BEFORE HEARING COMMISSIONERS
IN QUEENSTOWN | TĀHUNA ROHE

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	the proposed "Inclusionary Housing" Variation to Queenstown Lakes District Council's Proposed District Plan
AND IN THE MATTER OF	submissions on the Variation
BETWEEN	**CARDRONA VILLAGE LIMITED** ("**CVL**")
	KINGSTON FLYER LIMITED ("**KFL**")
	Submitters
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL**
	Planning authority

REPRESENTATIONS ON BEHALF OF CARDRONA VILLAGE LIMITED AND KINGSTON FLYER LIMITED

Before a Hearing Panel: Jan Caunter (Chair), Jane Taylor, Ken Fletcher and Lee Beattie

Introduction

1. I am project managing various matters for each of Cardrona Village Limited ("**CVL**") and Kingston Flyer Limited ("**KFL**"),[1] including their participation in these proceedings. They are separate entities, with interests in different locations (Cardrona, and Kingston), but share many common concerns.

2. CVL and KFL have not provided evidence, but provided detail in their written submissions as to their respective landholdings, and key matters of background. Refer:

   (a) *CVL: Submission [3]-[7]*. In addition, note:

      (i) The Village consent RM190669 allows:

         - 264 hotel rooms (5,510m^2);

[1] And its associated company Kingston Lifestyle Properties Limited ("KLP"). The two are referred to interchangeably in these representations.

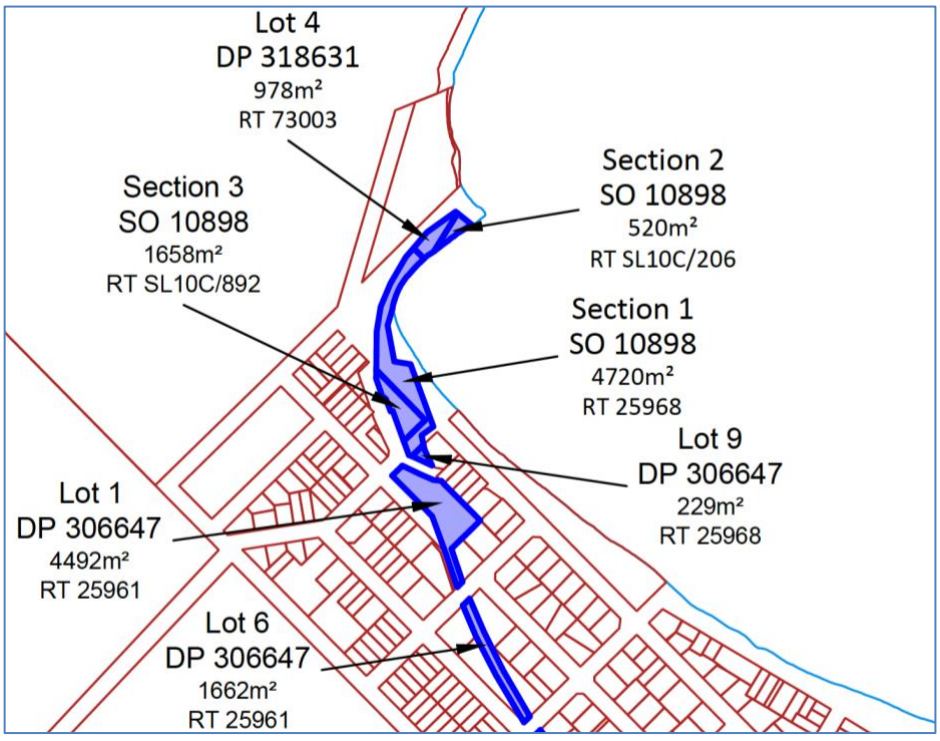
- 72 serviced apartment units (6,245m^2);
- 58 hostel beds (9 rooms plus managers flat) (445m^2); and
- 38 residential units (apartments and dwellings).

(ii) The Lodge Consent, extended lapse in ET061204, original consent RM061204 allows:

- a lodge for visitor accommodation purposes which includes a spa facility and tennis court; and
- 48 separate units to be used for visitor accommodation and residential purposes and the construction of a manager's residence.

Refer also CVL site plan, **attachment 1**.

(b) *KFL: Submission [4]-[9]*. While the Kingston Flyer's history and its return to service is well known, its development site at the north-western end of Kingston is likely to be less well known or understood. Refer also KFL land plan, **attachment 2**, the north-western end cropped below:



Key issues

The Plan Change is not one for Inclusionary Housing

3. The proposed plan change does not in fact promote “Inclusionary Housing”, as it purports to do. Unfortunately for the Council, saying something doesn't make it so:[2]

> … In discussing the question, he used to liken the case to that of the boy who, when asked how many legs his calf would have if he called its tail a leg, replied, ” Five,” to which the prompt response was made that *calling* the tail a leg would not *make* it a leg.

4. Rather: "If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck."

It is a tax, and is out of jurisdiction

5. What is proposed is:

   (a) a tax; and

   (b) goes beyond the purpose of the RMA.

6. It cannot therefore be the subject of financial contribution provisions.

7. In respect of the plan change imposing a tax, you now have specific evidence before you on this matter: eg Robin Oliver, called by Glenpanel Developments Limited.

