

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

AND

IN THE MATTER of a submission by **FULTON HOGAN LAND DEVELOPMENT LIMITED** on the Inclusionary Housing Plan Change by **QUEENSTOWN LAKES DISTRICT COUNCIL** to the operative Queenstown Lakes District Plan

SUBMISSIONS BY FULTON HOGAN LAND DEVELOPMENT LIMITED ON THE DRAFT INCLUSIONARY HOUSING PLAN CHANGE

1. INTRODUCTION

- 1.1 These submissions are made on behalf of Fulton Hogan Land Development Limited ("FHLD") in relation to the proposed variation to the Queenstown Lakes Proposed District Plan ("PDP") to introduce Strategic Objective 3.2.1.10, Strategic Policies 3.3.52, 3.3.53 and 3.3.54 and District Wide Chapter 40 Inclusionary Housing ("Variation").

Fulton Hogan Land Development Limited

- 1.2 FHLD is one of New Zealand's largest residential land development companies and has made a significant contribution to housing supply in the Auckland region and further afield over the past 25 years. Examples of FHLD's developments (some of which are joint ventures) include:
- (a) Drury East (when complete will accommodate circa 1,500 dwellings);
 - (b) Milldale - Wainui (when complete will accommodate 4,000 dwellings and a 6 hectare town centre);
 - (c) Millwater (near Silverdale) (3,000 dwellings);
 - (d) Pokeno (2,000 dwellings and 30 hectares of industrial land);
 - (e) Dannemora (4,000 dwellings);
 - (f) Halswell, Christchurch (1,200 dwellings, completed in 4 years following the Christchurch earthquakes); and
 - (g) Lincoln, Selwyn (900 dwellings, with 700 completed to date).
- 1.3 In addition to the above, FHLD has recently acquired approximately 38ha of land within the Northlake Special Zone in the Operative Queenstown Lakes District Plan ("ODP"), which has a dwelling capacity of over 390 dwellings. This development will be undertaken as a joint venture by WFH Properties Limited.

FHLD position

- 1.4 FHLD submits that there is no legal basis for implementation of the Variation and, if approved, the Variation would have a chilling effect on urban growth in the Queenstown

Lakes District as it would stifle economic development and reduce housing choice and affordability.

- 1.5 FHL D, therefore, opposes the Variation on the basis that it is fundamentally flawed. FHL D's position is that the Variation should be declined and the Queenstown Lakes District Council ("QLDC or Council") should investigate alternative avenues to address housing affordability issues in the Queenstown Lakes District.

Scope of submission

- 1.6 The flaws with the Variation are numerous. These submissions identify the most significant flaws. Specifically, these submissions address the following:
- (a) Context of the Variation (Section 2).
 - (b) The *Infinity* cases (Section 3).
 - (c) Section 108 of the RMA (Section 4).
 - (d) The NPS-UD (Section 5).
 - (e) Assessment of alternatives (Section 6).
 - (f) FHL D's conclusion (Section 7).

Supporting evidence

- 1.7 This submission has been prepared with reference to:
- (a) Expert economic evidence from Fraser Colegrave.
 - (b) Expert planning evidence from Daniel Thorne.
 - (c) Corporate lay evidence from Greg Dewe.

2. CONTEXT OF THE VARIATION

The Queenstown Lakes District and Affordable Housing

- 2.1 Consistent with the views of the Council and many other submitters, FHL D considers that providing for affordable housing is an issue of significant importance for all of New Zealand and, particularly, Queenstown Lakes District given that District house prices are significantly higher than other areas of New Zealand.
- 2.2 Housing affordability is a multifaceted and complicated issue; a number of driving factors in relation to the Queenstown Lakes District specifically have been identified and discussed in depth in the evidence of Fraser Colegrave. These include:
- (a) QLDC's limited ability to address the district's inordinately high land prices due to the widespread presence of protected outstanding natural landscapes;¹
 - (b) High construction costs within the district, which compounds the land costs issue identified above;² and

1 Evidence of Fraser Colegrave, at [60].

2 Evidence of Fraser Colegrave, at [61].

(c) An unusually high share of short-term rental dwellings and holiday homes within the district that are unoccupied for much of the year, directly reducing the pool of properties that may otherwise be available for long-term rental.³

2.3 While FHLD does not dispute that there are housing affordability issues in the Queenstown Lakes District and that the Council is right to consider options for addressing them, it has major concerns regarding the lack of a legal basis for the Variation.

