

30 June 2008

Partner: J Macdonald

Queenstown Lakes District Council
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QUEENSTOWN

Attention: Scott Figenshow

Dear Scott

LEGAL OPINION

PLAN CHANGE 24 - SCOPE ISSUES AND THE RMA (Our Ref: 349767-626)

We refer to your request for a legal opinion with respect to the above, and in particular "scope issues" raised in submissions to Plan Change 24 ("PC24") as follows:

1. Is affordable housing a resource management issue, within the "scope" of the RMA?
2. Can financial contributions be required under the RMA for affordable housing?
3. Is the provision of affordable housing a matter that can be addressed at local government level as well as/or independent to central government?
4. Should the "trigger" for affordable housing contributions be set at the "discretionary activity" consent requirement?

We address each of these issues in turn, and note in preparing this opinion, have read the section 32 report to PC24, and the submissions and cross submissions in opposition to the same.

We comment at the outset that we are of the opinion that the s32 report is sound, and provides an adequate assessment (particularly in Part 6 of the same) of the rationale or justification for affordable housing as a resource management issue, and hence the necessary basis for the objectives and policies that flow from that resource management issue.

PC24 proposes to introduce objectives and policies encouraging the provision of affordable housing (proposed to be included in Sections 3 and 4 of the District Plan) new definitions, and a new Appendix 11.

While the Plan Change does not contain any rules per se, a key implementation method is said to be an Affordable Housing Impact and Mitigation Statement (AHIMS). Appendix 11 sets out the method for preparing the AHIMS.

The objectives and policies sought to be introduced by PC24 are contained in those parts of the Plan that have District Wide coverage.

With respect to the specific questions you have sought our advice on, we advise as follows.

1. Is the provision of affordable housing a resource management issue, such that it is within the broad purpose or scope of the RMA, and thus can be the subject of objectives, policies and methods under the RMA?

“Scope” issues have been raised by submitters in opposition to the Plan Change. In the main, those submissions rely on the introductory text of the Affordable Housing Enabling Territorial Authorities Bill (AHETAB) whereby it is stated:

“An option could be to amend the Resource Management Act 1991 (RMA) to provide for affordable housing initiatives. Officials have considered this option but concluded that simple additions to the Act would not be possible. To include the proposed affordable housing mechanisms under the RMA would require a change to the purpose of the RMA.

Changing the purpose of the RMA is not the preferred option. The purpose of the RMA is “the promotion of sustainable management of natural and physical resources. Adding the promotion of affordable housing to the purpose would be likely to change the intent of the Act.....”

The opinions expressed pursuant to AHETAB are by no means decisive on the issue. In this respect, we note the submissions of Housing New Zealand Corporation to PC24, and in particular the following submission points:

- The Corporation supports PC24, and considers the bill is likely to complement the provisions of PC24
- PC24 deals with the effects of future growth on housing affordability whereas the bill is able to deal with both current and projected housing affordability problems
- While it is considered that it is possible for some territorial authorities to establish a direct link between a development and its impact on housing affordability, this may be difficult to achieve by all territorial authorities. For this reason, the AHETAB was developed to provide legal clarity for all territorial authorities wanting to use planning tools for affordable housing.

Notwithstanding the explanatory/background statements to the AHETAB, it is of some significance in our opinion that Housing New Zealand supports PC24, and also that reference is made to the “linkage” or effect and causation rationale in the RMA zoning methodology as a basis to provide justification, in a RMA sense, for PC24.

It is apparent that in pursuing the “linkage” methodology the necessary “nexus” between cause and effect can be made out, such that there is justification for affordable housing contributions to be levied pursuant to the provisions of the RMA. The inability for “all” territorial authorities to make this essential connection appears to underlie the explanatory statement to the AHETAB that it is outside the purpose of the RMA to provide for affordable housing.

2. Can financial contributions be required under the RMA for affordable housing.

PC24 does not seek to amend the provisions in Part 15 of the Plan, nor does it propose any new rules per se.

S108 (10) of the RMA provides that 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 (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.

We query whether a requirement for affordable housing can, in the current form of PC24, be imposed as a financial contribution. While there are objectives and policies, on a district wide basis that encourage the provision of affordable, there is no "purpose" specified in the Plan (for example refer to Part 15 provisions e.g. Rule 15.2.5.3 where the purpose is stated as follows:

1. *New Services*

Purpose

To provide services to and within the land in the subdivision or site of the development where the Council at its discretion chooses to provide the service or services.

