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

Statement of Evidence of Robin Oliver on behalf of Glenpanel Development Limited

(Tax)

19 December 2023

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Introduction

1 My full name is Robin Moncrieff Oliver. I live in Wellington, New Zealand.

2 I am a director of Olivershaw Limited, a two person chartered accountancy firm specialising in taxation advisory services.

Instruction

3 I have been engaged by Glenpanel Development Limited (**GDL**) to prepare evidence in respect of the Inclusionary Housing Variation (**Variation**).

Qualifications and Experience

4 I hold a Master of Arts degree with first class honours in Political Studies and a Bachelor of Laws degree from the University of Auckland. I have also passed papers in accountancy and economics from Victoria University of Wellington.

5 I have had extensive experience in providing advice on tax policy and tax law for almost forty years. I have written and commentated widely on tax issues including being the joint author (with Hon Justice Dame Susan Glazebrook) of the first edition of the main New Zealand text on the taxation of financial arrangements: *The New Zealand Accrual Regime – a practical guide* (CCH New Zealand Limited, 1989).

6 I was in the tax policy section of the New Zealand Treasury from 1984 to 1987. In 1987 and 1988, I was a tax manager at KPMG and then McLeod Lojkine Associates (a chartered accountancy firm specialising in taxation), and from 1988 to 1995, I was a partner first of McLeod Lojkine Associates and then of Arthur Andersen New Zealand.

7 From 1995 to 2011, I was Deputy Commissioner of Inland Revenue in charge of providing advice to the government on all aspects of tax policy. Over that time, I was New Zealand's representative on the tax committee of the OECD (the Committee on Fiscal Affairs) and was Deputy Chair of that Committee from 2004 to 2009.

8 I have been on the International Monetary Fund's panel of tax experts.

9 I was appointed by the Queen a Member of the New Zealand Order of Merit in the 2009 Queens's birthday Honours list, for services to Inland Revenue.

10 Since 2011, I have provided tax advice to the private sector as a director of Olivershaw Limited.

11 I was a member of the government's Tax Working Group chaired by the Hon Sir Michael Cullen. That Group reviewed the New Zealand tax system and issued its Final Report, The Future of Tax, in 2019.

12 My career focus has mainly been on central government tax, economic and financial policy and administration. I have, however, also been involved with the local government sector. I have advised the Department of Internal Affairs on local government tax issues. I have also had input into other analysis and research relating to local government taxes, financing and regulatory powers. Recent examples are:

(a) Paper prepared for the 2023 Review into the Future for Local Government – Olivershaw Limited (2022) The Future for Local Government – Study into the Principles of a High Quality Tax and Revenue System – Key Issues.

(b) Paper prepared for the Productivity Commission's 2019 Inquiry into Local Government Funding and Financing – Olivershaw Limited (May 2019) Report on Land Based Local Tax Systems.

Code of Conduct

13 I confirm that I have read the Code of Conduct for expert witnesses contained in the Environment Court Practice Note 2023. I have complied with the Code of Conduct in the preparation of this evidence, and will follow it when presenting evidence at the hearing. Unless I state otherwise, this assessment is within my area of expertise, and I have not omitted to consider material facts known to me that might alter or detract from the opinions I express.

14 I am not aware of any conflicts of interest I could have in providing evidence at this hearing.

Scope of Evidence

15 In my evidence I have been asked to address the following question:

> "whether the proposal under the Inclusionary Housing Variation ("**the Variation proposal**") to impose, as a condition of consent, that a developer advancing a proposal for residential development provide a percentage of serviced lots or a monetary equivalent to the Queenstown Lake District Council, amounts to a tax?"

The Variation Proposal

16 I have read the Queenstown Lakes District Council's ("**QLDC**") proposed District Plan as it relates to the Variation proposal. I have considered Standard 40.6 of that proposal which sets out a proposal to impose on most residential land development and subdivision in the QLDC area, a mandatory financial contribution (or the equivalent by way of transfer to QLDC of serviced lots for nil consideration). That financial contribution is stated to be intended by QLDC to be paid to the Queenstown Lakes Community Housing Trust. The Trust is an independent, not for profit, community organisation. As set out in clause 3 of its Deed of Trust, the primary objective and purpose of the Trust is to increase the provision of social and affordable housing in the QLDC area. More generally the Trust's website states its objective is to provide a range of housing programmes to assist eligible low to moderate income households who contribute to the social, economic and environmental wellbeing of the district, and are genuinely struggling to commit to the area due to housing stress.