This evidence distinguishes the PC24 proceedings

8. In the PC24 proceedings:

   (a) there was no finding of the High Court or the Environment Court that the plan change in those proceedings constituted a subsidy or tax (as the proceedings arose by way of a preliminary determination);

   (b) the High Court, in granting leave to appeal to the Court of Appeal, but refusing to grant leave on questions relating to whether that plan change amounted to a “subsidy” or “tax”, stated:

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[2] *Reminiscences of Abraham Lincoln by distinguished men of his time / collected and edited by Allen Thorndike Rice* (1853-1889). New York: Harper & Brothers Publishers, 1909, at p 242.

> … the issue is probably a factual issue that can, if necessary, be determined at the substantive hearing

9. Nonetheless, the High Court granted leave to appeal on the following question:

> Was the High Court right when it ruled that Plan Change 24 came within the scope of the RMA?

10. Its reasons were:

> I have no doubt that [this] question … gives rise to a question of law of general or public importance. I said as much in my decision. There does not appear to be any authority; at least of any Superior Court, on the topic. Notwithstanding that the determinations have been in the context of a preliminary issue, PC 24 itself provides a context for the vires issue to be determined. PC 24 speaks • for itself as to the mechanism that has been used and its intended purpose. Whether it should be upheld on the merits is an entirely different matter. While Mr Cunliffe was strongly opposed to the question going to the Court of Appeal, he accepted (responsibly) that the issue was capable of determination by that Court.
>
> Turning to the question of public or general importance, it is difficult to avoid the conclusion that the lawfulness or otherwise of PC 24, especially to the extent that it involves financial contributions (and I am using that terminology in a loose sense rather than in the technical sense under the RMA), will be of considerable interest to other Territorial Authorities. They are likely to be interested in how far they can go. In other words, the Court of Appeal decision is likely to be of considerable significance well beyond the Queenstown Lakes District.
>
> …
>
> … in the end I have been driven to the conclusion that now we are on this path of preliminary issues the sensible course is to grant leave for [this] question … to be determined by the Court of Appeal.

11. A copy of the High Court's decision granting leave to appeal is provided as **attachment 3**.

12. So, the Council, and the Panel, should not take any comfort from the previous High Court decision that the Council's lawyer places significant reliance on. The jury is still out, and even if the current plan change is lawful, it is almost inevitably destined to reach the higher appellate courts to have this determined with any real authority. That is a cost that needs to be factored into any analysis.

13. In the meantime, this Panel will need to form a view as to whether the plan change is within scope of the RMA, on the basis of the evidence before it that it is a tax.

Only Parliament can authorise a tax

14. Parliament endorsed guide, *Parliamentary Practice in New Zealand*,[3] states that:

> Taxation must be authorised by Parliament, either directly in primary legislation or by regulations authorised by primary legislation. … The prohibition on taxation without parliamentary authority applies to direct taxes such as income tax and to indirect taxes such as goods and services tax and customs and excise duties. The Regulations Review Committee has endorsed an Australian court's definition of a tax as any levy that is compulsory, for public purposes, and is legally enforceable.[4]

15. The protection that only Parliament can impose taxes upon the public is a comforting one. Its message to the citizenry is "Have no fear. You are protected. Nobody, no agency, no authority, can purport to tax you unless we, unless Parliament, have agreed. This has longstanding application, since the Crown's prerogative to impose taxes was removed, in the (English) Bill of Rights 1689. For example, see *Attorney-General v Wilts United Dairy Ltd*:[5]

> No power to make a charge upon the subject for the use of the Crown could arise except by virtue of the prerogative or by statute, and the alleged right under the prerogative was disposed of finally by the Bill of Rights (1 W. and M., sess, 2, c.2). It may be convenient at this stage to remind ourselves of this statute, an act for declaring the rights and liberties of the subject. **After reciting that the late King, by the assistance of divers evil counsellors, judges, and ministers, employed by him, did endeavour to subvert and extirpate … the laws and liberties of this kingdom … by levying money for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by Parliament ... all which are utterly and directly contrary to the known laws and statutes and freedom of this realm, the lords and commons declare that levying money for or to the use of the Crown [as above] is illegal**; ...
>
> … **We are being protected from the evil counsellors, ministers and judges who want to subvert our liberties**.

16. We need your, the Panel's, protection from the evil designs of the Council to subvert the liberties of landowners who wish to develop their land for housing by imposing a tax – that only Parliament has the prerogative to

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3 McGee, David, *Parliamentary Practice in New Zealand*, 4th ed., edited by Mary Harris and David Wilson, Oratia Books, Auckland, 2017: Refer https://www.parliament.nz/mi/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-32-revenue/.

4 As cited in *Parliamentary Practice in New Zealand*: Regulations Review Committee, report on constitutional principles to apply when Parliament empowers the Crown to charge fees by regulation (25 July 1989) [1987–1990] AJHR I.16C at [6.9]; Regulations Review Committee Investigation and complaints relating to civil court fees regulations (17 June 2002) [1999–2002] AJHR I.16M at 20; *Air Caledonie International v Commonwealth of Australia* (1988) 165 CLR 462.