We note at page 42 of the s32 report it is recorded that the proposed policies more clearly separate overall direction from actual methods.

We also note in s108 (10) that financial contributions means a contribution of land or money or a mix of the same, but not works and services. There may be an issue as to whether the provision of housing (as opposed to money or land to build them on or with) is a work, rather than a financial contribution and therefore outside the ambit of a financial contribution.

With respect to financial contributions in general we refer to the decision of the Environment Court in *Remarkables Park Limited v Queenstown-Lakes District Council* (attached), and particular from paragraph 37:

" 37 Given that broad background, s108 of the RMA 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 land owners/developer's responsibility) – but for services of site, that is from the site's boundary and radiating outwards. The very nature of these specialist (Pigovian – type) taxes suggests that only a contribution not the full cost of such services needs to be paid by the land owner/developer. Further, these financial contributions are subject to the Newbury tests that they have:

- (c) *to be for an RMA purpose not an ulterior one;*
- (d) *to fairly and reasonably relate to the development authorised; and*
- (e) *to be reasonable*

...contributions to roads, sewage, 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 (Section 7 (f) of the RMA) of the quality of the environment and the breadth of the latter term (see definition of Environment in Section 2 of the RMA), 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

3. Affordable housing – a local government issue, central government issue, or both?
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As discussed above, affordable housing has caught the attention of local and central government alike. The AHETAB proposes a mechanism for all territorial authorities to address affordable housing. Again, as discussed above the concept of linkage v's inclusionary zoning means that not all territorial authorities can avail themselves of existing statutory mechanisms to address affordable housing.

While on the one level, central government is looking to address and prove a mandate for all territorial authorities to address, and ultimately provide for and encourage affordable housing, there is conflict in QLDC addressing the matter under existing statutory provisions, such as the RMA, where necessary linkage or causation between effects and mitigation can be justified. As is evident in the submission in support from Housing New Zealand, if all territorial authorities could justify affordable housing contributions based on this "linkage zoning", the bill may not have been necessary.

We also make comment (again affirmed by the Housing New Zealand submission), that the bill is some way off becoming an Act of Parliament, and even then, it requires territorial authorities to undertake a housing needs assessment, and to develop a policy (which may even then, depending on the decision of the select committee, be subject of appeal to the Environment Court). QLDC is well advanced in such an assessment, and its initiative and ideas in addressing the issues faced by its community are supported and encouraged.

Certainly the indication from central government is that it is in full support of PC24, rather than seeking it be put on hold pending progress with the AHTAB, or statements that PC24 should be withdrawn, or amended pending the passage through Parliament of the AHETAB. In our opinion this recognises that the initiatives and mechanisms QLDC is preparing are as good as or not better in addressing our communities' unique needs as those that might otherwise be addressed in the AHETAB.

4. Trigger for affordable housing contributions discretionary or non-complying status?
(Subject to comments above re ability to impose as a financial contribution)

At our meeting last week we discussed the rationale for using discretionary/non-complying status as a trigger for requiring an affordable housing requirement.

It would appear from a reading of submissions opposing the plan change that there is either a misunderstanding of the trigger points or further clarification is required within PC24.

As we understand it, the trigger at discretionary or non-complying status is to “capture” developments that exceed anticipated density or intensity/scale of activities anticipated by the plan. The intention is that public/private plan changes will be required to provide affordable housing, and a reason for including non-complying activities, was in part to discourage a developer from seeking non-complying activity consent, rather than embarking on a plan change process to avoid affordable housing contributions. Likewise, the discretionary activity trigger will also capture developments in the Rural General Zone (e.g. Parkins Bay, Hillend type developments).

As we understand it however, the intention was not necessarily to “catch” all non-complying or discretionary activities e.g. height infringements, design control matters and the like. Some further refinement may be necessary to make clear that it is those developments that exceed anticipated density that are intended to be triggered by the discretionary/non-complying activity status.

We also take on board that the reason for PC24 being targeted at discretionary, non-complying, and future plan change applications is to try and provide a measure of fairness or equitability to developers/landowners who have invested in land pre PC24, and those that invest in the knowledge of development costs post PC24. The rationale for this being based on the Barker studies/reports, as to absorption of development costs, and the relative impacts of the same on the market. We also note that with respect to existing zoned land/development anticipated by the plan, that the AHETAB could well address existing, as opposed to future demand for affordable housing.

If we can be of further assistance at this stage of the plan change process, please contact the writer.

Yours faithfully
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