17 The Variation proposal, with the elements as set out above, would in my view result in residential property developers in the QLDC area being required to pay to fund affordable housing programmes. It can clearly be argued that augmenting the supply of affordable housing in the area would benefit the general welfare of the QLDC area community. Increasing the supply of affordable housing would not, however, in my view, directly add value to the developments paying the contribution by way of, for example, funding infrastructure or amenities provided to purchasers of developed lots.

Summary of My Evidence

18 In summary, my view is that the Variation proposal has all the normal hallmarks and indicia of a tax rather than some other form of funding. In my evidence set out below, I describe:

(a) The options governments in general (and local government entities in particular) have for funding activities.

(b) What are recognised as the hallmarks and indicia of tax as a source of funding and how tax is distinguished in international literature from other forms of funding.

(c) Why importance is placed on distinguishing tax from other forms of funding by New Zealand government entities.

(d) Examples of when it has been determined that certain forms of funding should be viewed as a tax.

19 Based on the above discussion, I conclude that a form of funding that has the following features should be viewed as a tax. It is:

(a) Imposed by a government entity.

(b) Mandatory.

(c) Unrequited.

20 I compare these features of a tax with the features of the Variation proposal and conclude that on any reasonable basis, the Variation proposal is a tax and should be viewed as a taxing proposal. Whether it is a tax that is appropriately authorised by Parliament, and whether such a tax would be justified under normal tax policy principles, is a legal question that should be addressed by submissions.

Funding and Financing Options for Local Government in New Zealand

21 The New Zealand Productivity Commission in its 2019 Inquiry into Local Government Funding and Financing (at page 2) states:

> "New Zealand's local authorities currently have a wide range of funding and financing options to choose from, including general and targeted rates, fees and user charges, development contributions, debt and asset recycling. Councils vary widely in how they use the available funding tools, but rates are the largest overall source of local government revenue."

22 To pay for the services it provides, and the social and infrastructure investment it makes, a local authority, if authorised by legislation to do so, can:

(a) Borrow. This form of financing requires funding from future revenue streams in order to repay the debt and pay interest.

(b) Use investment income derived from its past investments.

(c) Recycle assets – realise the value of past investments.

(d) Levy a tax – most commonly rates.

(e) Charge fees and user charges for its services.

Distinguishing Taxes from Fees

23 It is normally clear when resort is being had to borrowing, investment returns, or the selling of assets. When a local authority provides a service in competition with the private sector and charges a comparable fee for that service, it seems intuitively obvious to categorise this as a fee and not a tax. It is widely accepted that local authority rates explicitly authorised under the Local Government Act 2002 and the Local Government (Rating) Act 2002 should be categorised as taxes and not fees even though some element of rates may be fees if they are based directly on the benefits received by the ratepayer (water rates).

24 The line between what is a tax and what is a fee becomes unclear at the boundary. Take for example a local authority fee that may be a charge for goods or services well in excess of what the private sector would charge where those goods or services are supplied only by the local authority as a statutory monopoly. The excess fee seems to have all the characteristics of a tax on those wanting the goods or services only the local authority can provide.

25 Drawing the line between what should be characterised as a tax and what should be characterised as a fee can be of considerable importance. That is the case for collators of financial, fiscal and economic data. Such data is often used to assess the impact of government expenditure and taxation on economies and societies across countries and/or over time. As one example, whether a payment is categorised as a tax or a fee can impact on the measurement of a country's GDP and other National Accounts. For such analysis to make sense, taxation needs to be measured consistently across countries and over time. Those setting statistical standards have therefore put considerable effort into distinguishing taxes from fees.

The Statistical Distinction Between Taxes and Fees

26 Given the need for data consistency, it is not surprising that there is general conformity as to how to distinguish between a tax and a fee. The same criteria are used by the United Nations, International Monetary Fund, OECD, World Bank, European Commission, European Statistical Office Eruostat), and country statistical issuers. I am relying mainly on an article by David Beckett, "Taxes and fees for sales of services: how they differ and why it is important," UK Office for National Statistics, May 2019. This seems to me the best analysis of the issue as well as explanation of it.