5 (1921) 37 T.L.R. 884, 886. Cited in *Taxation and the Constitution*, Lindsay McKay, (1985) 15 V.U.W.L.R. 53 at 55.

impose. The Panel is the current gatekeeper to protect landowners in this district from unlawful taxation by the Council. Even though the Council may be well-meaning, that cannot make what is unlawful lawful, and it is a criminal waste of resources for both the Council and its ratepayers. It would be no surprise if it has cost the Council into the millions to pursue this folly, even just to this point, with further millions of costs to see it through to completion.

17. While the decision on the Plan Change will ultimately be the Council's, convention (and all fairness and common sense) would require the Council to withdraw (or decline[6]) the Plan Change if that was your recommendation to it. This is what the submitters that I represent wish to see.

Council's legal advice

18. It is always frustrating when a Council fails to be transparent to its community by refusing to disclose its legal advice – despite that being the basis on which it is making decisions that affect people and communities.

19. Yet, despite earlier encouragement from the Panel, the Council still hides behind the shield of legal privilege, rather than being upfront about its advice about the challenges and the risks of its chosen path.

20. There is no reason to dispel the suspicion that the Council's early advice on the Plan Change was not supportive of it, or what was disclosed was not sanitised in some way. An opinion for internal client consumption, that honestly appraises the client of the merits of its position, is quite different to an opinion that is promoted publicly or legal submissions made by Counsel at a hearing.

21. At the latter stage, Counsel's role is to advocate for the Council's position, subject only to their overriding duty to the Panel. Despite that duty, that allows quite a latitude to Counsel to put their client's position.

22. In respect of the former, ie the release of the "*Affordable housing – alternative mechanisms*" Legal Opinion (**attachment 4**), I note:

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6 Noting that withdrawal would probably be the better option, as that is less amenable to challenge, and would provide all parties with greater certainty, most quickly.

(a) The brief given to its authors was refused to be disclosed. We have no idea: (i) what the detailed instructions were; or (ii) whether the advice is a summary or modified version to what was originally provided to the Council.

(b) The lead author of the opinion was Mr Whittington, who is Counsel for the Council in respect of these proceedings. It would be a rare thing for any lawyer to publicly retreat from earlier advice, at least (as I have observed in my former practice) without significant pressure applied from a decision-maker, to elicit a concession.

(c) Mr Whittington summarised, at [3]: "that QLDC would face significant difficulties addressing the district's affordable housing issues through any of these alternative mechanisms", ie rates, development contributions ("**DCs**"), bylaws, or central government partnership agreements.

(d) While DCs and bylaws are probably not viable options, in respect of rates, Mr Whittington acknowledges at [6] that rates are a "powerful" funding tool, but appears to dismiss them as an option as:

(i) a general rate might not be "palatable politically" at [9];

(ii) in respect of a targeted rate:

(aa) he couldn't identify who a targeted rate would be levied on at [11] (despite multiple options under Schedule 2 of the Rating Act); and

(bb) significantly, he found, that:

> 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.

(e) This latter point is precisely what developers are saying to this Panel in respect of the tax proposed to be imposed under this Plan Change: that the additional costs will be passed on.

(f) No real thought or effort appears to have been given to partnering with central government.

Developing in Queenstown is already hard – don't make it harder

23. This Council needs to be doing more to push other levers (ie alternatives) to lower house prices.

24. For example, it could:

(a) rezone blighted land at Victoria Flats for resource recycling (including construction recycling) and construction support activities (eg storage of construction materials);

(b) include additional land to current zoning opportunities, such as at Spence Park adjoining the current Ladies Mile Variation area;

(c) work with developers proactively to advance workers' accommodation to fill that need;

(d) remove impossible to administer restrictions on visitor accommodation – if the market is flooded with hotels, air bnb, etc, then residential will become a more attractive proposition for developers and investors; and

(e) make the consenting process more streamlined and efficient, together with the engineering approvals process.

25. There is a myriad of initiatives that the Council could undertake, all of which would work with the development community, and not against it.

26. I urge you to consider these, and other alternatives, and ask for more information on them if necessary.

Newbury still applies

27. Section 108(2)(a) provides that a resource consent may include:

> … subject to subsection (10), a condition requiring that a financial contribution be made:

28. Under s108(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

(b) the level of contribution is determined in the manner described in the plan or proposed plan.

29. More generally, a condition in a resource consent cannot be imposed under s108AA(1) unless:

(a) the applicant for the resource consent agrees to the condition; or

(b) the condition is directly connected to 1 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 of the Water Services Act 2021; or

(c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

30. Aspects of s108AA(1) reflect the "*Newbury* test", which is a reference to common law requirements that planning consent conditions must be imposed for the purposes of the RMA, fairly and reasonably relate to the permitted development and not be unreasonable. They were expressed in this way in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

31. In respect of section 108AA(1)(b), and the use of the phrase "directly connected", this reflects, or, more likely, strengthens[7] the requirement of "logically connected" that was previously established by the Supreme Court in *Estate Homes* (and building on *Newbury*):[8]

> … We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are **logically connected** to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not for example relate to external or ulterior

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7 *Ngāti Whātua Orākei Whai Main Ltd v Auckland Council* [2019] NZEnvC 184 at (45] (Newhook PEJ).

