

**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**")

LEGAL SUBMISSIONS ON BEHALF OF WINTON LAND LIMITED

5 MARCH 2024

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

- 1.1 These submissions are made on behalf of Winton Land Limited ("**Winton**") in support of its original and further submission on the Variation. Winton generally supports the intention to increase affordable housing supply in the district.
- 1.2 There is general agreement that Queenstown's housing market is under considerable strain with issues of supply and affordability being amongst the worst in the country. It is also generally acknowledged this is the result of multiple causes over a number of years. Despite the complex nature of the problem with many contributing causes, Council's attempted solution is a blunt instrument levied on one small sector of Queenstown's community (and ironically one that is actually seeking to deliver additional homes to address one of the key challenges). The Council's proposal is counterproductive, disproportionate, does not give effect to the National Policy Statement on Urban Development 2020 ("**NPS UD**") and the relevant regional policy statements and simply does not meet the requirements of s 32 of the RMA.
- 1.3 Winton is a residential land developer that specialises in developing integrated and fully master-planned neighbourhoods, and is a significant contributor to development in New Zealand, particularly in the Queenstown Lakes District. Winton has a portfolio of approximately 6,500 residential lots, dwellings, apartment units, retirement village units and commercial lots across both New Zealand and Australia, including several developments in the Queenstown Lakes District.¹ Winton's current projects in the Queenstown Lakes District include Northbrook Arrowtown, Ayrburn and various developments at Northlake in Wanaka such as The Preserve, Northbrook Wanaka, and Northlake Apartments.
- 1.4 Winton is concerned that the Variation disincentivises residential development investment by imposing additional costs on residential developers. Winton is one of a group of residential developers² ("**residential development consortium**") presenting a joint case on the Variation. The following witnesses have presented evidence on behalf of the residential development consortium:

¹ Statement of Evidence of Lauren Christie dated 19 December 2023 at [3.1].

² Darby, Glenpanel, Maryhill, Station at Waitiri, Silverlight, Gibbston Highway, Macfarlane Investments, Remarkables Park Limited, Winton Land Limited.

- (a) Lawrence Yule – Local Government;
- (b) Phil Osborne – Economics; and
- (c) Dave Serjeant and Chris Ferguson – Planning.

1.5 Winton will call additional evidence from Lauren Christie, the General Manager of the Winton Queenstown office.

1.6 These legal submissions follow submissions presented by counsel on behalf of other members of the residential development consortium yesterday. We endorse those submissions including their summary of the appropriate legal framework. To avoid wholesale duplication, these legal submissions will address the following points:

- (a) the jurisdictional issue presented by the Variation;
- (b) failure of Council's assessment under s 32; and
- (c) failure of the Variation to give effect to the NPS UD.

2. JURISDICTIONAL ISSUES

2.1 The submissions presented by Ms Baker-Galloway address jurisdictional concerns with the Variation in detail. We endorse and adopt those submissions. The Panel will need to be satisfied that the Variation falls within the scope of Council's powers under the RMA. In our submission it does not.

2.2 On the question of the validity of the transfer of funds, building on Ms Baker-Galloway's submissions yesterday, the caselaw essentially takes you back to s111 of the RMA and the question becomes the provision of housing is causing or contributing to housing unaffordability. We say it does not.

3. FAILURE IN SECTION 32 ASSESSMENT

3.1 As set out in the submissions of Ms Baker-Galloway and the evidence on behalf of the residential development consortium, there are a myriad of different causes of the housing problems in Queenstown. There could well be a range of different tools used together to efficiently and effectively address these issues. In this instance, Council has elected to levy a financial contribution on a small sector of the community, some (but not all) residential developers, where there is no clear link between the issue and those being tasked with funding the solution. In such circumstances, real care needs to be

taken in analysing the problem, the options and whether the proposed solution will address the problem.

- 3.2 As discussed with Ms Baker-Galloway, this option is novel and untested. That reinforces the need for care with the assessment of alternatives.
- 3.3 As set out in the evidence of Mr Serjeant, even if Queenstown Lakes Community Housing Trust meet their 15-year housing provision targets (to be funded by the Variation proposal), "this will do little to reduce the affordable housing shortage".³ In essence the method proposed by the Variation is not effective as it will not achieve its objective.⁴ Of course "every little bit counts" on gnarly issues such as these. However, that cannot protect the Council against the need to carry out a proper s 32 assessment. There has been no robust analysis of either the actual benefits that will accrue, or the resulting costs.
- 3.4 The definition of the problem in the s 32 evaluation does not define the problem in a way that enables measurement of options to address the problem.⁵ The economists agree that, although quantification of the housing shortfall could be approximated by a range of methods, these would not be sufficiently reliable for the basis of policy decisions.⁶ As set out by Mr Serjeant, "the extent to which the Variation can meet the objective and the certainty of meeting the objective must be a key matter for the s 32 analysis".⁷ This has not occurred.
- 3.5 It is absolutely possible to assess a composite solution through a s 32 analysis. That is what Mr Ferguson has proposed. This can include a combination of RMA and non-RMA options.