27 The international statistical consensus is that taxes are compulsory and unrequited charges levied by government on business and households. (Eurostat's 2010 European System of National and Regional Accounts (ESN) – para 20.165, and UN, IMF, OECD, World Bank and EC 2008 System of National Accounts (SNA) - para 7.71).

Levied by government.

28 Taxes are a prerogative of government and ultimately rely on government coercive power for enforcement and collection. New Zealand is a non-federal parliamentary democracy. Constitutionally, only Parliament can levy taxes. The executive cannot levy taxes without the explicit authority of Parliament. This was established under the Bill of Rights Act 1688. The principle is in the Constitution Act 1986, section 22(a) of which states that it is not lawful to levy a tax except by or with the authorisation of an Act of Parliament. Parliament can authorise taxes and can delegate its taxing power if it does so with sufficient explicitness. The rating power delegated to local authorities through the Local Government Rating Act is an example of this.

29 International statistical standards recognise that governments may authorise public or private sector bodies to levy a tax. However, where a non-government body levies a tax (such as a fee that amounts to a tax), the transaction is re-characterised with the fee being shown as received by the government, and an equal and opposite payment then recorded from the government to the private sector body.

Mandatory

30 Tax is compulsory and distinguished from a voluntary payment. As noted above, ultimately taxation relies on the coercive power of the government for enforcement and collection.

31 This is not to be interpreted as saying that because a charge is made only if you do something or undertake some activity, it does not meet the mandatory requirements to be a tax. Income tax remains a tax even though if you do not earn income, you pay no income tax. GST remains a tax even though if you save and do not spend money no GST applies. Many countries levy stamp duties on the sale of houses. If you do not sell or buy a house you are not liable for the stamp duty; but it is still a tax. The same applies to excises on tobacco, gambling or alcohol. If you do not smoke, gamble or drink, you do not pay these excises; but they are taxes.

32 As part of their normal activities, government entities (including local government bodies) set standards for how goods and services are provided. Usually, the provider will bear the cost of meeting those standards. However, sometimes the provider will be required to (or have the option to) pay the government entity that will then use the contribution to pay for meeting the standards set. That is the case in the local authority area where councils' development contributions are used to ensure developments meet standards for the provision of infrastructure and/or amenities that the council provides. Such charges are mandatory. The issue then is whether they meet the other character of a tax. That is, are the charges 'unrequited'? In the context of development charges this means, do the facilities and amenities funded by the charges directly benefit the developer and/or those purchasing lots in the development? If there is such a direct benefit, the charges do not in my view amount to a tax under the statistical standards discussed in this brief. I discuss the 'unrequited' requirement of a tax next.

33 With respect to the mandatory requirement of a tax, there is sometimes a discretion exercised by the government entity whether a fee, levy or tax is charged. The existence of a discretion does not negate the mandatory character of the charge. Internationally countries will often waive or reduce taxes on a discretionary basis. This may be done to encourage investment. This does not mean the charge is not mandatory and it does not mean it is not a tax if the charge is unrequited. In New Zealand, the Commissioner of Inland Revenue has some care and management discretion under sections 6 and 6A of the Tax Administration Act 1994. That does not mean the Income Tax and GST are not taxes.

Unrequited

34 Perhaps the main feature distinguishing a government fee from a tax under international statistical standards is that a tax must be unrequited. This is defined to mean that nothing commensurate with the charge is provided to the payer. (European System of Accounts 2010 at 20.165; System of National and Regional Accounts 2008 at 22.88.).

35 It is important that the commensurate consideration is provided directly to the payer before a charge is not categorised as a tax on the basis the charge is requited. Presumably it is argued by those supporting particular taxes that they are used to provide benefits to society, a community or a section of society commensurate with the amount collected. This does not, however, make the charge requited and thus not categorised as a tax.

36 To be requited and not categorised as a tax the benefit must flow directly to the person paying the charge. Even then to meet the requirements of being requited the benefits flowing directly to the person paying must be commensurate with the level of the charge.

37 David Beckett in his UK Office for National Statistics paper (cited in paragraph 25 above) on taxes and fees explains what commensurate means by way of three questions:

(i) What is the service being provided? To be requited, significant work should be undertaken by the provider in the delivery of the service and the charge should be proportionate to the service being provided.