8 *Waitakere City Council v Estate Homes Limited* (2006) 13 ELRNZ 33, at [66]. In *Estate Homes* the developer proposed to construct a road along the path of a designation. In its decision granting resource consent, Waitakere City Council required that the road be designed, formed and constructed to the standard of an arterial road. Recognising that there was a public benefit in doing so, a condition of consent determined the amount payable by the City Council for the work. At issue was whether the compensation payable was reasonable, and this turned on the appropriate standard of road that could reasonably be required for the subdivision.

> concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so.

32. While s108AA(5) states that: "Nothing in this section affects section 108(2)(a) (which enables a resource consent to include a condition requiring a financial contribution)", that cannot derogate from the more fundamental *Newbury* (ie common law) requirement that:

    (a) any condition (including a financial contribution condition) must be directly connected to an adverse effect;

    (b) any financial contribution rule must also itself (by parity of reasoning) be directly connected to an adverse effect of the activity to which it relates; and

    (c) must not be unreasonable.

33. *Newbury* also requires that a condition (and by parity of reasoning, a financial contribution rule) to be imposed for a resource management purpose.

34. If the Council's argument is taken to its logical conclusion (ie the purpose of the RMA is so broad, that it must allow the levying of a tax to require developers to contribute to the "social" goal of affordable housing), then the limits of financial contributions could have almost no limits. For example, the Council could decide that the cost of living is a social issue for the district, just like the cost of housing, and so impose contributions on developers to be put towards providing foodbanks, or petrol vouchers, school fees, or anything.

Practicalities – the RMA objection and appeal processes

35. Even if the Council ultimately succeeds in retaining its proposed financial contribution tax, I do not understand that it will result in proposals that seek to avoid the tax becoming prohibited. This means that it will be open for developers to challenge the imposition of a financial contribution tax in the circumstances of their consent. They may have any manner of reasons for doing so. For example, a developer may have a legitimate and demonstrable case (ie they can prove it with compelling evidence), that:

(a) imposing the financial contribution on their development will render it unviable - so the choice would be between no housing, or no tax;

(b) their development will incorporate affordable housing that is more certain, and integrated, than could be delivered by the Trust (for example because of the development's economies of scale) – while this would presumably still achieve the outcomes intended by the Plan Change, it will no doubt be subject to debate, uncertainty, etc – all introducing additional costs and delay to delivering housing (including affordable housing).

36. The reason every Tier 1 and Tier 2 council (except Western Bay of Plenty District Council) has shifted from a financial contribution regime to a development contribution regime is the cost and uncertainty of having to work through objections and appeals to financial contribution conditions imposed at the consent stage. My recollection is that this was the very reason development contributions were introduced in the first phase.

37. These are very real and practical issues, in terms of efficiency and effectiveness, that do not appear to have been considered to any great extent to date.

Closing comments

38. Developing is hard. It is also risky – particularly for small developers. The big players can afford to hold their land, and drip feed to the market.

39. Smaller players just can't do this – in order to address holding costs, consenting costs, and the like – just to get land consented and ready for development, they often have to sell down some of their landholdings to stay in the game. Even when consented, they have to wait for infrastructure to be provided before they can, in practice, proceed. This was the case, for example, with the Cardrona Lodge. If they cannot still make the economics work to fund the development then there is a risk of sale of the land to the bigger players, who can then sit on the land until it suits them.

40. This proposed tax is yet another cost on developers. On top of development contributions, and on top of rates (which impact on holding costs, as well as purchase prices).

41. The submitters I represent here today strongly urge the Panel to consider the issues they have raised, and think very carefully before recommending the Council continue its fraught financial contribution tax journey.

Project Manager
28 February 2024


N
TO WANAKA
CARDRONA VILLAGE SITE
SETTLEMENT ZONE
LAND TO BE ZONED
RURAL
CARDRONA VALLEY
GENERAL STORE
SOHO STREET
PROPOSED BRIDGE OVER RIVER
CARDRONA HOTEL
CARDRONA LODGE SITE
RIVERGOLD WAY
BENDRAE RESORT
RURAL ZONE LAND TO BE
ZONED SETTLEMENTS
CARDRONA VALLEY ROAD
CARDRONA RIVER
SETTLEMENTS ZONE
TO QUEENSTOWN
WAHI TUPUNA OVERLAY

Legend

lot boundary

Kingston Lifestyle Properties Ltd Land

N

Lot 4
DP 318631
978m²
RT 73003

Section 3
SO 10898
1658m²
RT SL10C/892

Section 2
SO 10898
520m²
RT SL10C/206

Lake
Wakatipu

Section 1
SO 10898
4720m²
RT 25968

Lot 9
DP 306647
229m²
RT 25968

Lot 1
DP 306647
4492m²
RT 25961

Lot 6
DP 306647
1662m²
RT 25961

Section 1
SO 7617
3040m²
RT 25961

Lot 2
DP 318661
3788m²
RT 73094

Lot 1
DP 318661
73.0600ha
RT 73094

0m 200m 400m 600m

SCALE BAR 1:10000

Client/Location:

Kingston Lifestyle Properties Ltd
Kingston

Purpose/Drawing Title:

Railway Land

Surveyed by:		Original Size:	Scale:		
Drawn by:	DB	A3	1:10000		
Checked by:			DO NOT SCALE		
Approved by:		Sheet No:	Revision No:	Date Created:	Reference:
		1	A	08/04/2020	0002 - 42

PLOT DATE: 08 April, 2020 - 10:35 PM BY: DB

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IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2012-425-000365
[2012] NZHC 750

BETWEEN		INFINITY INVESTMENT GROUP HOLDINGS LIMITED WILLOWRIDGE DEVELOPMENTS LIMITED ORCHARD ROAD HOLDINGS LIMITED Applicants
AND		QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing: 23 April 2012

Appearances: J Gardner-Hopkins for Applicants
R S Cunliffe and R Morris for Respondent

Judgment: 23 April 2012

ORAL JUDGMENT OF CHISHOLM J

Introduction

[1] This application for leave to appeal to the Court of Appeal arises from Plan Change 24 (PC 24) to the Queenstown Lakes District Plan. This change was introduced by the Queenstown Lakes District Council to address its concerns about affordable and community housing within its district. The proposed change was publicly notified in 2007.

