) Failure to give effect to the operative RPS, and proposed RPS;

(d) Failure to justify the Variation methods as efficient and effective, and 'most appropriate' in terms of section 32 of the Resource Management Act 1991 (**RMA** or **Act**);

(i) S32 issue 1 - Fundamental flaw in not properly considering reasonably practicable alternatives

(A) The lack of planning uplift / increased supply;

(B) The rating alternatives

(ii) S32 issue 2 – Effectiveness - objectives won't be achieved

(iii) S32 issue 3 – Efficiency - lack of evidential basis to support conclusions as to cost and benefits of the Variation methods;

(e) Solutions proposed by Submitters;

(f) Appendix 1 – Variation methods are *ultra vires* as they are beyond the scope of a valid financial contribution provided for in the RMA.

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[6] Evidence of Mr Osborne, at [64], Evidence of Mr Colegrave, at [130].

12 The Submitters have collaborated to present considered and careful evidence which addresses the failings of the Variation in terms what must be evaluated pursuant to section 32 of the Act. The intent is to better inform the Panel of the more realistic net costs of the Variation, it's the implementation issues and unintended consequences. The Submitters' evidence also tries to assist by proposing meaningful alternative mechanisms to achieve the objectives, in particular:

(a) Addressing why the use of Local Government Rating Act 2002 (**the rating option**) is a lawful, effective, equitable and more efficient method; and / or

(b) Suggesting a combined package of policy responses including revised Variation policy direction.[7]

13 The Submitters welcome the opportunity to collaborate with Council in terms of delivering affordable housing supply solutions, but are disappointed in the approach to the Variation, effectively running a legally uncertain test case through the RMA Schedule 1 process, without a comprehensive section 32 evaluation and evidence as to the efficiency and effectiveness of both the Variation's methods, and realistic alternatives, so as to assist the Panel in making a finding as to what is 'most appropriate'.

Failure of the methods to address the problem

14 The Variation is premised on a projected under-supply[8] in affordable housing, however a number of the key issues cited which contribute to the problem are not addressed by the corresponding methods and do not relate to the "purpose statement" for the proposed new chapter 40:

> "The combination of **multiple demands** on housing resources (including proportionately **high rates of residential visitor accommodation and holiday home ownership**); **geographic constraints** on urban growth and **the need to protect valued landscape resources** for their intrinsic and scenic values, means that the District's housing market cannot function efficiently. This has long term consequences for low to moderate income households needing access to affordable housing."[9]

[7] Evidence of Mr. Ferguson, at [96].

[8] Evidence of Mr Serjeant, at [20].

[9] QLDC Proposed Chapter 40, 40.1 Purpose Statement

15 The Variation tries (and even then, ineffectively) to address only a very small part of the stated problem definition / issues of affordability, and does not address other exacerbating factors such as:

(a) The lack of rental supply for worker accommodation, including short term and seasonal worker accommodation;

(b) The lack of enforcement and oversight on short term visitor accommodation letting / Airbnb constraining renting supply;

(c) High rates of vacant home ownership;

(d) The failure to translate zoned capacity into supply of residential land to market as a result of constraints and delay in the provision of infrastructure,[10] or planning barriers to development[11].

16 Therefore, the Variation does not address the multi-faceted issues around affordable housing supply, pricing, and availability, and provides only a very limited solution by supporting those on the Housing Trust waitlist[12].

17 Without any real answer to most of the problem, the provisions fail to address what are likely to be the most significant contributing factors to affordable housing supply. The Submitters all support affordable housing as critical to the wellbeing of the District, and planning evidence across the development sector has posed solutions which are a collective response to the issues, including (in no preferred order):

(a) short term letting regulation and enforcement[13];

(b) translating zoned capacity into residential development by delivering on infrastructure provision;[14]

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[10] Evidence of Tim Williams, at [27]

[11] Evidence of Lane Hocking, at [5]: "There is generally a llengthy, complex and expensive process involved in creating titled sections for zoned land in the District"…

[12] Evidence of Ms Hoogeveen, at [3.8] "The Trust provides for approximately 0.6% of the District's housing stock. Whilst it would greatly help those who benefit from being housed by the Trust, this is a very small portion of the market, and it seems more appropriate and effective to make all housing less expensive."

[13] Evidence of Mr Colegrave, at [125].

[14] Evidence of Tim Williams and Lane Hocking

(c) zoning and planning development incentives;[15]

(d) tying the Variation tax to a planning uplift[16];

(e) facilitate the provision of purpose-built prefabricated workers accommodation[17]

(f) seeking to address the delivery of infrastructure and streamlining of consent processes, directly aligned with the NPS-UD;[18]

(g) Investigating and undertaking a thorough assessment of reasonably practicable rating options.

18 The problem is multi-faceted, but the 'solution' suggested through the Variation is very narrow and only shifts resources from a small group of housing providers, to one entrusted charitable trust.

Failure to give effect to the NPS-UD

19 Sections 72 to 77 of the Act set out the legal framework under which the Variation has to be considered. A summary of the requirements (including the requirements of evaluation reports under s32) is set out in the Environment Court decision of *Colonial Vineyard Limited v Marlborough District Council.*[19] Many of these are uncontentious – these legal submissions just focus on matters in contention.

20 A district plan variation must give effect to[20] any national policy statement, and any national planning standards. Give effect to is a strong direction. It means implement.[21] The only national policy instrument of relevance to the Variation is the National Policy Statement on Urban Development 2020 (**NPS-UD**).

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[15] Evidence of Mr Thorne, at [4.3] "for example incentivisation to landowners to engage the affordable housing provisions where there is the ability to provide more flexibility in allotment sizes, and achieve greater residential densities / typologies with a higher degree of certainty".

[16] Evidence of Mr Serjeant, Mr Ferguson – supporting what they characterize as 'option 1'.

[17] Evidence of Mr Colegrave, at [127].

[18] Evidence of Tim Williams at [35]

[19] *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55

[20] RMA, s 75(3)(a),(b) and (ba).

[21] *Environmental Defence Society Inc v New Zealand King Salmon Company* [2014] 1 NZLR 593 (SC) at [77].

21 Counsel for Council's Memorandum in response to the Hearing Panel's 'Minute 2' (**Memorandum**)[22] provides a synopsis of the legal case for the Variation. In respect of the relevance of the NPS-UD to the Variation, the Memorandum notes:

> [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.**

22 Nothing in Policy 1 of the NPS-UD, or the NPS-UD more generally, has the effect of expressly or implicitly 'authorising or even requiring' a planning approach that results in a tax / transfer of wealth through financial contributions, for affordable housing. The NPS-UD policy 1 aims for well-functioning urban environments, including through differential price thresholds and varieties of typologies. It is quite a leap to justify the Variation in terms of Policy 1, if possible at all.