Why are we talking about whether the sky is falling?

- 3.6 Council's legal submissions state that the track record of inclusionary housing in the district shows "the sky does not fall in when developers are required to contribute land or cash by way of contribution to solving housing issues".⁸ Of

³ Statement of Evidence of David Serjeant dated 19 December 2023 at [12].

⁴ As set out in the evidence of Mr Serjeant, "the data demonstrates that, even without the uncertainties recognised in the economic evidence by Mr Osborne, if QLCHT meet their 15-year housing provision targets, which are funded by the contributions derived from the proposed rules, this will do little to reduce the affordable housing shortage. The Variation Strategic Objective 3.2.1.10 seeks a high, if not complete, level of remediation of the current state of unaffordability. As the proposed rules do not come close to meeting that objective, they fall at the first hurdle". Statement of Evidence of David Serjeant dated 19 December 2023 at [12].

⁵ Statement of Evidence of David Serjeant dated 19 December 2023 at [60].

⁶ Economics Joint Witness Statement held on 30 January 2024, response to question 5.

⁷ Statement of Evidence of David Serjeant dated 19 December 2023 at [65].

⁸ Legal Submissions on behalf of Queenstown Lakes District Council dated 23 February 2024 at [11.3].

course it does not. But that completely misses the point. In response, residential developers will simply become more judicious with where they are prepared to invest. That in turn will impact on housing supply and affordability further.

- 3.7 The evidence for the residential development consortium is the tax would place further financial constraints on developers and have the counterproductive effect of stymying residential development, through either limiting the supply of housing, which is central to housing affordability, and / or forcing developers to pass the additional costs onto purchasers which will make houses less affordable. The Sense Partners Economic Assessment ("**Sense Economic Assessment**") notes as a disadvantage that the cost of provision of affordable housing may be transferred to other players in the housing market in the short term. However, it is not clear (and there is no supporting assessment) as to why the transfer of costs would only be in the short term.
- 3.8 In Mr Osborne's view, the short-term costs of the Variation are likely to be much more pronounced than the longer-term impacts, at which point the Sense Economic Assessment agrees increased supply will play a greater role in market stabilisation⁹ with Council's legal submissions agreeing that "affordability issues endure until supply shortages are resolved".¹⁰
- 3.9 Evidence for Council acknowledges that a financial contribution will result in adverse costs, including costs for developers, administration costs for Council, plus the possibility of housing being delayed, not proceeding or having to be sold at a higher price to off-set increased costs.¹¹

Windfall gains and quid pro quo?

- 3.10 The Council's own evidence recognises the need for a linkage between developers who receive a windfall gain and the levying of the financial contribution. For example, the Sense Economic Assessment¹² states that examples of inclusionary zoning internationally are generally accompanied by corresponding incentivising provisions.
- 3.11 The Council's case seems fixated on a perception that developers are somehow getting a windfall gain, and that this Variation simply reflects a quid pro quo. But it just does not stack up.

⁹ Statement of Evidence of Philip Osborne dated 19 December 2023 at [66].

¹⁰ Legal Submissions on behalf of Queenstown Lakes District Council dated 23 February 2024 at [3.4].

¹¹ S42A Report of David Mead at [4.19], also referenced in Statement of Evidence of Christopher Ferguson dated 19 December 2023 at [47].

¹² Attachment 3g to the s32 Report.

- 3.12 The Variation does not provide any incentive, bonus or windfall gain to developers.¹³ This is contrast with the previous voluntary agreements which were linked to planning uplift or entered into in the context of broader agreements to provide commercial certainty.¹⁴
- 3.13 The Council has sought to draw a link to the intensification variation. Again, that does not withstand scrutiny. Any potential for greater levels of development, through the intensification variation, is currently uncertain and not uniformly applied.¹⁵

Rating as an option

- 3.14 As outlined in the evidence on behalf of the residential development consortium and other submitters, there are a number of other options available to Council to address the issues of housing affordability in the district. These are outlined in the evidence for the residential development consortium and the submissions of Ms Baker-Galloway.¹⁶ A key option that has not been fully assessed is the option of funding from general or targeted rates under the Local Government Rating Act 2002.
- 3.15 Council has not disputed that the rating framework could be used to generate funding for affordable housing. The option has been dismissed out of hand as not being *politically expedient*. With respect, this is a superficial reason and does not constitute sufficient consideration of rates as an option under s 32, especially given the advantages in the use of this option as compared to a narrowly levied financial contribution. If political expediency were the sole consideration, no rates increases or tax increases would ever be supported, no matter the need. This may well be an issue, like climate change, that ratepayers may not be opposed to contributing to. In response to questions

¹³ Economics Joint Witness Statement held on 30 January 2024, response to question 20. "The experts note that the variation does not in and of itself propose an increase in urbanisation i.e. such as an upzoning, nor in and of itself does it produce any windfall gain".