[2] From the outset the plan was opposed by the applicants who were involved, or potentially involved, in property development within the district. Amongst other things they believed that PC 24 was ultra vires the Resource Management Act 1991

(RMA). However, the Council rejected their challenge in 2008. Following that they appealed to the Environment Court, raising numerous issues.

[3] Leave to argue preliminary issues concerning the vires of the change was sought. On 16 November 2009 the Judge Jackson decided:

> If PC 24 is ultra vires then there will be no need to have a substantive hearing as to the relative affordability of houses within the Queenstown Lakes District.[1]

He granted leave for preliminary issues to be determined prior to the substantive hearing.

[4] Those preliminary issues were determined in a decision delivered by Judge Whiting sitting alone on 9 July 2010.[2] The rulings decisions were:

(a) PC 24 fell within the scope of the RMA.

(b) The plan change did not come within the prohibition of s 74(3) of that Act.

(c) The Affordable Housing: Enabling Territorial Authorities Act 2008 did not prevent affordable housing from being addressed under the RMA.

On appeal to this Court it was alleged by the applicants that those rulings were wrong in law.

[5] I dismissed the appeal.[3] The applicants now seek leave to have the following questions determined by the Court of Appeal:

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[1] *Infinity Investment Group Holdings Limited v Queenstown Lakes District Council*, Decision C114/2009, 16 November 2009.
[2] *Infinity Investment Group Holdings Limited v Queenstown Lakes District Council*, Decision No. [2010] NZEnvC 234.
[3] *Infinity Investment Group Holdings Limited v Queenstown Lakes District Council*, CIV-2010-425-000365, 14 February 2010.

(a) Does the Resource Management Act 1991 empower Territorial Authorities to impose a subsidy or tax through their District Plans?

(b) In resolving this question should the scope of the functions of a Territorial Authority under s 31 of the RMA be read down?

(c) Does Plan Change 24 come within the scope of the RMA?

As a result of exchanges between counsel and the Bench some modifications to the questions were proposed. I will come back to that.

[6] Before addressing the three questions it is necessary to briefly refer to the delay between the lodging of the application for leave to appeal and this hearing. At the beginning of the hearing I enquired into this issue because I was concerned that there had been such a long delay.

[7] While Christchurch earthquake issues might have played a hand in the delay, it seems that the primary reason is that after the release of my decision and the lodging of the application for leave to appeal, the parties explored whether it might be possible to resolve their differences in some other way. That took time. In the end result it was not possible to resolve the matter. Given that situation, delay will not play a part in my decision.

The test

[8] By virtue of s 208 of the RMA, s 144 of the Summary Proceedings Act 1957 is to be applied. There is no significant dispute about the underlying principles which were summarised by the Court of Appeal in *R v Slater*:[4]

> ... there must be: (i) a question of law; (ii) the question must be one which, by reason if its general and public importance or for any other reason, ought to be submitted to the Court of Appeal; and (iii) the Court must be of the opinion that it ought to be so submitted...

[4] *R v Slater* 1997 1 NZLR 211 at p215

Questions (a) and (b)

[9] Early in the piece Mr Gardner-Hopkins responsibly accepted that question (c) is the critical question and that there are problems with (a) and (b).

[10] In respect of (a) Mr Gardner-Hopkins accepted that there was no finding of this Court or the Environment Court that the change constituted a subsidy or tax. He raised the possibility of question (a) being re-framed with reference to financial contribution rather than subsidy or tax. Mr Cunliffe also suggested that as matters stand the question whether a subsidy or tax arises probably is more a matter of fact than of law.

[11] It was also accepted by Mr Gardner-Hopkins that question (b) is closely related to question (a). In other words they should probably share the same fate.

[12] As I signalled during the course of argument, I am not prepared to grant leave in relation to question (a), whether in original or in modified form. These are my reasons. First, there were no findings of the Environment Court or this Court that PC 24 amounted to a subsidy or tax (or. indeed, that it constituted a financial contribution). Secondly, the issue is probably a factual issue that can, if necessary, be determined at the substantive hearing. Thirdly, and importantly, it is difficult to see what this question adds to question (c).

[13] Similar considerations apply to question (b). It does not add anything to (c) and, taken in isolation, is meaningless.

Question (c)

[14] During the course of the hearing there appeared to be a consensus that this question might be better expressed as

> Was the High Court right when it ruled that Plan Change 24 came within the scope of the RMA?"

While other modifications to that question were also canvassed, it is not necessary to

refer to those modifications. I proceed on the basis that the leave issue should be determined on the basis of the question as re-framed above.