23 Council's Memorandum does not cite any other relevant provisions of the NPS-UD in support of the Variation. For example, Objective 2 is not referenced, but it is referenced in Council's legal submissions.

> **Objective 2**: Planning decisions improve housing affordability by supporting competitive land and development markets.

24 The reference in Objective 2 to 'supporting competitive land and development markets' is key, and has not been addressed in Council's legal analysis. For example, Council's Memorandum omits the material parts of the definition[23] of 'well-functioning urban environment' in Policy 1 of the NPS-UD, which includes an urban environment that, as a minimum:

> (d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets.

25 Based on the evidence it is submitted the proposed financial contribution will adversely impact the competitive land and development markets. It is

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[22] Dated 28 November 2023

[23] NPS-UD Policy 1 (a) and (d)

not applied across the board – only to a subset of PDP zones, creating distortions. It will result in additional transactional and administrative costs for those in affected zones, and may result in either delay in bringing land and developments to market, and/or higher prices.

26 As cited in Mr Ferguson's evidence, the policy thrust of the NPS-UD is an enabling planning instrument directed at the supply side of the affordable housing equation:

> [45] The NPS-UD is designed to improve the responsiveness and competitiveness of land and development markets. In particular, it requires local authorities to open up more development capacity, so more homes can be built in response to demand.

27 Its overall policy intent is to support well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, with a particular emphasis on providing sufficient development capacity.

28 Mr Ferguson's evidence at 47-49, summarises that, in reliance on the Submitters' economic and corporate evidence, not only will the Variation have net economic costs, it will also result in:

(a) a constraint or delay in the supply of affordable housing to market,[24] and a cost increase to end buyers (direct increase in the price of new land and dwellings as the tax is passed on via higher selling prices).[25]

(b) Reducing profitability - If profitability falls below the minimum rate of return, development activity may be deferred (in time and/or in space to other areas), which lowers supply and increases prices.[26]

29 These consequences are contrary to the directives from the NPS-UD to, at a minimum, support, and limit as much as possible adverse impacts on the competitive operation of land and development markets. The Variation will only assist the lucky few eligible for Housing Trust assistance, but may reduce supply and increase prices of new homes for everyone else.

30 Therefore, not only is there nothing in the NPS-UD which authorises or mandates the method of financial contribution / tax on residential land development, the evidence for Council itself establishes adverse impacts

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[24] Evidence of Mr Smith, at [9a].

[25] Evidence of Mr Colegrave at [153].

[26] Evidence of Mr Stalker, at [26 – 28].

on the proposed financial contribution regime on the efficient operation of the land supply market, in direct contradiction of the NPS-UD policy direction to achieve a competitive and affordable housing market.

31 The NPS-UD was gazetted in mid-2020 against a background of systemic constraints on urban development including absence of supporting infrastructure, density controls in district plans, and over-regulation from different planning rules and methods on urban development capacity.

32 For context, the Cabinet Paper supporting the NPS-UD identified the urban market as dysfunctional, and the driver of this being:

> "an unresponsive planning system characterised by a reliance on restrictive land use regulation and the controlled release of land for urban purposes."[27]

33 The Recommendations and Decisions report for the NPS-UD stated:

> "Urban areas are dynamic and complex, continually changing in response to wider economic and social change. The current planning system can be slow to respond to these changing circumstances and opportunities, which can lead to a mismatch between what is enabled by planning and where development opportunity (or demand) exists. This can lead to delays in supply, or incentivise land banking; and the intent of the responsive planning provisions in the National Policy Statement on Urban Development (NPS-UD) is to enable the planning system to work responsively towards more competitive development markets, through development (including at scale)."[28]

34 The Environment Court has previously said the purpose of the (now superseded) National Policy Statement on Urban Development Capacity 2016 is "*… to open doors for and encourage the development of land for business and housing, not to close them.*"[29] This statement remains applicable.

35 Mr Thorne's evidence for Fulton Hogan Land Development Limited sets out other background documents of the NPS-UD, including the section 32

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[27] Cabinet Paper National Policy Statement for Urban Development at [20]-[21].

[28] Ministry for the Environment and Ministry of Housing and Urban Development. 2020. *Recommendations and decisions report on the National Policy Statement on Urban Development*. Wellington: Ministry for the Environment and the Ministry of Housing and Urban Development.

[29] *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59, [2019] NZRMA 426 at [39].

evaluation report and regulatory impact statements, concluding that the overarching theme of NPS-UD introductory materials signals:

> [3.9] … its design and intent are to address the fundamentals of land supply, development capacity and infrastructure. **I do not consider that it was contemplated that Objective 1 of the NPS-UD would be used to justify further transaction and development costs through measures such as IZ financial contribution requirements.**[30]

36 In summary, it is submitted that the relevant NPS-UD directive is clear – identify broad locations where realisable development capacity can be provided to achieve a competitive and affordable housing market. The Variation being progressed in isolation from, and without regard to, other planning and zoning supply initiatives fails to meet those outcomes, and in fact is contrary to key provisions by having an adverse impact on the competitive operation of the market.

Failure to give effect to the operative and proposed RPS

37 When preparing the Variation, the Council is required to:

(a) give effect to any operative regional policy statement (i.e. the Partially Operative Otago Regional Policy Statement 2019);[31] and

(b) have regard to any proposed regional policy statement (i.e. the Proposed Otago Regional Policy Statement 2021).[32]

38 Council's Memorandum, and Mr Mead's evidence, cites UFD-P10 of the proposed RPS as support for the Variation. However, as identified in paras 57-60 of Mr Ferguson's planning evidence, the proposed RPS urban development response is closely aligned with the NPS-UD direction discussed above, namely to respond to insufficient housing choice through increasing development capacity or providing more development infrastructure as required, as soon as possible. Mr Ferguson also considers that alignment consistent with current chapters 3 and 4 of the PDP.

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[30] Evidence of Mr. Thorne at [3.9].

[31] RMA, s 75(3)(c).

[32] RMA, s 74(2)(a)(i)

39 There is no direct or indirect support / policy direction in either the partially operative or proposed RPS instruments which support the imposition of this sort of financial contribution on new residential land development.[33]

Failure to identify and evaluate reasonably practical alternatives and justify the Variation as efficient and effective (and therefore 'most appropriate') in terms of section 32 of the RMA

Objectives of the Variation - the s32 assessment for objectives

40 The objectives of the Variation are to be examined on the extent to which they are the most appropriate way to achieve the purpose of the Act.[34] In turn, the provisions (policies, methods and rules) of the Variation must examine, whether they are the most appropriate way to achieve the objectives of the Variation 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[35].