The Variation as proposed by the Council

2.4 The QLDC has proposed the Variation to its PDP to provide for affordable housing through the mechanism of a financial contribution under the RMA. According to the opening legal submissions for QLDC, affordable housing is a planning approach that delivers housing to the market at less than the market price and must be “retained” in perpetuity as affordable housing.⁴

2.5 QLDC’s proposed objectives for implementing the Variation is to provide more people from low to moderate-income households with affordable housing choices within the district so that a diverse and economically resilient community representative of all income groups is maintained into the future, in a way and at a rate that assists with providing a range of house types and prices in different locations.⁵

2.6 The Council has proposed to meet these objectives by requiring residential subdivisions and developments to pay an affordable housing financial contribution. This contribution will then be collected by the QLDC and provided to the Queenstown Lakes Community Housing Trust (“QLCHT”) (or another registered Community Housing Provider).

2.7 The proposed ‘affordable housing financial contribution’ would be payable either at the time of residential subdivision approval and/or when a building consent is issued for a new build (including apartments in business and mixed-use areas). The proposed contribution for a subdivision would be:

(a) **New subdivisions that create vacant residential lots within existing urban areas:** 5% of the additional serviced lots created are to be provided to the Council as either a transfer of land or as an equivalent monetary contribution.

(b) **Residential subdivisions in a Settlement Zone, Rural-Residential Zone, Wakatipu Basin Rural Amenity Zone Lifestyle Precinct or Special Zone:** 1% of the anticipated sales value of the additional lot(s), as defined in the proposed provisions.

The Queenstown Lakes Community Housing Trust

2.8 As stated above, the contribution will be given to the QLCHT, who will then invest these contributions into QLCHT’s Secure Home scheme or one of its affordable rental programs. These properties will ultimately result in housing stock being held in perpetuity by the QLCHT, which is not accountable to the developers who will be paying the financial contribution or the Council, except via a 7-page Relationship Framework Agreement that developers are not parties to.⁶

2.9 The QLCHT has stated that Secure Homes takes up 50% - 60% of the portfolio, with the remaining being allocated to affordable rental programs. The premise of the Secure

3 Evidence of Fraser Colegrave, at [62] – [65].

4 Council’s legal submissions, at [3.6].

5 Evidence of Daniel Thorne, at [5.1].

6 Statement of evidence of Amy Bowbyes (14 November 2023), Appendix one.

Home program is that a family will pay an upfront payment (purchase price) for the home based on its construction costs only; the QLCHT then registers a 100-year lease over the land in an individual's name, giving the individual the right to occupy the home for their lifetime. As part of this process, the QLCHT requires you to pay monthly ground rent to use the land. As QLCHT is not considered a landlord, the individual is required to take care of things like house insurance, council rates, and maintenance, and is required to follow a maintenance schedule. Participating in the Secure Home scheme requires a commitment to remain in the property for the first three years, but, after that, it may be sold back to QLCHT at any time for the same price the individual paid, plus an inflation adjustment.

- 2.10 Individuals may participate in the Secure Home scheme or one of its affordable rental programs if they fit into a specific set of criteria. The Council has submitted that the criteria proposed by the QLCHT would ensure that the financial contribution received would be specifically used to develop housing for eligible households on low-moderate incomes, which is allegedly not able to be achieved through the open market.⁷
- 2.11 The QLCHT has stated that the adoption of the Variation will go a long way towards securing enough land to reduce the number of households needing a home on QLCHT's waiting list and achieving its goal of assisting 1000 households in securing healthy homes by 2038.⁸ QLCHT's 2023 annual report states that it has housed 244 families since its inception in 2005, with 123 families currently housed as at mid-2023. While that is an important contribution, it represents only 0.6% of the district's total dwelling stock.⁹

3. THE INFINITY CASES

- 3.1 The Council has relied on the Environment Court's decision in *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* ("*Infinity*")¹⁰ as the starting point for the Council's authority for the Variation. The *Infinity* case related to promulgation by QLDC of Plan Change 24 ("PC24") to address issues relating to affordable and community housing in the district. The primary issue in the case, argued as a preliminary question of law, was whether the provisions of the RMA enabled the planning provisions of PC24 that directed developers to provide or subsidise affordable housing. The Environment Court stated the following regarding the effect of PC24:¹¹

"In practical terms this means that the developer at the time a plan change request is submitted or an application for a resource consent (non-complying or in some cases discretionary) is made will include in the plan or application, provision for the applicable Affordable Housing component. This may require the appropriate number of allotments to be set aside for multi-unit or duplex development. In other words there would be a requirement to incorporate allotments which encourage a form of housing that by its nature is more likely to be affordable to lower and moderate income families. Appendix 11 indicates that up to sixty percent of the Affordable and Community Housing component may be sold by the developer in the normal way.