Argument for the applicant

[15] My judgment accepted that the underlying issues are difficult and there are no earlier authorities; the question of law is capable of bona fide and serious argument; the change itself provides the necessary foundation for the question of law to be determined by the Court of Appeal (in just the same way as it has been determined by the Environment Court and this Court); and a determination on the merits is unnecessary for the question to be answered by the Court of Appeal.

[16] As to the question of general or public importance: the Court of Appeal decision will be of interest not only to Territorial Authorities outside the Queenstown Lakes District, but also to developers outside the region; this reflects that these days there are financial constraints on Territorial Authorities which might encourage them to look at plan changes similar to PC 24; and the fact that the question before the Court of Appeal is so broadly framed it makes it even more significant for other Territorial Authorities and developers.

[17] With reference to whether or not the discretion of the Court should be exercised favourably, Mr Gardner-Hopkins submitted: the question under consideration goes to the very heart of the matters before the Environment Court; while there are two sides to the argument, on balance the matter should go to the Court of Appeal now because if the appeal succeeds a three week hearing before the Environment Court (and associated costs) would be avoided; this was the whole purpose of attempting to resolve the preliminary issue; and we are now "stuck with" having the preliminary matter finally resolved by the Court of Appeal.

Argument for the respondent

[18] According to Mr Cunliffe question (c) does not constitute a question of law that fits within s 114 because it is too wide to have any meaning; in effect the Court of Appeal would be asked to consider the issue of validity in a vacuum without any

factual matrix; a question of law qualifying under s 114 could only arise after the substantive issues have been determined; the decision of this Court was nothing more than an orthodox approach to statutory interpretation; and what the applicants are seeking borders on a declaratory judgment.

[19] As to whether issues of general or public importance were involved: the issues under consideration are only relevant to the Queenstown Lakes District; this reflects the landscape and other issues peculiar to that district which have given rise to the pressure for affordable housing; if the issue had been of significance beyond that district it is extraordinary that it did not arise during the 20 years that the RMA has been in force; and in the absence of a determination on the merits, any determination of the Court of Appeal would not have any precedent effect.

[20] In relation to discretion Mr Cunliffe submitted: the interests of justice would be best served by refusing the application; there would be no detriment to the applicants if leave was refused because they could still, if necessary, pursue the issue to the Court of Appeal after the substantive hearing; and it would be desirable for the Court of Appeal to have the benefit of fully reasoned decisions of both the Environment Court and this Court before adjudicating on the issue.

Conclusions

[21] Although there was no mention in my decision about the desirability of the path that has been pursued (determining the preliminary issue of law first), it should not be inferred that I am particularly enthusiastic about the path that has been followed. Having said that, I have to accept the reality that preliminary issues have now been considered and determined by both the Environment Court and this Court. In other words, as Mr Gardner-Hopkins put it, we are "stuck with" the current situation.

[22] I have no doubt that question (c) gives rise to a question of law of general or public importance. I said as much in my decision. There does not appear to be any authority, at least of any Superior Court, on the topic. Notwithstanding that the determinations have been in the context of a preliminary issue, PC 24 itself provides

a context for the vires issue to be determined. PC 24 speaks for itself as to the mechanism that has been used and its intended purpose. Whether it should be upheld on the merits is an entirely different matter. While Mr Cunliffe was strongly opposed to the question going to the Court of Appeal, he accepted (responsibly) that the issue was capable of determination by that Court.

[23] Turning to the question of public or general importance, it is difficult to avoid the conclusion that the lawfulness or otherwise of PC 24, especially to the extent that it involves financial contributions (and I am using that terminology in a loose sense rather than in the technical sense under the RMA), will be of considerable interest to other Territorial Authorities. They are likely to be interested in how far they can go. In other words, the Court of Appeal decision is likely to be of considerable significance well beyond the Queenstown Lakes District.

[24] Having concluded that there is jurisdiction to grant leave it is necessary to consider whether the Court's discretion should be exercised in favour of granting leave. I can readily see why both sides have strongly supported their competing stances.

[25] From the point of view of the applicant, if the appeal to the Court of Appeal succeeds it will save the time and expense of a lengthy Environment Court hearing. Obviously that would be a very costly hearing, involving the cost of experts as well as lawyers. While Mr Gardner-Hopkins could not exclude the possibility of PC 24 re-surfacing in some other way if the appeal succeeded, that possibly is too speculative for it to receive much weight at this point.

[26] On the other hand, from the point of view of the Council, if the appeal to the Court of Appeal fails, that will simply be a further illustration of the folly of pursuing these preliminary issues. It would be much better to get on and determine the substantive matter and, if necessary, the Court of Appeal can resolve any remaining issues of law after that.

[27] This is a relatively finely balanced matter, but in the end I have been driven to the conclusion that now we are on this path of preliminary issues the sensible course is to grant leave for question (c) to be determined by the Court of Appeal.

Result

[28] The application for leave to appeal is granted. The question to be determined by the Court of Appeal is:

> (c) Was the High Court right when it ruled that Plan Change 24 came within the scope of the RMA?

Costs

[29] Mr Gardner-Hopkins has indicated that he does not seek costs on this application and I applaud that approach. This has been a reasonably finely balanced matter where both sides have been pursuing plausible arguments. It is appropriate that costs lie where they fall.