41 The term “most appropriate” does not mean the superior method, but means the “most suitable”.[36]

42 The evidence of Mr Ferguson and Mr Serjeant collectively propose minor changes to the key objectives of the Variation to ensure it provides a focussed response to the issues / problem definition, and as a way to achieve the purpose of the Act.

43 The conclusion from the evidence of Mr Ferguson and Mr Serjeant is that the Variation objectives to deliver affordable housing choices are generally appropriate, given alignment with other PDP provisions across chapters 3 and 4 which address housing affordability through a supply response.[37]

44 The real issue with the Variation is that the methods (specifically, the financial contribution requirements) are not an efficient and effective way to deliver on the proposed objective 3.2.1.10 (providing affordable housing

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[33] Evidence of Mr Ferguson, at [63]-[64].

[34] RMA, ss 74(1) and 32(1)(a).

[35] RMA, s 32(1)(b).

[36] Rational Transport Society Inc v New Zealand Transport Agency [2012] NZRMA 298 at [45].

[37] See Mr Ferguson's listed provisions at para 90: (PDP 4.2.1.4a, 4.2.1.4b, 3.2.2.1, 4.2.2.8).

choices so that a diverse and economically resilient community is achieved and maintained into the future), as addressed below.

45 The Variation will be ineffective and inefficient because it would provide a further disincentive for land supply[38], will exacerbate unaffordability by increasing the price of affected land[39], and carries high administration costs.[40]

Provisions - policies and rules - the s32 assessment

46 The provisions are to be examined, having regard to their efficiency and effectiveness, as to whether it is the most appropriate (i.e., suitable) method for achieving the objectives of the Variation, considering:

(a) the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the proposed provisions;[41]

(b) if practicable, quantify the benefits and costs;[42]

(c) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.[43]

47 It is submitted that the provisions fundamentally fail to deliver on the Variation objectives of provision of affordable housing because of three key issues:

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[38] Evidence of Mr Tylden, at [31]: For some developers, they may need to wait until there is certainty as to their costs, so they can plan, structure, and finance their developments accordingly. We all know that there are some incentives to land-bank, and only release land slowly. This Variation may incentivise that further as developers seek to offset the costs of the inclusionary housing financial contributions to them by waiting until land prices are higher (or constructions costs are lower, if that ever might be the case)

[39] Evidence of Mr Ries at [14]: The draft change is likely to constrain the supply of new housing which the Queenstown Lakes District desperately needs, while saddling working families with financial burdens which they will be hard-pressed to bear.

[40] Evidence of Mr Osborne at [58j] and [64]: A further cost, not included in the Sense Partners cost benefit assessment relied on by Council, relates to administrative costs, including costs associated with RMA legality testing and transaction costs (e.g. valuations of likely sale prices). Given the low end represented in Figure 16 of the assessment these costs could materially impact the overall level of quantified benefit (and have partly been included in the Insight 'reworked' figures

[41] RMA, s 32(2)(a).

[42] RMA, s 32(2)(b).

[43] RMA, s 32(2)(c).

48 **S32 assessment Issue 1 - failure to adequately consider reasonably practicable alternatives**;

49 Mr Ferguson's evidence addresses options 1 and 2 following the Council's s32 assessment structure, being:

(a) Option 1 – greater supply of zoning capacity and voluntary agreements or adequate capacity and active intervention; and

(b) Option 2 – RMA methods versus non-RMA (ie the rating option)

50 There are a range of policy responses driven by Council which are addressing the supply-side of the affordable housing issue, but which will take time to bed in. As summarised at paras 98-101 of Mr Ferguson's evidence, the option 1 planning methods include:

(a) Imposing constraints on the erosion of housing supply by residential visitor accommodation and homestays;

(b) Increasing density and reduced lot sizes through PDP reform;

(c) Continuing linking developer-lead planning/value uplift to a Housing Trust contribution (which has to date, provided the most significant income stream to the Housing Trust).

51 As summarised in Mr Ferguson's evidence at para 103, the combined planning responses of increased supply, continued developer agreements at the time of planning uplift, and further regulation of residential visitor accommodation are all considered to be more effective and efficient planning responses to achieve the strategic objective of the Variation. Without consideration of the other exacerbating issues and available tools to address housing supply and availability constraints, the Variation is flawed and is neither efficient or equitable in economic terms.[44]

52 Option 2 –includes the consideration of non-RMA regulatory responses to achieving the objective. The Submitters' case in particular focuses on the effectiveness and efficiency (and lawfulness) of levying a targeted rate under the Local Government Rating Act 2002 as a preferred, more appropriate, alternative. The ability to levy rates as a mechanism to deliver on affordable housing supply has significant advantages compared to the financial contribution regime under the RMA, including:

[44] Evidence of Mr. Colegrave, at [45].

(a) It provides for a more equitable response by levying larger sectors of the community rather than only new residential land development and subdivision in a limited subset of PDP zones;[45]

(b) It does not run up against the same uncertain jurisdictional / vires hurdles as compared to the financial contribution regime under the RMA and is more difficult to challenge legally;

(c) It provides for a more flexible mechanism of investment by QLDC into the provision of affordable housing – by direct partnership agreements, contracting on the delivery of affordable housing directly[46] or delivering and maintaining affordable housing itself as a social and community outcome (as many councils do);

(d) It likely has less economic costs in terms of the immediate planning / litigation process of the Variation, its necessary enforcement and oversight subsequently, as well as the economic costs downstream that will inevitably manifest as social and environmental costs which negatively impact housing delivery (supply);[47]

(e) It can be reviewed as frequently as necessary and is therefore more responsive to corrections and/or changing circumstances than provisions in a district plan;

(f) It is easier and quicker for Council to implement;

(g) It provides certainty of the timing and scale of revenue to be collected, and therefore provides more certainty for Trust to plan its provision of housing longer term.

53 Given the comparatively efficient and effective advantages of using a form of rating alternative, Council's consideration of this alternative is inadequate. Mr Whittington simply advised the Panel that:

> 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 assessment.[48]

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[45] Evidence of Mr Ferguson, at [105].

[46] Evidence of Mr Ferguson at [108].

[47] Evidence of Mr Osborne as summarized by Mr Ferguson at [109-110]

[48] Inclusionary Housing Variation Council's Legal Submission 10.3

54 With respect, simply stating that the elected councillors have been advised of the alternative of a rating method, does not satisfy the requirement in section 32 – what information were they provided – we do not know. And it is certainly this Panel's role to inquire into, and make their own determination of that assessment.

55 In terms of legal advice, the Council's only consideration of this as an alternative option appears to dismiss the use of targeted rating for the reasons set out below, noting that these reasons were not traversed in the Section 32 Report:

> [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 (i.e. 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.[49]

56 However, as addressed by Mr Yule's evidence, the Variation equally has the consequences of passing on costs to developers – though the catchment of those being targeted in the Variation (compared to rates) is comparatively much smaller.