Appendix 11 indicates that at least forty percent of the Affordable Housing component is to be set aside for Community Housing. This component is the only direct contribution required. It can be satisfied by either the setting aside of land for that purpose, by making a payment equal to the value of the land concerned, or by actually

7 Statement of evidence of Amy Bowbyes (14 November 2023), at [4.2].

8 QLCHT has indicated have stated that there are over 1100 households currently on the waiting list to be allocated on a first-come, first-served basis.

9 Evidence of Fraser Colegrave, at [96].

10 *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2010] NZEnvC 234.

11 *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2010] NZEnvC 234 at [23]-[24].

providing the housing. The Community Housing component can be either managed by an appropriate trust or by the developer however, it must be retained for Community Housing."

- 3.2 The Court concluded that, broadly, the PC24 inclusionary housing provisions fell within the scope of section 31(1)(a) – (b) and section 5 of the RMA, but it also stated the following:¹²

"... While acknowledging that the objectives, policies, and rules of Plan Change 24 are in contention, I am not prepared at this stage of the proceedings to hold that the rules fail to be necessary in achieving the Act's purpose."

- 3.3 The substantive hearing of PC24 never took place as PC24 was eventually withdrawn by the Council for economic and political reasons, following an appeal to the High Court¹³ and leave being granted by the High Court for an appeal to the Court of appeal on the following question:¹⁴

"Was the High Court right when it ruled that Plan Change 24 came within the scope of the RMA?"

- 3.4 In addition, the High Court stated the following in its decision on the appeal with respect to the purposes for which financial contributions can be imposed pursuant to section 108 of the RMA:¹⁵

"Mr Whata sought to demonstrate by way of diagrammatic analysis that PC24 was beyond the range of purposes for which financial contributions could be lawfully imposed. I am not confident that the line he drew reflects the limit of purposes for which financial contributions can be lawfully imposed. But that is a matter that should be determined by the Environment Court with the benefit of evidence at a substantive hearing."

[emphasis added]

- 3.5 Given the above, it is submitted that the *Infinity* cases are not good authority for any proposition that imposing financial contributions on developers to pay for affordable housing is authorised under the provisions of the RMA, particularly given that there was never a substantive hearing to finally determine the issue.
- 3.6 We address the issue regarding imposing financial contributions under section 108 and the relevant case law in that regard in Section 4 below. Mr Whata (now Justice Whata) appears to have been clearly of the opinion that imposing financial contributions pursuant to section 108 for affordable community housing was not authorised under section 108 of the RMA. We share that view and expand on it below. Somewhat surprisingly, there is no mention of the section 108 provisions on financial contributions in the Environment Court's decision in *Infinity*. That, in our submission, is another critical reason why *Infinity* is not good authority for what the QLDC now proposes via the Variation.

4. SECTION 108 OF THE RMA

- 4.1 A financial contribution for affordable housing would be imposed as a condition of consent. It is therefore necessary to consider whether such a condition could be imposed

¹² *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2010] NZEnvC 234 at [27].

¹³ *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2010-425-365, 14 February 2011.

¹⁴ *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2012] NZHC 750 at [28].

¹⁵ *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2010-425-365, 14 February 2011 at [56].

in light of the relevant provisions of section 108 of the RMA and case law on those provisions.

4.2 Section 108(2)(a) of the RMA states:

"(2) A resource consent may include any 1 or more of the following conditions:

(a) subject to subsection (10), a condition requiring that a financial contribution be made."

4.3 Section 108(10) of the RMA prohibits a resource consent from imposing 'financial contributions' conditions unless stated prerequisites are met:

"(a) the condition is imposed in accordance with the purposes specified in the plan or proposed 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 or proposed plan."

4.4 The Courts have also identified four principles for considering the validity of a financial contribution:¹⁶

(a) Is the contribution imposed for a purpose specified in the Plan?

(b) Has the level of contribution been determined in a manner described in the Plan?

(c) Does the condition imposing the contribution satisfy the *Newbury* tests (as now modified by *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, (2006) 13 ELRNZ 3, [2007] NZRMA 137 (SC))?

(d) Is the condition fair and reasonable on its merits?

4.5 The Supreme Court stated the following in *Waitakere City Council v Estate Homes Ltd* regarding the requirements for valid conditions of consent:¹⁷

"... In order for that requirement to be validly imposed it had to meet any relevant statutory stipulations, and also general common law requirements that control the exercise of public powers. Under these general requirements of administrative law, conditions must be imposed for a planning purpose, rather than one outside the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.