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Legally privileged and confidential

Memo

To:	Queenstown Lakes District Council
From:	Nick Whittington and Mitchell East
Date:	7 July 2021
Subject:	**Affordable housing – alternative mechanisms**

Introduction

1 Queenstown-Lakes District Council is considering incorporating affordable housing provisions to its proposed district plan.

2 You have asked us to provide advice on whether there are any alternative mechanisms that QLDC could use to address housing affordability issues in its district. We have considered whether housing affordability could be addressed via general or targeted rates under the Local Government (Rating) Act 2002 (**Rating Act**), by development contributions under the Local Government Act 2002 (**LGA**), through bylaws, or through partnership arrangements with central government.

3 We consider that QLDC would face significant difficulties addressing the district's affordable housing issues through any of these alternative mechanisms.

QLDC proposal

4 The key aspects of QLDC's affordable housing proposal are:

(a) QLDC is proposing to introduce district plan provisions with the objective of providing "affordable housing for low to moderate income households in a way and at a rate that assists with providing for social and economic well-being and managing natural and physical resources".

(b) Subdivision or development that is proposed to contain residential lots or units and which provides an affordable housing contribution in accordance with certain standards is a permitted activity. Otherwise, subdivision or development is a discretionary activity for which a resource consent is required.

(c) There are standards proposed for calculating the amount of an affordable housing contribution. Speaking generally, they require:

(i) Residential subdivisions (depending on the size and location) to provide a monetary contribution, calculated as a percentage of the sale value, to QLDC, or to provide a percentage of the serviced lots to QLDC for no consideration.

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(ii) Developments that fall short of creating one new unit – in urban growth boundaries or other Residential Zones outside urban growth boundaries – to provide a monetary contribution (the lesser of two per cent of the estimated sale value or a fixed amount per square metre of the net increase in gross residential floorspace) to QLDC.

(iii) Developments that fall short of creating one new unit – in Settlement, Rural-Residential, Resort or Special Zones – to provide a monetary contribution (a fixed amount per square metre of the net increase in gross residential floorspace) to QLDC.

(iv) In some instances, residential subdivisions that have made a monetary contribution may have to provide a "top up" monetary contribution to QLDC for residential floorspace.

(d) The obligation to provide an affordable housing contribution to QLDC does not apply to certain types of specified development, such as any development that will provide more than 10 per cent of dwellings as social or affordable housing delivered by Kāinga Ora or any development that is a managed care unit in a rest home.

(e) Where a financial contribution is not provided and an alternative is not proposed then the requirement for an affordable housing contribution must be met by the lot or floorspace being to an eligible buyer with a legally enforceable retention mechanism "which is fair, transparent as to its intention and effect and registrable on the title of the property".

General or targeted rates

5 There are two key pieces of legislation relevant to QLDC's rating decisions. The LGA governs how local authorities make decisions, consult with their communities and manage their finances. The Rating Act determines liability for rates and prescribes a local authority's ability to set rates.

6 Rates are a particularly powerful local authority funding tool:

(a) The main purpose of the Rating Act is to promote the purpose of local government in the LGA by providing local authorities with flexible powers to set, assess, and collect rates to fund local government activities.[1]

(b) Rates typically comprise around 60 per cent of local authorities' income. It is by far the most dominant revenue stream and the one that local authorities have the most control and certainty over.[2]

(c) The Rating Act also seeks to ensure that rates are set in accordance with decisions that are made in a transparent and consultative manner. However, it is very difficult for parties to challenge local authority rating decisions. Courts will not interfere with a local authority rating decision unless the decision is found to be unreasonable, irrational or perverse in defiance of logic, such that Parliament could not have contemplated the decision being made by an elected council.[3]

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1 Rating Act, s 3.

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

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

7 That the provision of affordable and social housing is within the purpose of local government is supported by the Local Government (Community Wellbeing) Amendment Act 2019 which restored the promotion of "social, economic, environment, and cultural wellbeing" to the statutory purpose of local government.

8 We consider that QLDC could use a proportion of its general rate to address affordable housing issues in its district. For example:

(a) QLDC could fund the provision of affordable housing in its district in the same way, for example, that some councils use rates revenue to purchase or maintain pensioner housing. However, given the shortfall of affordable housing in Queenstown, this would require a significant level of investment.

(b) As we understand the problem, there is sufficient residential land available for development within the district but the development community is not using that land to build houses in the affordable bracket. Rather, larger and more expensive dwellings are more profitable. QLDC could use a proportion of its general rates to build, or to subsidise developers through contracts to build, housing in the affordable price bracket to ensure that housing typologies that meet the needs of the district are built.

9 The Morrison Low Report into local authority funding identified that there are a range of significant challenges facing local authorities which are driving rates increases.[4] The report identified grave affordability issues with rates for some population groups. Against this background an increase in general rates to fund the provision of affordable housing (or compensate developers for lost profit on affordable housing) may not be palatable politically.