57 Furthermore, Mr Yule confirms that, in response to LGOIMA requests made by Counsel for the Submitters, QLDC has not undertaken a financial analysis of alternative funding mechanisms to assist affordable housing provision.[50] I.e. it does not appear to have considered the costs and benefits (in a s32 sense) of what a targeted rate could potentially levy. Had the Council undertaken a more thorough investigation / analysis of this comparative option, it would potentially show:

(a) Comparatively fewer administration costs compared to implementation of the Variation regime;

(b) Comparatively higher and more predictable/reliable yield of targeted rating income (depending on how and where it is applied), and a more

[49] Memorandum from Meredith Connell dated 7 July 2021 (Alternative Options Memorandum) at [11].

[50] Evidence of Mr Yule at [18].

equitable outcome than charging a small sector of the community to address an existing shared social issue.[51]

58 The Submitters' economic evidence also concludes that a rating alternative would be a more direct and equitable apportionment of costs - it would spread the cost among the community (given the benefits of affordable housing have a public-good nature as the community and economy as a whole benefit from its provision).[52]

59 The Panel is obviously very live to these types of reasonably practicable alternatives and is testing counsel and experts. This evidences the failure of Council – it should have undertaken a sufficient evaluation of these options, and this would have resulted in putting forward a better planning outcome, with strong evidential support.

60 While the Panel's inquiry is necessary, it is respectfully submitted that the evaluation and comparison of alternatives during the hearing, 'on the fly' cannot properly remedy the deficiencies in Council's case to the extent that there will be a reliable evidential basis to support a finding that the Variation provisions are efficient, will be effective, and are most appropriate to achieve the objectives of the Variation. Were the defects not so fundamental, this Panel might have been able to remedy them through inquiry, but it is respectfully submitted they go so deeply to origins of the Variation that they are not able to be remedied, and the Panel's careful scrutiny will hopefully come to this same conclusion.

Who will be taxed?

61 Even if the method remained in the financial contribution rather than rating sphere, this is a whole of district issue, but the catchment of those subject to the variation is limited. The Variation does not apply to:

(a) large corporate employers and worker accommodation;

(b) visitor accommodation development;

(c) other commercial development which generates need for affordable housing for workers;

(d) operative zoned land – some of which has relatively large residential capacity still to be subdivided and developed; and

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[51] Evidence of Mr Yule at [17].

[52] Evidence of Mr Osborne, at [56].

(e) units in already contributing areas.

62 The Variation is also not intended to apply to areas where previous agreements or plan provisions meet the objectives. While Council's rebuttal has attempted to provide further certainty as to this point, with a new explanatory clause 40.4.5, this still appears to be a work in progress, and it is not clear whether the areas identified in Ms Bowbyes' schedule, such as Mt Cardrona Station (PC 52) for example, are proposed for eventual inclusion in a Schedule that identifies areas exempt from the effect of the Variation.

63 A number of these issues are raised at paras 113-141 of Mr Ferguson's evidence. With the catchment so narrow, a very small sector of the market is charged with the onus of financially contributing to a broad social issue. The inequity in that regime is relevant to what is the opportunity cost of not capturing operative zoned land, non-residential developments, and existing consented developments – what has been left on the table?

64 **Issue 2 – Effectiveness - Objectives will not be achieved.** As addressed above from paragraph [5] onwards, the proposed method provisions in the Variation are not likely to achieve the Objectives. Council's assessment does not acknowledge that the financial contribution mechanism (tax)[53] does not directly and with certainty provide for the outcome of delivering affordable housing. The transfer of wealth to the Council, then (likely) to the Trust, does not directly translate to an increased supply of land for affordable housing, nor affordable homes to market.

65 As stated in Mr Yule's local government evidence, the indirect nature of the taking of financial contributions from land development and then giving to a charitable trust for unspecified future activities, is highly unusual:

> [24] … It is unusual for the Local Authority to collect what are effectively development levies and then give them to a non-elected charitable Trust…
>
> [26] Local Authorities are usually a preferred partner to receive government funding support for issues that impact Central and Local Government common areas of interest.

66 Not only is there no hook or link in the Variation to the provision of affordable housing, there is also no real attempt to quantify the likely scale of revenue to be gathered and therefore affordable housing product to be delivered.

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[53] Being the preferred mechanism of contribution as compared to provision of land.

67 In Mr Sergeant's evaluation he observes:

> The effectiveness of the Variation **is measured in terms of how effective it will be in making a significant reduction in the affordable housing waiting list**. This is achieved by matching the actual housing needs of the homeless and under-housed population, whatever their demographic situation, with the housing supply produced by the Variation rules.[54]

68 However, Council's evidence makes no attempt to quantify how effective the Variation will be in these terms. This aspect of how 'effective' the Variation will be is addressed further below under the theme of costs and benefits.

69 Overall it seems highly likely that the Council simply doesn't know, and hasn't considered, where, how, and when the financial contributions will be taken, what the quantified costs will be, on whom, and what the corresponding quantified benefit in terms of the contribution to the Housing Trust will be.

70 There is simply no clear evidence on how much, and when, the objective of the Variation (provision of supply of affordable housing) will be achieved. The Submitters therefore rely on the economic evidence of Mr Osborne, considering unintended policy consequences, which concludes:

> Additionally, in considering the potential level of the quantified benefits presented by Council, there is a higher likelihood that the quantified economic impact will be materially negative combined with potentially inefficient impacts on housing provision as a whole.[55]

71 **S32 Issue 3 – Efficiency and failure in economic evidence to adequately consider and quantify costs and benefits**

72 The lack of evidential foundation for the Variation, and the scale of its benefits, is particularly surprising given the Variation has significant

[54] Evidence of Mr Sergeant at [56]

[55] Evidence of Mr Osborne at [71]

ramifications in terms of net economic costs[56] and delay of residential development to market.[57]

73 Council is required to quantify costs and benefits. This means that the effects of the proposal should be 'nailed down as far as possible. In other words, instead of vague best-guess information, research should confirm the scale and significance of the proposal using numeric data.'[58]

74 The Panel have asked the Council experts whether they have quantified the likely revenue, and therefore likely scale of affordable housing the Trust will be able to provide as a result of the Variation. No answer was forthcoming. The Panel asked Julie Scott the same question, and her response was that Council was the better party to ask.

Scale of benefits

75 For a range of reasons based on the evidence it is submitted the likely scale of benefits arising is lower than Council's position.

76 The Council's economic case in particular is flawed by characterising the Variation as a tax on a 'planning windfall' gain, where there is no such gain or incentive compared to 'business as usual' under the district plan. It appears this may no longer be a point of contention however - the economics experts now agree the Variation will **not** promote an increase in urbanisation and will **not produce any windfall gain**.[59] The originally assumed benefit of that cannot be relied upon.