(ii) What is the level of the charge? This should be set as no more than required to cover the cost of providing the service. There should not be a surplus by design that is used to fund other activities that are not directly related to the service provided to the person paying the charge.

(iii) What is the benefit received by the person paying? There should be a clear benefit that is directly in exchange for the charge. The charge should not primarily be a means to fund broader benefits to society or to a section of society.

38 Applying the above well accepted criteria to charges levied by New Zealand local authorities:

(a) Rates levied under the Local Government (Rating) Act should be categorised as taxes unless (and then only to the extent that) they embody a fee for goods and services directly and proportionately received by the ratepayer (rates specifically paying for water and based on water usage).

(b) Financial contributions levied under the Resource Management Act 1991 (or its replacement) should also be categorised as a tax but not if the funds provide a direct benefit to the developer and/or those purchasing developed lots.

International Examples of Taxes versus Fees

39 I list below some examples of how international statistical standards have been applied to determine what should be categorised as a tax and what should be categorised as fees.

(a) Normal charges by the UK Home Office for issuing in the UK visas to live or work in the UK have been categorised as a tax. They are:

(i) Levied by a government body (the Home Office);

(ii) Compulsory if you want to live and work in the UK;

(iii) Unrequited because the charge has been deliberately set so as to exceed the cost of providing the service. The surplus is used to fund other specific activities such as securing the border against the importation of illegal drugs and preventing people smuggling. The surplus is thus spent on activities unrelated to the administrative cost of providing visas so the charges are classified as an unrequited.

(b) Premium charges for visas to reduce waiting times are classified as a fee not a tax because it has been determined by the National Office of Statistics that the extra fee is voluntary – a person can get a visa to live or work in the UK without paying the extra premium. They simply have to wait longer for the visa.

(c) Charges for sitting an exam to qualify for permission to drive a car by obtaining a driver's licence are categorised as a fee provided the amount charged is proportionate to the cost of assessing the competence of a person's driving skills.

(d) Charges by the UK Land Registry for the registration of title to land are categorised as a tax because the amount charged is based on the value of the land or property being registered. This does not reflect the cost of providing this service (which varies according to factors other than land or property value – such as the area the land is in and its size). Land Registry charges do not reflect the direct benefit the person seeking registration obtains. The charges are therefore unrequited and classified as a tax.

(e) The UK operates a Financial Services Compensation Scheme (**FSCS**). This is the UK's statutory deposit insurance for customers of authorised financial services firms. FSCS can pay compensation if a firm is unable, or likely to be unable, to pay claims against it. The running of the scheme and compensation payments made are funded by annual levies paid by the UK financial services industry. These payments are classified as a tax. While it was noted that financial institutions paying the levy do derive some benefit from the scheme that compensates their

customers, the primary benefit is to the customers and the financial industry generally. The charge is thus regarded as unrequited.

The Treatment of Taxes and Fees in New Zealand

40 The above discussion was in terms of international statistical standards that obviously New Zealand also follows. Drawing a distinction between taxes and fees also has importance for aspects of the New Zealand government aside from statistical collation. Modern governments through various entities (including local government bodies) provide numerous goods and services to society. It is natural that charges are levied for these supplies. Since the 1980s the emphasis on government entities charging for services has increased as the government has sought to increase the efficiency of its operations and reduce fiscal pressures.

41 Nevertheless, there are key government concerns if this increased focus on charging is then used to be a vehicle for back-door taxation. In essence there is an ongoing concern by various key entities within government that the move to greater reliance on fees and charges might be used as a vehicle for ad hoc tax measures disguised as fees.

(a) There is a general concern that taxation powers be properly used in accordance with normal standards for good government. This concern is expressed in Productivity Commission publications.

(b) Parliament is concerned that its constitutional prerogative to have the sole right to authorise taxation could be undermined. This concern is conveyed through the Office of the Auditor General and Parliament's Regulatory Review Committee.

(c) The executive is concerned that it retains control over taxation measures and in particular taxation measures remain consistent with its Revenue Strategy. This concern is reflected in various measures taken by Treasury.

42 In taking measures to reflect these concerns the government broadly follows the distinction drawn by international statistical standards as to what is a tax and what is a charge or fee – mandatory and unrequited. However, it seems that unrequited is defined more in terms of does the charge exceed full cost recovery rather than whether it provides commensurate benefits to the person paying. That seems to reflect the greater ease of measuring whether a charge exceeds cost recovery as opposed to measuring the benefits received by the person paying, rather than any substantial difference with the statistical approach.