¹⁴ Statement of Evidence of Lauren Christie dated 19 December 2023 at [4.4].

¹⁵ Statement of Evidence of Philip Osborne dated 19 December 2023 at [58(f)]. In addition, as set out in the Economics Joint Witness Statement held on 30 January 2024, response to question 23(b), the economics experts for the submitters do not agree with the principle "of balancing or averaging out the consequences of this [V]ariation or other separate plan changes or plan variations and consider that its incremental effects should be viewed in isolation consistent with common economic practice, which is primarily concerned with effects "at the margin" where all other factors are held constant".

¹⁶ These include a financial contribution applied to a broader contribution target, clearly linked to an incentive, and explicitly linked to other strategic initiatives such as the intensification variation. This position is reinforced by the report prepared by Community Housing Aotearoa, and Community Housing Solutions which offered a detailed examination of inclusionary zoning, including that it should be "accompanied by cost off-setting measures such as faster consenting, delayed payment of development contributions, and/or planning concessions".

from the Panel, Ms Lee's evidence was that 92% of respondents considered affordable housing was affecting the community.

- 3.16 The Variation is also inequitable. At its core it is requiring one small sector of the Queenstown community to disproportionately provide a remedy for a shortfall in the stock of affordable housing. There are clear issues with the fairness of the residential development sector bearing the sole burden of the financial contribution provisions. The Variation completely ignores the demands on housing created by the tourism and business development sector. Imposing a mandatory tax solely on residential development is especially unfair when it is the residential development sector that is acting to provide supply, and therefore is part of the solution.
- 3.17 The rating option avoids the equity issue created by the financial contribution option as the much broader ratepaying community are invested in solving the problem.¹⁷ The residential development sector is happy to do their proportionate part. For this position to be criticised in the Council's legal submissions as somehow ironic¹⁸ reiterates the lack of perspective in the Council's case.
- 3.18 A rating-based approach also provides more certainty around application and funding that will be generated – there is no certainty around the level of development whereas there is more certainty around ratepayer base. Use of the pre-existing rates regime rather than a bespoke administrative-heavy financial contribution regime also reduces Council's administrative costs.¹⁹

4. FAILURE TO GIVE EFFECT TO NPS UD

- 4.1 The Variation (like any variation to a district plan) must give effect to national policy.²⁰ The only national policy statement which is of relevance is the NPS-UD. However, as set out in the legal submissions of Ms Baker-Galloway and the evidence of Mr Serjeant and Mr Ferguson, the Variation is contrary to the direction in the NPS UD. We do not repeat the submissions and evidence regarding the Variation's lack of alignment with the objectives and policies of the NPS UD, in particular Objective 2.

¹⁷ Statement of Evidence of Christopher Ferguson dated 19 December 2023 at [107].

¹⁸ Legal Submissions on behalf of Queenstown Lakes District Council dated 23 February 2024 at [10.4].

¹⁹ Statement of Evidence of Christopher Ferguson dated 19 December 2023 at [109].

²⁰ *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55 at [17]; and RMA, section 75(3)(a).

- 4.2 Mr Osborne's evidence identifies potential unintended consequences of the Variation including that there is likely to be a competitive disadvantage to areas identified by Council as suitable for greater intensification and smaller typologies.²¹
- 4.3 As Ms Christie outlines in her evidence, the Variation imposes additional costs on developers which will make the process more expensive. Not only will this discourage residential development but is likely to result in additional costs being passed onto purchasers.²² This is because the margins of development are tight, and any additional costs need to be borne by the purchaser if they were not able to be factored into land prices.²³
- 4.4 Mr Eaquib for Council agrees that the Variation will result either in a decrease of supply or an increase in prices.²⁴ He considers this is addressed by way of separate Council plan variations (Mr Osborne and Mr Colegrave disagree).
- 4.5 However, because this Variation does not incentivise the development of land, and will contribute to overall prices rising, full realisation of the intensification variation to give effect to Policy 5 of the NPS UD is likely to be detrimentally affected.

5. CONCLUSION

- 5.1 Stepping back, Council's aspiration is admirable, but its execution, assessment and analysis has been fundamentally flawed.
- 5.2 There are gaps in its analysis, flaws or issues with the analysis it has carried out, and alternatives that have not been properly assessed.
- 5.3 At its heart the Variation falls short of meeting the requirements of s 32, and ss 72 to 77 of the RMA.

Dated 5 March 2024

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²¹ Statement of Evidence of Philip Osborne dated 19 December 2023 at [65(a)].

²² Statement of Evidence of Lauren Christie dated 19 December 2023 at [4.6].

²³ Statement of Evidence of Lauren Christie dated 19 December 2023 at [4.3]. Economics Joint Witness Statement held on 30 January 2024, response to question 23(b). "The variation imposes a cost which must be funded either by lower margins and / or higher selling prices".

²⁴ Economics Joint Witness Statement held on 30 January 2024, response to question 23(b).