77 The evidence of Mr Osborne concludes there remain a number of potential unintended market responses that are likely to reduce the efficiency and effectiveness of the Variation and the QLD housing market as a whole,[60] and that overall the short-term costs are likely to be much more pronounced than the longer-term impacts, at which time the Sense Partners report agrees increased supply will play a greater role in market stabilisation.[61]

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[56] Evidence of Mr Ferguson at [113] "the [Variation is] ineffective and inefficient because it would provide a further disincentive for land supply, will exacerbate unaffordability by increasing the price of affected land and carries a very high administration cost"

[57] Corporate evidence of Mr Smith, Mr Ries, Mr Stalker, and Mr Tylden as summarized above in submissions

[58] Ministry for the Environment , 2013, A guide to s 32 of the RMA 1991, At 50

[59] Joint Witness Statement of Economics Experts at [20]

[60] Evidence of Mr Osbrone at [65].

[61] Ibid, at [66].

78 Council's Memorandum dated 28 November 2023, cites the immediacy of the issue to be addressed

> [7] … Based on the Council's evidence, meeting the demand for affordable housing is **urgent and therefore a short-term requirement**…

79 However, based on Mr Osborne's evidence the short-term effects will actually be adverse, not positive.

80 The economic experts also appear to agree on this:

> **The experts consider that the variation will result in either a decrease in residential supply or an increase in prices.** SE considers that this effect has been addressed by way of separate Council plan variations seeking to enable additional development entitlements whereas FC and PO do not see or necessarily agree with that link. PO and FC additionally disagree with the principal of balancing or averaging out the consequences of this variation or other separate plan changes or plan variations, and consider that its incremental effects should be viewed in isolation consistent with common economic practice, which is primarily concerned with effects "at the margin" where all other factors are held constant.[62]

81 The evidence of Mr Colegrave is that the Variation will reduce affordability, increase the cost to housing supply and reduce the number of future homes available in the district.[63]

82 While Mr Eaqub's opinion is that the Variation will result in an increase in retained affordable housing, that is unquantified, and dependent on the Trust's performance. Otherwise the economics experts confirm they:

> do not have sufficient information to comment on whether the variation may or may not result in net more affordable houses under the control of a community housing provider than would otherwise been created.[64]

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[62] Joint Witness Statement of Economics Experts at [23.b]

[63] At 36-42

[64] Joint Witness Statement of Economics Experts at [23.d]

83 In other words, Council has not provided evidence that supports a finding that the Variation will likely achieve its objectives. The nature and scale of any benefits is uncertain.

84 The Council's economic and planning evidence rely heavily on overseas experience, to justify the Variation despite often not being vaguely comparable.[65] Mr Serjeant's evidence, at 15-18 provides an analysis of some of the international examples cited by Council's economic and planning analysis, concluding that:

> [14] … Care must be exercised in making comparisons with such programmes, as the characteristics of each are highly variable in terms of whether they are mandatory/voluntary, whether an on-site contribution is preferred or a payment in lieu option is available, whether incentives are offered, what the development threshold (unit numbers) is before a contribution is required, the level of contribution sought, and whether the contribution is linked to residential or non-residential development, or both[66].

85 By contrast, the international comparisons cited tend to spread the contribution (tax) more widely amongst the land development sectors and the rates of growth allow the application of incentives through up-zoning or density bonuses, compared to the narrow application of this Variation.[67] The important differences with the overseas examples QLDC relies on, and this Variation, have not been assessed as reasonably practicable alternatives by QLDC. Not only does QLDC's evidence and section 32 evaluation not compare apples with all the apples, it is clear that those overseas examples are not directly comparable. QLDC's case should have contained a detailed s 32 evaluation of each of those overseas regimes QLDC is relying on, that differ to this Variation, to ensure all relevant considerations are taken into account.

86 Mr Eaqub's evidence is broad-brush and does not contain a clear statement of the economic costs and benefits of the Variation, on whom and over what period of time. It does not quantify (let alone monetise) any policy outcomes. As above, Mr. Equab's evidence appears to justify implementation of the Variation by referencing overseas examples, which

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[65] Evidence of Mr Colegrave, at [130e].

[66] Evidence of Mr Serjeant, at [14].

[67] Evidence of Mr Serjeant, at [52]

have little relevance to a New Zealand context, and which have not been assessed pursuant to section 32 as alternatives.

87 Not only is there no evidence that can be relied upon to determine the nature and scale of benefits, there is evidence that the Variation will have adverse effects, and cost the community.

Adverse effects/costs of the Variation

88 The record of the economists' conferencing succinctly summarises this point:

> ***24.*** *What are the potential costs of increased supply of affordable housing through the Variation?*
>
> ***1.*** *SE considers this to a be a key point of contention requiring substantial thought and that he will address this through the existing rebuttal evidence process. He did not consider attempting to address it in part at this conference to be appropriate.*
>
> ***2.*** *In light of SE's position FC and PO have addressed the question as follows*
>
> ***3.*** *FC and PO consider the potential costs of the variation to include:*
>
> *i. The financial costs of the contribution and the administration of the new regulations potentially leading to higher house prices and a reduction in affordability for everyone except those helped by the Community Housing Providers (currently the QLCHT)*
> *ii. The potential reduction in the total supply of both housing and specific affordable housing*
>
> *iii. Potential slowdown in construction activity or housing supply*
> *iv. Reputational costs to QLDC (its relationship with stakeholders) and potential loss of collaborative/goodwill provision of affordable houses beyond the minimum that the variation would impose.*
> *v. Potential impacts on the district's ability to meet its obligations under the NPS-UD to provide "at least" sufficient capacity to meet demand "at all times"*
> *a. How likely are they?*
>
> *PO and FC believe the above costs are very likely*

89 It makes no sense to treat new residential housing developers as part of the problem, as they are a critical part of the solution (by providing new housing to meet ongoing growth/ demand, and taking on the risks to do so). As a result, the Variation could have serious unintended adverse effects, including increasing the price of new homes and eroding affordability for

the broader market.[68] This is similar to the concern of the Auckland IHP cited by Council's legal submissions, that the proposed affordable housing provisions *would likely reduce the efficiency of the housing market due to effectively being a tax on the supply of dwellings and be re-distributional in their effect.*[69]

90 The IHP made further findings as to the likely adverse effect of the proposed Auckland Unitary Plan affordable housing provisions that resonate with the concerns in respect of this Variation:

> For these reasons the Panel considers that housing affordability is best addressed in the Plan as primarily housing supply and housing choice issues and that consideration of housing affordability needs to permeate the provisions throughout the Plan. This is in contrast to the retained affordable housing provisions in the notified Plan that treat affordability separately from other land use provisions. **Furthermore, these provisions would effectively be a tax on the supply of housing and therefore would tend to impede rather than assist an increase in that supply.**[70]

91 In terms of unintended consequences, putting aside corporate evidence which confirms the costs of the variation will largely be passed on to the market, the issue of disparity among different types of developers and in different areas has not been acknowledged. For example:

(a) Affected developers may choose to wait to develop, at the very least until appeals are resolved on the variation and the process works through to finality[71], and because their counter-part operative zoned land developers are able to continue to subdivide, and develop under operative zoning conditions.

