

**BEFORE THE INDEPENDENT HEARINGS PANEL  
IN QUEENSTOWN**

**IN THE MATTER OF** the Resource Management Act 1991 ("**RMA**")

**AND**

**IN THE MATTER OF** the Inclusionary Housing Variation ("**Variation**") to the  
Queenstown Lakes Proposed District Plan ("**PDP**")

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**SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF WINTON LAND  
LIMITED**

**8 MARCH 2024**

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**MAY IT PLEASE THE PANEL:**

1. These submissions are made on behalf of Winton Land Limited ("**Winton**") in response to questions raised by the Panel during the presentation of Winton's case on 5 March 2024.
2. The Panel's questions focussed on the interaction of sections 77E, 77T and 108AA of the RMA, alongside the caselaw that has developed on the imposition of conditions, including *Newbury*.
3. As a starting point, section 108AA enables a Council to impose conditions provided that (as relevant to the Variation), the condition is directly connected to one or both of the following:
  - (a) an adverse effect of the activity on the environment (s108AA(1)(b)(i));
  - (b) an applicable district or regional rule, or a national environmental standard (s108AA(1)(b)(ii)).
4. Commissioner Taylor asked whether section 108AA(1)(b)(ii) broadened subsection (b)(i). In response, the Departmental Report prepared when section 108AA was enacted is clear that section 108AA was not intended to broaden the position under earlier caselaw, in fact it narrowed it.<sup>1</sup> Accordingly, the Council cannot seek to rely on section 108AA(1)(b)(ii) to avoid the clear caselaw that has developed over many decades in this space.<sup>2</sup>
  - (a) The caselaw includes:
    - (i) *Newbury*<sup>3</sup> which requires consent conditions to: be for a resource management purpose, and not for an ulterior one; fairly and reasonably relate to the authorised development; and be reasonable.

<sup>1</sup> Resource Legislation Amendment Bill 2015, Departmental Report No. 2, pp 328-329, Policy decisions for Resource Legislation Amendment Bill Departmental Report - 16 May 2017 - Regulatory Impact Assessment, p83.

<sup>2</sup> See *Wilkins Farming Co Ltd v Southland Regional Council* [2020] NZEnvC 155 at [21] "in addition to the restrictions imposed in s 108AA, for a condition to be imposed it must also satisfy the tests for validity. Set out in the House of Lord's decision of *Newbury District Council v Secretary of State for the Environment* (Newbury), 22 the three tests are ...".

<sup>3</sup> *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1979] 1 All ER 243 (UKHL).

- (ii) *McNally* which summarised the particular requirements for financial contribution conditions in a four step process:<sup>4</sup>
- (aa) Whether the contribution has been imposed for a purpose specified in the plan;
  - (bb) Whether the level of contribution has been determined in a manner described in the plan;
  - (cc) Whether the *Newbury* tests (as set out above) are satisfied; and
  - (dd) Whether the condition is fair and reasonable on its merits, that is, fair or proportionate to both the consent holder and the community and the result of a process of reason rather than arbitrary whim.
- (b) Commissioner Beattie also asked whether sections 77E or 77T expanded the financial contribution-making powers of a council. These sections do not expand the scope of Council's powers, nor exclude financial contributions from the established case law principles. These sections were introduced in the particular context of legislative change where significant intensification was enabled as of right to address concerns from Councils regarding powers to levy contributions to provide necessary infrastructure. As outlined in oral submissions, the legislative intent was to confirm that financial contributions could be charged for permitted activities and that Councils were authorised to review their financial contribution policies as part of the Intensification Planning Instrument process to allow continuity in a Council's ability to levy financial contributions for infrastructure.<sup>5</sup>
- (c) The Council's ability to include a rule requiring affordable housing contributions in the PDP also needs be within the scope of the Council's functions as set out in section 31 of the RMA with reference to the overall purpose of the Act in Part 2. However, the High Court has cautioned against construing the Council's functions broadly. As set out in *Muir*<sup>6</sup>

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

<sup>4</sup> *McNally v Manukau City Council* [2007] NZEnvC 76; [2008] NZRMA 523 at [5] cited in *Tauranga City Council v Minister of Education* [2019] NZEnvC 32 at [61].

<sup>5</sup> Report of the Environment Committee, Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill, p20.

<sup>6</sup> *Western Bay of Plenty District Council v Muir* [2000] NZRMA 353 at [27].

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.

- (d) Commissioner Taylor also requested information on the consideration of non-RMA options as part of a s32 evaluation. Comments by the Independent Hearing Panel for the Auckland Unitary Plan are of particular relevance. That Panel was clear that "[i]t is important to consider these other regulatory methods when assessing proposed resource management methods".<sup>7</sup> There are also a number of examples of non-RMA options considered, including for example controls under the Building Act 2004.

**Dated** 8 March 2024

Daniel Minhinnick / Kristen Gunnell  
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<sup>7</sup> Report to Auckland Council Overview of recommendations on the proposed Auckland Unitary Plan dated 22 July 2016 at [5.3.1].