10 QLDC also has the power to set a targeted rate for activities or groups of activities if those activities or groups of activities are identified in its funding impact statement as the activities or groups of activities for which the targeted rate is to be set. Targeted rates may be set differentially for different categories of rateable land under s 17 of the Rating Act. The categories of rateable land are defined in terms of matters listed in Schedule 2 of the Rating Act. These relate to various characteristics of the land, the use to which land is put, and how it may be used under the RMA.[5]

11 We think that there would be additional difficulties with to levying a targeted rate to address affordable housing. It is unclear to us to whom QLDC would apply a targeted rate (ie to what land and how would this relate to the Schedule 2 matters). It seems to us that applying a targeted rate to residential land would not assist housing affordability and the costs would likely be passed on by developers. Alternatively, QLDC could seek to apply a targeted rate to industrial and commercial land on the basis that it generates employment, which it requires people to meet, and there is a need for housing to be affordable for those people.

12 To have either a general or targeted rate QLDC would need to identify the activity that the rates revenue is funding in the long term plan.

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

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

Development contributions

13 We have considered whether QLDC could use funding obtained from development contributions to provide or subsidise affordable housing in its district.

14 The purpose of development contributions is to enable territorial authorities to recover from those persons undertaking development a fair, equitable and proportionate portion of the total cost of capital expenditure necessary to service growth over the long term.[6] A development contribution must be used for, or towards, the capital expenditure of the reserve, network infrastructure, or community infrastructure for which the contribution was required.[7]

15 Network infrastructure means the provision of roads and other transport, water, wastewater and stormwater collection and management.[8] Community infrastructure means land, or development assets on land, owned or controlled by the territorial authority for the purpose of providing public amenities, and includes land that the territorial authority will acquire for that purpose. [9]

16 We do not consider that affordable housing comes within the definitions of community infrastructure or network infrastructure. Accordingly QLDC has no power to require development contributions to address housing affordability issues in its district.

National Policy Statement on Urban Development 2020

17 Strictly speaking, the NPSUD is not an alternative mechanism for addressing affordable housing issues. As we set out below, QLDC is legally required to give effect to the NPSUD in preparing and changing its district plan. The NPSUD is designed to improve responsiveness and competitiveness of land development markets. It requires local authorities to open up development capacity to allow more homes to be built in response to demand.

18 There are a number of provisions in the NPSUD that, in some way, deal with affordable housing. Indeed, objectives 1 and 2 of the NPSUD directly (and indirectly) refer to affordable housing:

(a) **Objective 1**: New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.

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

19 "Well-functioning urban environments" is defined in Policy 1 as including "urban environments that, as a minimum … have or enable a variety of homes that meet the needs, in terms of type, price, and location, of different households".

20 In addition, subpart 5 of the NPSUD requires certain local authorities to prepare a Housing and Business Development Capacity Assessment (**HBA**) every three years. The purpose of an HBA, among other things, is to provide information on the demand and supply of housing and of business land in the relevant urban environment, and the impact of planning and infrastructure decisions of the relevant local authorities on that demand and supply. Every

6 LGA 2002, s 197AA.
7 LGA 2002, s 204.
8 LGA 2002, s 197.
9 LGA 2002, s 197.

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

21 A district plan must "give effect to" a national policy statement, including the NPSUD.[10] The Supreme Court has said that "give effect to" simply means "implement".[11] The phrase is a "strong directive, creating a firm obligation on the part of those subject to it".[12] The effect of this requirement means it is not open to QLDC to simply ignore the terms of the NPSUD, particularly as the NPSUD is expressed in directive terms.

22 Our view is that the NPSUD appears to expressly authorise, and perhaps even require, a planning approach that ensures houses are built with certain typology or price (ie affordable) characteristics and which target different household needs. Inclusionary zoning can be used as a tool to provide homes of different types and prices. So inclusionary zoning can be seen as a mechanism for giving effect to the NPSUD.

Bylaws

23 Other jurisdictions have regulated affordable housing policies by implementing bylaws. We have considered whether New Zealand legislation would enable QLDC to enact an affordable housing bylaw.

24 A number of statutes in New Zealand enable local authorities to make local bylaws in certain circumstances to regulate problems within certain topics or matters. Any new bylaw must be within the scope of the empowering provisions that allow the Council to make the bylaw.

25 We do not consider that a bylaw regulating the provision of affordable housing would fit within any of the existing topics or matters for which bylaws are allowed.

Partnership with central government

26 We have also considered whether QLDC may be able to address affordable housing issues by partnering with central government or iwi to provide affordable houses in its district.

27 The Local Government (Community Wellbeing) Amendment Act 2019 restored the promotion of "social, economic, environmental, and cultural well-being of communities" to the purpose of local government. That purpose also requires a focus on intergenerational interests as it refers to promoting well-being "in the present and for the future".

28 Shortly after the introduction of the 2019 Amendment Act, the then Minister of Local Government released a Cabinet Paper titled, "Working with Local Government on Community Well-being".[13] That Paper invited the Minister, working collaboratively with local government, to explore policy, regulatory and non-regulatory options that ensure local authorities and communities set specific priorities for intergenerational well-being and increase the role of community well-being priorities in guiding local authority planning and decision making.

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10 Resource Management Act 1991, s 75(3)(a).

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

12 At [77].

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

29 There has been little in the way of further development following the Cabinet Paper. By way of example, the Department of Internal Affairs' central-local government partnerships team has not provided any additional policy developments on the topic.

30 We suggest that QLDC continues to keep a watching brief on central government policy and partnership opportunities but we doubt that this will be an option before QLDC needs to decide whether to progress the affordable housing provisions.

Conclusion

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