General Perspective

43 A general perspective on governmental fees and taxes is set out by the New Zealand Productivity Commission. The Commission's 2014 Report "Regulatory Institutions and Practices draws (at section 12.1) a distinction between cost recovery charges (fees) and taxation. It describes fees as being "imposed on beneficiaries of regulation or on those who cause 'the problem'". Other charges should in its view be regarded as forms of taxation.

44 The Commission's report then cites with approval the Australian Productivity Commission (at section 12.1) that described fees as a direct charge that reflects the costs of the service and that service must be delivered to, or at the request of, the party paying the account. Other charges should be viewed as taxes.

45 The New Zealand Productivity Commission then supported the use of fees for cost recovery on efficiency and fairness grounds. That is such fees should ration the supply of services so that they are not produced at a cost in excess of the value consumers place on the service. On the other hand, the Commission concluded that the inappropriate use of fees can lead to adverse outcomes. These include:

(a) Overcharging for services to fund excess governmental expenditure on their provision.

(b) Overcharging for services so as to subsidise other governmental activities that would not be seen as justified if funded from general taxation.

(c) Undermining contestable markets and discouraging innovation if new market entrants are discouraged by high fees.

(d) Weakening the independence of regulators if they become dependent on fees paid by those being regulated.

46 The overall conclusion is that fees should be based on cost recovery principles but the above adverse outcomes need to be considered when considering whether activities should be funded by fees or taxes.

Constitutional Perspective

47 Parliament through its various connected entities has a more constitutional focus. As previously noted, taxation is the prerogative of Parliament.

Parliament wants to protect that prerogative and not have it undermined by government entities disguising taxes as fees.

48 The Australian Productivity Commission stated in its 2001 Report "Cost recovery by Government agencies" (at G6),

> "many constitutions require that taxes be implemented through specific legislation, and this principle invalidates user charges that have the character of a tax but are not supported by such specific legislation. This is the situation in Australia, Canada, New Zealand and the UK and many other countries."

49 The New Zealand Parliamentary Counsel Office in its submission to the 2014 Productivity Commission Report cited above reinforced the importance placed on distinguishing fees from taxes. It submitted that for any new proposed charge it should be clear whether the intent is to impose charges to recover costs or to impose taxes and levies not directly linked to the costs of providing goods or services (Productivity Commission Report 12.2).

50 The Legislative Design and Advisory Committee supports Parliament in its law-making function. It produces Legislation Guidelines for officials, the current Legislative Guideline being the 2021 edition. Chapter 17 states:

> "There is an important distinction between a fee or levy and a tax.
>
> Parliament may delegate to the Executive (or others) the power to set and charge a fee or levy, but generally a tax may only be imposed by an Act. In rare circumstances Parliament may delegate the setting of certain features of a tax to the Executive, but only in very certain and confined terms."

51 The Guideline then sets out the distinction between a fee and a tax being that a fee should only recover the cost of the service provided. Later in the Chapter 17 it states: "The fee amount recovered should bear a proper relation to the cost of providing the service or performing the function and should not exceed the cost."

52 Parliament guards its taxing prerogative and monitors the use of fees to undermine that prerogative mainly through its Regulations Review Committee. Under Standing Order 378(2) the Regulations Review Committee can report to Parliament regulations that:

(a) are inconsistent with the empowering legislation;

(b) make some unusual or unexpected use of powers, or

(c) that contain a matter more appropriate for parliamentary enactment.

53 It interprets this to mean it can report back to invalidate a fee that is in fact a tax.

54 It has reported regulations setting fees that it considered to be in substance taxes on several occasions:

- In 1989 it reported back licence fees for aircraft crew and maintenance engineers on the basis that an element of the fee covered cost of research into training methods for pilots. It was concluded that current pilots and engineers did not benefit from this research. Charging them for something they did not directly benefit from amounted to a tax.

- In 1998 it reported back licencing fees for gaming operators on the basis that it was a set fee and did not reflect the different costs of regulating depending on the size of gambling operations. A fee that did not reflect the actual costs of different persons paying the fee amounted to a tax.