(b) Developers may choose to wait until market conditions change, further planning uplift eventuates, or other taxation policy incentives are mandated.[72]

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[68] Evidence of Mr Colegrave at [130b].

[69] Inclusionary Housing Variation Council's Legal Submissions, 23 February 2024, [8.3] citing the IHP Panel Report to AC Overview of Recommendations 22/7/2016 at page 59

[70] IHP Panel Report to AC Overview of Recommendations 22/7/2016 at page 59

[71] Evidence of Mr Osborne, at [65a]

[72] Evidence of Mr Ries at 9 – where neither the price paid by developers falls nor the price of developed sections rises, then there is simply less residential development.

(c) The additional tax burden results in commercial unviability, stopping residential development projects, or the burden of the tax is spread is passed on to purchasers.[73]

(d) Mr Colegrave considers that the complexity of the proposed financial contribution rules, coupled with the financial challenge of the contribution required in those rules, will deter some development.[74]

92 Overall, it is submitted that a further layer of tax[75] will have the effect of reducing or deferring affordable housing supply, in direct contradiction to the stated objectives of the Variation.

Solutions proposed by Submitters

93 The Submitters propose solutions to the issue of affordable housing, based upon a more in-depth analysis.

94 Mr Serjeant concludes:

> [19] If an RMA option is to be pursued then I support a much broader approach, similar to Mr Ferguson's Option 1, where the contribution target is broader, where incentives are provided, and where the Variation is linked to other strategic initiatives such as the intensification variation. Failing modifications to the proposed Variation, I support a general rating approach.

95 Evidence for other submitters are aligned.

> The best solution is likely to be multi-faceted and require coordinated input from Central Government and other key stakeholders. Options that encourage the provision of smaller homes on smaller sections, at both pace and scale, seem the most effective and efficient ways to address the problem, so I strongly support such initiatives on economic grounds[76].
>
> Tighter, district-wide control of land use activities such as residential visitor accommodation is also an option. Applying a specific development contribution across all sectors in the District would also be a more

[73] Evidence of Mr Stalker, at [23].

[74] Evidence of Mr Colegrave, at [40], [51].

[75] As categorized by Mr Oliver's evidence

[76] Evidence of Mr Colegrave, at [30].

> equitable application of some sort of targeted fund-raising exercise.[77]

Power to transfer money received

96 The Panel has queried whether the proposed transfer of revenue to the Trust is lawful/within Council's powers. While counsel has not completely landed on the answer to this question yet, the below is included to be of assistance, in terms of what we have determined so far.

97 Section 12 of the Local Government Act 2002 confers the "power of general competence" on local authorities. It authorises territorial authorities to undertake any activity that a legal person or body corporate may undertake, subject to any other enactment and the general law and an obligation to act wholly or principally for the benefit of its district (or, in the case of a regional council, for the benefit of all or a significant part of its region, and not for the benefit of a single district).

98 QLDC appears not to be precluded from transferring ratepayer money to a trust or other third party by any enactment or the general law. There are numerous examples of QLDC transferring ratepayer money to trusts in the form of community grants in response to requests made through submissions or commitments made in the 2021-2031 Ten Year Plan (for example, the agreement between QLDC and Wanaka Community House Charitable Trust for the development and maintenance of the Wanaka Community Hub). The Court of Appeal in *Commissioner of Inland Revenue v Wellington Regional Stadium Trust* considered a commitment by Wellington Regional Council to provide ratepayer funding to the Wellington Regional Stadium Trust (established on the initiative of the Wellington City Council) for a new sports stadium in Wellington. The Court of Appeal did not make any statements or findings to the effect that the transfer of ratepayer money to a trust was in anyway unlawful but noted the consequences including "liability for income tax and the requirement that any funding provided by the Wellington City Council (WCC) be on 'arm's length terms' if the trust was a council-controlled trading organisation." (*Commissioner of Inland Revenue v Wellington Regional Stadium Trust* CA164/04, 6 September 2005 at [1]).

99 This is consistent with the Environment Court' statement in *Central Otago District Council and others v Otago Regional Council* Dec No C 204/2004 at [31]:

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[77] Evidence of Ms Hoogeveen, at [3.10].

I agree that financial contributions cannot legally be directed to be paid straight to another party. 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.

Conclusion

100 In summary, while the Submitters support the Objectives of the Variation, the proposed methods to achieve the Objectives are not supported by evidence, and run the real risk of unintended adverse rather than positive outcomes on the issue of affordable housing. It is likely there are better alternatives that would achieve better outcomes for the district's communities.

Dated this 1st day of March 2024

Yours faithfully
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Appendix – Variation is *ultra vires* the RMA

Executive Summary

1 This Appendix sets out our submission on the legality of QLDC's Variation for Inclusionary Housing (**Proposal**) under the Resource Management Act 1991 (**RMA**).

2 In summary we submit:

(a) The Proposal's requirement for monetary or land contributions exceed the scope of what is provided for under section 77E and s108(10), read in light of s108AA of the RMA and the established '*Newbury* tests'[78] for consent conditions, including financial contributions;

(b) Despite the introduction of s108AA(5) post-dating previous inclusionary zoning case law, the broader principles of *Newbury* continue to apply. To be *vires* any condition, including financial contribution conditions must be for a planning purpose and not an ulterior one, must fairly and reasonably relate to the development, and must otherwise not be unreasonable;

s77E and s108(10) to be read in light of s108AA(1) and the 'Newbury tests'

3 Section 77E gives local authorities the power, generally, to make rules requiring financial contributions for all activity classes, except prohibited. S77E (2) specifies what a valid financial contribution rule must address:

> (a) the purpose for which the financial contribution is required (which may include the purpose of ensuring positive effects on the environment to offset any adverse effect); and
>
> (b) how the level of the financial contribution will be determined; and
>
> (c) when the financial contribution will be required.

4 The scope of financial contribution conditions for activities that require consent, is then constrained by s108(10) and s108AA(1)(b), plus the *Newbury* tests established in case law. Logically, the rule providing for the financial contribution condition is also constrained.

5 Applying these two sections in sequence, first s108(10) restricts financial contribution conditions by its subclauses (a) and (b):

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[78] *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731.

