Counsel's notes – Willowridge, Metlifecare, Universal
6 March 2024

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1. **Introduction:** I acknowledge Mr Gresson's assistance preparing the filed written submissions. Set out below are a list of key issues and my submissions in response. These oral observations should be read alongside those written submissions.

2. **What this variation is actually about:** The resource management issue to which this Variation responds is more accurately described as: How can the Community Housing Trust be funded? A more accurate objective would accordingly be: That the Community Housing Trust is sufficiently funded in order to provide affordable housing.

3. **Fundamental legal difficulty:** The fundamental difficulty with those propositions is that any funding under the RMA can only be by way of a financial contribution, and it is simply not lawful to levy a financial contribution for the purpose of funding the Trust (as laudable as the purpose of providing affordable housing is) where there is no link between the contribution charged and the adverse effects of the activity attracting the charge. Even if such a mechanism were lawful, it would be ineffective and unfair and therefore inappropriate to request that funding from such a small sector of the community.

4. **IPI/MDRS processes:** I appeared in many IPI plan change hearing processes in the Canterbury and Bay of Plenty Regions. A focus from my client in those processes was the essential need for district plans to enable *a range* of housing types. Smaller houses on smaller lots are more affordable. Enabling this *housing choice* is a key outcome of the NPS-UD and is implemented in part by the MDRS. As a society we must change our expectations about what type of housing we want to live in, but also – and, in my submission, more importantly - what *type* of housing we see as acceptable in our communities. (And in highly desirable areas like Queenstown Lakes, where the landscape constraints further limit land availability, it is even more important that communities accept more intensive forms of residential activities.) If district plans start including rule packages providing for a range of housing options, the market will respond to those rules at the appropriate time. But there must be that option in the rules – if the minimum lot size is 700m^2, then land will be developed to that level of intensity. Every lot that is developed at a lower intensity precludes a future greater intensity of development, at least for the short to medium term (ie a significant opportunity cost).

5. **Section 77E:** This amendment was introduced as part of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act to enable financial contributions to be applied *inter alia* to permitted activities. This was a necessary amendment to allow councils to fund the infrastructure required by the proposed MDRS/NPS-UD intensification. It was not intended to undermine or upset the well-established 43 year old *Newbury* principles that, when applied in the context of a financial contribution requirements, means that any financial contribution can only be charged in response to an adverse effect *of the development* on which the financial contribution is charged (see also the *Estate Homes* case). The link between the contribution charged and an effect is essential and this was reiterated clearly by the High Court in the *Infinity* case – ironically this is the sole Court decision on which the Council's legal argument in support of this Variation is based. (If there was no requirement for such a link, the operators of the Cardrona Skifield could be charged a financial contribution to construct a community swimming pool in Queenstown.)

6. **Section 32:** Section 32 is the engine room of the RMA. It requires a rigorous assessment of any proposal. While qualitative costs and benefits are important, some attempt must

be made to assess the qualitative costs and benefits to some extent. The Council has failed to identify the benefits that will flow from this Variation – and more importantly, confirm that those benefits will be greater than would occur under the status quo. A section 32 assessment requires an assessment of options, including options *outside of the RMA*. There is a clear difference in the language between *provisions* (which are RMA provisions), and *options*, which will include the full suite of potential responses including those that can be undertaken pursuant to or enforced under other legislation. See *SWAP Stockfoods* at [171]-[172] and Section 5.3.1 of the IHP Overview of Recommendations, both provided to the Hearing Panel with the written submissions.

7. **Lawful scope of RMA provisions**: The broad scope of the purpose of the RMA, ie sustainable management, does not give a *carte blanche* to authorize any rule or, in this case, any financial contribution related to that concept. Refer Section 5.3.2 of the IHP Overview of Recommendations, and the reference in that extract to the Full Court of the High Court's decision in *Western Bay of Plenty v Muir*:

> The Interpretation Act 1999 requires legislation to be interpreted according to its text and in light of its purpose. The Panel takes guidance from another decision of a full court of the High Court in *Western Bay of Plenty District Council v Muir* [30] cautions against over-reliance on the purpose rather than the text of legislation:
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> > [27] . . . Whilst of course the purpose of the [Resource Management] Act is sustainable management of natural [and] physical resources and as a consequence rules must be necessary to achieve the purpose of the Act, simply because such a rule might be directed towards that purpose does not of itself make the rule lawful if the rule itself is *ultra vires*.

8. **Can the Variation encapsulate the current "voluntary" requirements:** In short, no. Any attempt to do so falls foul of the same fatal flaw as the Variation. There is no link between the adverse effect (lack of affordable housing) and the activity on which the contribution is to be charged (the provision of housing by a small group of residential developers, rather than any activity that creates a demand for housing). Just because it is being done "voluntarily" outside of the formal RMA process does not mean that it is a lawful RMA method. (Writing objectives, policies and rule that enable or incentivize a range of different sized lots and household sizes and forms is entirely lawful and would give effect to the NPS-UD (housing choice) – that is entirely different proposition from requiring the entry into an agreement with the Trust (unlawful) or requiring a payment of a financial contribution to fund the Trust (unlawful).)

9. **To be enduring and effective, planning provisions must be equitable (ie fair):** Even if it were legal, the current proposal is not appropriate (it is not equitable). It is manifestly unfair to require only a small sector of the community to fund the solution to a much larger community wide problem, the causes of which are district wide (at least) and the benefits flowing from resolving the problem are equally district wide (at least): *Swap Stockfoods* at [163]-[164].

10. **Recourse to Part 2**: Part 2 can be considered under s 32(1)(a) – to the extent that the objectives need to be tested against the purpose of the Act. But in the context of urban development & housing, the purpose of the Act (Part 2) has been given effect by the NPS-UD. If the NPS-UD 'does not work' in the context of Queenstown, then the NPS-UD should be amended. You cannot use Part 2 to impose an outcome that is contrary to, or undermines, the NPS-UD. For example, the NPS-FM includes NOF standards (prescriptive bottom lines). If a council or resource user said those standards were not appropriate – ie if they said that the NPS-FM "didn't work" for them or their region and they tried to rely on Part 2 to justify a different lesser standard then there would be huge outcry (and such an approach would be contrary to the *NZ King Salmon* decision).

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