- In 1990 it reported back international civil aviation operator fees because the fee was set to cover the costs of New Zealand's membership of an international governmental civil aviation organisation. It was concluded that this membership benefited the wider community and not just those paying the fees and thus had the character of tax.

55 The Committee's view on taxes and fees is summarised in the publication Regulations Review Committee Digest (7th ed) by D Knight and E Clark, New Zealand Centre for Public Law, Chapter 10 as being one of opposition to:

> "regulations setting fees exceeding the level needed to cover costs in order to either maintain a financial reserve or to provide goods or services to individuals. In the absence of approval by the empowering statute, the setting of fees above the level needed to cover costs will generally amount to the imposition of a tax without the authorisation of Parliament in contravention of section 22 of the Constitution Act 1986. The Committee has confirmed that any

> authority given to a public entity to charge a fee is implicitly capped at the level of cost recovery. The collection of fees above the level needed to cover costs is therefore considered a matter for parliamentary enactment."

56 The Regulations Review Committee is supported by the Office of the Auditor General (**OAG**). OAG also produces a guide on fees – "Setting and administering fees and levies for cost recovery: Good practice guide" 2021. That guide emphasises the need to justify fees based on cost recovery only and that the services funded by the fees need directly to benefit the person paying the fees. If these principles are not adhered to, then the charge is likely to be a tax and "this would breach the constitutional principle that Parliament's explicit approval is needed to impose a tax" (para 3.12).

57 The OAG also audits the management of departmental fee memorandum accounts (explained below) to further manage the tax/fee boundary.

Revenue Strategy Perspective

58 A third perspective on the fee/tax issue is that of the New Zealand Executive (Cabinet and Ministers). The Executive's concern is that it retain control over taxation policy. The principles of New Zealand tax policy have been set out in numerous Review Committee reports. The latest was the (Cullen) report of the 2019 Tax Working Group – The Future of Tax. At page 28 of the Final Report the tax principles were stated to be: efficiency, fairness, revenue integrity, fiscal adequacy, compliance and administration costs, and coherence. These principles are reflected in the government's Revenue Strategy included in its Budgets and the Tax Principles Act 2023.

59 In broad terms they reflect the objective of balancing the costs of tax with fairness. In very broad terms the result is the "broad base low rate" approach to tax. Taxes are levied on as broad a base as feasible. This reduces the economic costs of different rates of tax being levied on substitutable activities. Where tax rates vary between substitutable activities, activities subject to low tax rates will be favoured and those facing high rates will be penalised. When this happens, choices are altered (distorted) for tax reasons and, on the assumption that in the absence of tax people make choices that maximise their wellbeing, narrow tax bases reduce overall national output and welfare. A broad tax base allows a given level of revenue to be raised at lower tax rates than a narrow base. Broad tax bases are also seen as fair in that people in a similar position pay the same level of tax.

60 New Zealand governments have also traditionally been opposed to hypothecated taxes. That is taxes the revenue from which can only be spent on one particular purpose. That is because the purpose on which hypothecated taxes are spent is often not the government's spending priority. Hypothecated taxes are argued to lead to low quality spending.

61 Tax policy in accordance with the agreed revenue strategy is managed by the Ministers of Finance and Revenue supported by Treasury and Inland Revenue. They do not want the revenue strategy and tax policy undermined by departments levying their own (especially hypothecated taxes) under the guise of fees.

62 As a result, Treasury produces its own Guidelines for Setting Charges in the Public Sector (2017). This focuses on the efficiency of resource use. It recommends that fees be based on the full cost recovery of the services provided unless there is a strong case for lower fee levels. Treasury also emphasises the need for those charging fees to find ways to lower their costs and to identify and enable alternative providers who might be able to deliver the services at lower cost.

63 Finally, Treasury Instructions 2021 (accounting instructions issued to all government departments) require departments charging fees to operate memorandum accounts recording any surplus or deficit on a full cost recovery basis. The aim is to require fees to be based on full cost recovery but to allow for fees to exceed or be less than costs over the short term but not the long term. Departments running persistent deficits are in effect penalisd with a charge.

Would the Proposed Variation be a tax Under the Above Criteria?

64 I now turn to the question of whether the proposed QLDC Variation would be a tax under the criteria outlined above.

Imposed by a government entity

65 Clearly this criterion would be met because QLDC is a government entity being a local authority established by legislation.