> (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
>
> (b) the level of contribution is determined in the manner described in the plan or proposed plan.

6 Section 108AA (1) (b) restricts the scope of financial contribution conditions further, by requiring that the condition is directly connected to one or more of the following:

> (i) an adverse effect of the activity on the environment:
>
> (ii) an applicable district or regional rule, or a national environmental standard:
>
> (iii)a wastewater environmental performance standard made under section 138 the Water Services Act 2021; or

7 While we note that the introduction of s108AA was effectively a codification of (part of) previous consent condition case law, it is not a complete replacement of the same. It is submitted the broader principles of *Newbury* still apply to conditions including financial contribution consent conditions.

8 Financial contribution conditions (and therefore provisions in plans allowing for those) must at least still satisfy the *Newbury* tests which endure beyond the introduction of s108AA. Case law postdating the introduction of this section still applies the common law test in addition to / on top of s108AA, in respect of conditions generally.[79] [it appears that Parliament's introduction of s108AA(5) in 2017 did not intend to exempt financial contribution conditions from the connection to adverse effects per se, but rather was aimed at the ability to offer such conditions on an augier basis]. In any event, the two further *Newbury* grounds being conditions for a planning purpose not an ulterior one, and not otherwise unreasonable, still stand.

9 Section 77E as it applies to rules requiring financial contribution consent conditions must be read in light of the more restrictive requirements of

[79] See for example, *Wilkins Farming Co Ltd v Southland Regional Council* [2020] NZEnvC 155, at [21] – [26], however noting this was not specifically in the context of financial contribution conditions (of which no case law on point has been found since the 2017 amendment), but it does confirm that for conditions to be lawful they must comply with s108AA and meet the *Newbury* tests.

s108(10) and s108AA, otherwise they would effectively be nullified at the stage of implementation.

10 The wording of s108(10) appears to be inclusive in that it states:

> (10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless-
>
> > (a) The condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and

11 Section 77E was introduced later into the Act in 2021 and uses similar phrasing to 108(10) although could be construed as being slightly broader on a literal reading:

> **77E Local authority may make rule about financial contributions**
>
> (2) A rule requiring a financial contribution must specify in the relevant plan or proposed plan—
>
> > (a) the purpose for which the financial contribution is required (which may include the purpose of ensuring positive effects on the environment to offset any adverse effect); and
> >
> > …

12 However, the addition of the wording of 'which may' in s77E compared to s108(10)(a) is likely to be of no consequence given:

(a) There is limited commentary or explanation of the introduction of this change introduced in the 2021 RMA amendments, beyond that the amendment clarifies that a territorial authority may include a provision in a district plan to charge financial contributions for any class of activity, excluding prohibited activities[80].

(b) The Report from the Environment Select Committee to the House, December 2021 noted:

> the RMA authorises financial contributions and that they provide funding to address the adverse effects **of a development on the environment**. We were advised that the use and application of financial contributions has been ambiguous, despite case law confirming that financial contributions can be charged for permitted activities. The bill would make it clear that a territorial authority may include provisions in its district plan to charge financial contributions for any class of activity, excluding a prohibited activity.[81]

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[80] Environment Select Committee Report to the 53rd House of Representatives on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill, dated December 2021

[81] https://www.parliament.nz/resource/en-NZ/SCR_118070/e14e3e97b6f73854163fcd0ba2df2d4b62e4538f

(c) As set out above, both s77E and s108(10)(a) are curtailed by the requirement to satisfy the *Newbury* tests; and

(d) As discussed by the High Court in *Infinity,* expanded on below, affordable housing contributions may only be *vires* where it is demonstrated that the proposed use or development of land has the effect, or the potential effect, of adversely affecting the issue of affordable housing.

PC24

13 Prior to the PC 24 decision[82], as it relates to this Variation, the context was set by decisions such as *Remarkables Park Limited v Queenstown Lakes District Council,* Environment Court, C161/ 2003 and *Alexandra District Flood Action Soc Inc v Otago RC*, Environment Court, C102/05,

14 The2003 *Remarkables Park* decision obiter remarks are below (the first procedural decision on the 1998 financial contribution provisions):

> [5] … In submissions counsel stated that a contribution may be imposed for purposes other than mitigating adverse effects of a particular subdivision as long as those purposes are specified in the Plan are in accordance with section 108(9*): McLennan v The Marlborough District Council*. We respectfully question whether that is correct**: in our view it is highly likely that financial contributions must (approximately) relate to the effects caused on public services and facilities by a new subdivision and/or development. However we do not have to decide that point here**[83].
>
> [32] There is an elusive phrase in section 108 (10) of the Act as to the purpose of financial contributions needing to be specified in a plan:
>
> ... (*including* the purpose of ensuring **positive effects** on the environment to offset any adverse effects) ...
>
> [Our emphasis]
>
> In our view it is important to understand the relationship of financial contributions to other ways of achieving positive effects under the RMA.
>
> [37] … section 108 of the RMA then contemplates "financial contributions" (upon the granting of resource consents). As we have stated, these are not defined in the RMA. However, they are clearly not usually contemplated to be for services to be provided on the land being subdivided and/or developed (those are normally the landowner's/developer's responsibility) - but for services off-site, that is from the site's boundary and radiating outwards. The very name of these specialist (Pigovian-type) taxes suggests that only a contribution not the full cost of such services needs to be paid by the landowner/developer. Further**, these financial contributions are subject to the Newbury tests that they have:**

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[82] *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council*, NZRMA [2011], 321

[83] *Remarkables Park Limited v Queenstown Lakes District Council,* Environment Court, C161/ 2003, at [5].

(a) to be for an RMA purpose not an ulterior one;

(b) to fairly and reasonably relate to the development authorised;

(c) to be reasonable;

- see *Housing Corporation of New Zealand v Waitakere City Council,* Contributions to roads, sewerage, water supply, reserves usually fit within RMA purposes. Contributions towards housing, hospitals, education and libraries are not usually required. However, when a council has particular regard to the maintenance and enhancement." of the quality of the environment and the breadth of the latter term, then the social, economic, aesthetic and cultural conditions which affect people and communities appear to allow contributions to be levied for these types of buildings and the institutions they house.

15 In the *Alexandra District Flood Action Society* decision Judge Jackson's division stated that the purpose of financial contributions to be paid by a consent holder is 'partly mitigating or compensating for damage from the outer ripples or waves of effects that are **caused by dropping a new activity into the pond which is the receiving environment**'[84].

16 Turning to PC 24 the High Court assessed the purpose of PC 24 as being within the functions of the Council under s31 and in light of the purpose of the Act generally. The Court confirmed that there must be a link between the adverse effects of the use or development of the land and the objectives, policies and methods that are established to achieve integrated management, in order comply with section 72 and be within the scope of territorial authority functions under section 31.