Mandatory

66 While, as I understand it, a landowner would not be charged the levy unless they implemented residential subdivision or land use development work, the levy would still be regarded as mandatory under any of the above criteria. That is because the existence of compulsion is assessed only after

the payer of a charge has chosen to carry out an activity. Having decided to develop and sell the land, the VARIATION is clearly mandatory.

67 This seems to me to be clear from the above described statical standards and the approach on New Zealand government entities when determining whether categorising taxes. As noted above, any discretionary element in the administration of the charge does not negate it being mandatory in character.

Unrequited

68 As I understand it, the Variation charge is intended by QLDC to be paid to the Queenstown Lakes Community Housing Trust to be used to increase the supply of affordable housing in the QLDC area. It is argued that this would benefit the overall community and even be of benefit to developers on whom the charge is proposed. That may be the case. However, any benefit to the developer paying the levy would be indirect.

69 Statistical standards are very clear that for a charge to be viewed as providing a benefit to the person paying the charge (so as to be requited and not a tax), the charge has to be of direct and immediate benefit to the person paying. There needs to be a clear benefit that is directly related to the service provided directly in exchange for the charge. The UK FSCS levy is considered to provide benefits to the financial institutions paying he levy. However, the primary benefit is to customers and the financial industry generally. The compensation is viewed as of general benefit and not of direct benefit to those paying and nor is it seen as being in direct exchange for a service. The levy is thus viewed as unrequited and the levy categorised as a tax.

70 The same approach is adopted by the New Zealand Regulatory Review Committee. The Committee considered aircraft crew and engineer licence fees that funded research into training pilots did not provide a direct benefit to those paying the fee so the licence fees were unrequited. Similarly, international civil aviation operator fees that funded New Zealand's membership of an international civil aviation organisation were held to provide too indirect a benefit to those paying the fees to be regarded as a fee rather than a tax.

71 In these cases, it did not seem to be questioned that the activities funded by the invalidated fees were of community benefit. Given the nature of the fees under consideration, those paying seemed likely to benefit more than most given the fee payers operated in the industry for which the services

were relevant. However, when determining whether a charge is a fee or a tax, to not be a tax it is always stressed that the benefit provide to the payer needs to be very direct.

72 The provision of affordable housing supply through the Variation proposal is not the type of direct benefit required to categorise a charge as requited and thus a fee and not a tax. Even if it could be argued (which I do not accept) that developers would benefit from this activity more than the general public (because they are involved in the housing industry), that is not sufficient to meet the very clear requirements for a requited fee to be of direct benefit to those paying it.

73 A second aspect required for a charge to be regarded as requited is that it must be set at a level that is commensurate or proportional to a service provided. The New Zealand bodies cited above have all interpreted this as meaning the fee should be capped at a cost recovery level. The services provided to developers in the case of the Variation proposal seems to be limited to planning approval. The proposed level of charge does not seem to purport to be related to the cost of providing that service.

74 The proposed Variation charge will far exceed the costs to the council directly relating to the development itself. Given the intention is that QLDC pass on the levy to Lakes Community Housing Trust, this again is indicative of an unrequited charge that amounts to a tax.

Conclusion

75 As a mandatory, unrequited charge imposed by a government entity, the proposed Variation charge has all the international statistical standard indicia and the New Zealand government practice of a charge that should be viewed as a tax. There seems to be no basis for any other conclusion.

76 The Variation charge seems to be a tax on one narrowly defined activity (certain residential land developments) and be a hypothecated tax funding one government activity (the provision of affordable housing). This is, on the face of it, inconsistent with the government's tax policy settings and Revenue Strategy. It would be a narrowly based hypothecated tax. Despite this, it may be concluded that Parliament has authorised a tax contrary to government policy. The statement of the Legislation Design and Advisory Committee's 2021 Legislative Guideline (cited above) should always be borne in mind:

> "Parliament may delegate to the Executive (or others) the power to set and charge a fee or levy, but

> generally a tax may only be imposed by an Act. In rare circumstances Parliament may delegate the setting of certain features of a tax to the Executive, but only in very certain and confined terms."

77 I defer to legal counsel in terms of the authority of such a tax is authorised under the Resource Management Act 1991.

Robin Oliver

19th December 2023