> [41] A literal reading of s 31(1)(a) indicates that one of the functions of a territorial authority is to establish objectives, policies and methods to achieve integrated management of the effects of the use or development of land within its district for the purpose of giving effect to the Act. It goes without saying that **there must be a link between the effects of the use or development of the land and the objectives, policies and methods that are established to achieve integrated management.** Moreover, that the purpose must be to give effect to the Act.
>
> [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**.[85] **Thus the requisite link between the effects and the instrument used to achieve**

[84] *Alexandra District Flood Action Soc Inc v Otago RC*, Environment Court, C102/05.

[85] Above, n3, at [41] – [42].

> **integrated management exist.** And for reasons that will follow, its purpose is to give effect to the Act.
>
> [43] Similar conclusions can be reached with reference to s 31(1)(b). Under that paragraph 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 para (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.**

17 The Court went on to assess the ability for imposition of financial contribution consent conditions under s108(10):

18 The Court noted the requirements for consent conditions (including financial contributions) in light of established case law on s108, that conditions must fairly and reasonably relate to the development:

> [55] I accept, of course, that the potential reach of these powers needs to be assessed against the constraints described by the Supreme Court in *Waitakere City Council v Estate Houses Ltd:*
>
> [61] ... In order for that requirement to be validly imposed it had to meet any relevant statutory stipulations, and also general common law requirements that control the exercise of public powers. Under these general requirements of administrative law, conditions must be imposed for a planning purpose, rather than one outside the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest. **The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.**

19 The High Court ruling is therefore not a 'green light' *per se* for financial contributions for affordable housing, but rather, explicitly required any such provisions to establish the causal nexus between adverse effects of a housing proposal and positive offsetting effects enabled through contributions, and in light of whether such conditions would fairly and reasonably relate to a proposal requiring consent. As noted above, we consider that these principles endure despite the introduction of s108AA(5) in requiring that such conditions are for a planning purpose, and not unreasonable (being the broader *Newbury* tests), if not also still requiring a demonstrated connection to adverse effects of the proposal.

20 It was also a fact-specific judgment in the context of PC 24, which is distinguishable in important ways to the current Proposal, particularly in terms of prescribing a form of calculating adverse housing supply or demand effects:

(a) PC 24 required that an impact on the affordable housing market be demonstrated; it required specific assessment of the effects of a development on the supply of, and demand for, affordable housing (see pol 1.1 and Appendix 11). Appendix 11 in particular required a formulaic assessment of the generated demand for affordable housing from particular expected land or building uses. If a development established no adverse effects on affordable housing demand (i.e. less than 1 household) then no contributions were required. This was summarised by the High Court at [11];

(b) The current Proposal, by comparison, is a blunt instrument which seems to assume all brown and greenfield development in almost all zones creates an adverse effect on supply of affordable housing, and requires contributions accordingly.

(c) The High Court decision on PC24 is therefore distinguished on the facts given the Variation targets activities which have no causal nexus to adverse effects being mitigated or offset.

21 The *Newbury* rationale lends weight to the analogy in this Proposal, that the imposition of a financial contribution that will be used for affordable housing, on developers creating a two-lot (or greater) subdivision, or building dwellings, is not a **'planning purpose' that fairly and reasonably relates to the development activity or effect.**

Whether the current Proposal establishes the nexus between positive effects to offset adverse effects

The Proposal as currently drafted targets development across brownfield and greenfield zones, therefore the question is whether any form of subdivision or addition of residential floorspace in those identified areas has an adverse effect on the provision of affordable housing supply in the District. One can accept the direct adverse effect on associated matters, such as infrastructure and traffic generation, which may be the subject of valid contributions, however the same causal nexus is not made out in respect of the relevant adverse effect of residential development on the supply of affordable housing.

22 This particular Proposal requires no effects assessment at the consenting stage to determine adverse effects of a development proposal on affordable housing supply. Council has not sought to establish a nexus to any

mitigating or positive effects to result from financial contributions taken. The Proposal is therefore *ultra vires* the RMA, and in particular contrary to the expression and intent of section 77E when read in light of s108AA and associated s108 case law on consent conditions, given that the Proposal will not create a mechanism of ensuring mitigating or positive offsetting effects in respect of adverse effects of the consented activity.

Ultra vires the RMA – therefore an unauthorised tax

23 Another way of looking at this question is from the other direction. Assuming acceptance that the proposal is correctly charactised as a 'tax', as per Mr Oliver's expert opinion, if this tax is not authorised by the RMA, what is the consequence?

24 As recorded in the Court of Appeal decision *Estate Homes Ltd v Waitakere City Council [2006] NZRMA 308, [2006] 2 NZLR 619*

> **[186]** With respect to the view of Chambers J, we consider that the Council cannot extort the creation of a public work without compensation by demanding it as the price of consent to subdivision. Certainly, as Chambers J argues, Estate was not bound to proceed with its subdivision. But if it chose to exercise its right to do so in accordance with the law it was not liable to be taxed for the privilege. As Professor Joseph observes in his discussion of the principles (Constitutional and Administrative Law in New Zealand (2nd ed)909):
>
> The *Local Government Act 1974* [s 690A] codifies the common law against extra-parliamentary taxation.
>
> > **[187]** That is an expression of the principle now stated in s 22 of the ***Constitution Act 1986*****, that:**
> >
> > **It shall not be lawful for the Crown, except by or under an Act of Parliament (a) To levy a tax …**
>
> which must apply a fortiori to a local council.

25 In other words, only Parliament can levy a tax unless it has passed an Act of Parliament that authorises another entity to levy the same. From the tax angle this is also echoed and confirmed in the *Infinity* decision:

> [57] Finally, I should respond to the appellants" submission based on the public law principle that no tax or charge should be levied without the proper authority of Parliament. Particular reliance was placed on *Harness Racing New Zealand v Kotzikas* in which the Court said: 20
>
> [95] We are of the view that the fundamental principle in delegation cases is put on a sounder basis by the House of Lords in the *McCarthy & Stone* case than it was by the

> divided Court in *Campbell v MacDonald.* **That is: a power to levy may arise by express words or necessary implication in the sense of that term as given by Lords Lowry and Hobhouse.**
>
> If PC24 is to be properly regarded as giving rise to a "power to levy" then it is my view that the express language that Parliament has used in the RMA shows that the statute must have intended an instrument like PC24 to have been within its scope (subject to scrutiny on the merits). In other words, it is included by necessary implication. Any other interpretation would undermine the full range of powers that Parliament intended to confer on territorial authorities in relation to district plans.

26 The statutory power to levy is of such import, that it may only arise by express words. It is respectfully submitted that there is no such clear and express words in the RMA that would empower the imposition of the proposed financial contribution.