...

... We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it

16 *Retro Developments Ltd v Auckland City Council* (2004) 10 ELRNZ 330 (EnvC).

17 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, (2006) 13 ELRNZ 3, [2007] NZRMA 137 (SC) at [61] and [66].

imposes are not unrelated to the subdivision. They must not for example relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so."

[emphasis added]

- 4.6 For the reasons addressed below, it is submitted that any financial contribution conditions imposed on developments for the purpose of funding affordable housing would fail the tests for valid conditions in that they:
- (a) would not fairly and reasonably relate to the developments; and
 - (b) would be imposed to address external/ulterior concerns; and
 - (c) would not be fair and reasonable on the merits.
- 4.7 Ultimately, what the Variation is seeking to do as regards to financial contributions is impose a tax on developments, via conditions of consent, to pay for housing that is not related to the developments. Affordable housing is an external/ulterior concern insofar as the Council is seeking through the Variation to set price controls for such housing and tax developers to pay for it. In that respect, the Variation is premised on the basis that developers receive "planning windfall gains" and should be compelled to return some of those gains to the community to provide affordable housing. That premise is incorrect - many developers have already bought land and paid for it on the basis of the ODP rules in place at the time of the purchase.¹⁸
- 4.8 There is no argument that the District has a housing affordability issue. However, as acknowledged by the Council, this issue does not stem solely from the residential development community.¹⁹ Unlike where development creates a demand for infrastructure and, therefore, is required to make a financial contribution to pay for that infrastructure, the concept of housing affordability is complicated, multifaceted, and cannot be linked / applied to individual developments. In that respect, the Independent Hearing Panel (Chaired by Environment Court Judge Kirkpatrick – now the Chief Environment Court Judge) decision on the proposed affordable housing provisions in the proposed Auckland Unitary Plan stated that:

"The proposed Unitary Plan as notified included objectives and policies to require residential developments of more than 15 dwellings to include provision for 'retained affordable housing' of at least 10 per cent of the units. Such housing was defined to mean dwellings sold or rented at a rate such that households on 80 to 120 per cent of the median household income for Auckland would spend no more than 30 per cent of their gross income on rent or mortgage repayments. Future transfers of these dwellings would be controlled as to price or rent by the use of encumbrances on the land, with purchasers or tenants being required to demonstrate their eligibility to meet the affordability requirements.

Auckland Council submitted that affordable housing provisions are able to be imposed legally through the Unitary Plan and that this intervention is justified on the basis that a number of other provisions in the Plan place upward price pressure on the housing market. It was submitted that this upward price pressure then generates a corresponding adverse effect on the social and economic well-being of the community that permits avoidance, remediation or mitigation

19 Evidence of Gregory Dewe, at [4.3].

through price control provisions implemented under the Resource Management Act 1991 (via the Unitary Plan).

Assuming that there is jurisdiction to include such price controls in the Unitary Plan to address price effects arising from other provisions of the Unitary Plan, the Council did not clarify how the Plan-based price effects would (or could) be distinguished from price effects from other sources (e.g. from immigration, monetary, or tax policies, or from price variations due to location or building quality). Without such a distinction there is no certainty that any price controls imposed through the Unitary Plan would address only the price effects arising from other provisions of the Unitary Plan, rather than being a price-control mechanism with general application. In the Panel's view the Resource Management Act 1991 and plans promulgated pursuant to it are not intended to include general price-control mechanisms.

...

The Panel was persuaded by the submissions of the Ministry for Business, Innovation and Employment and Housing New Zealand Corporation, among others, that the affordable housing provisions as proposed by the Council would likely reduce the efficiency of the housing market due to effectively being a tax on the supply of dwellings and be redistributive in their effect. The Panel is of the view that the imposition of land use controls under the Resource Management Act 1991 is not an appropriate method for such redistributive assessments and policies.

The Panel accepts a number of submissions (by Advance Properties Group, Ministry for Business, Innovation and Employment, Housing New Zealand and others) that the most appropriate way for the Plan to address housing affordability in the region is by enabling a significant increase in residential development capacity and a greater range of housing sizes and types. While these measures are unlikely to resolve the issue of housing affordability in isolation, they are the primary way the Plan can contribute to address this issue.

Lastly, the Panel notes it is open to property owners to provide dwellings for rent or sale at below market values, as housing providers with social objectives routinely do. The Panel considers these choices should be left with property owners and it is not the appropriate jurisdiction of the Unitary Plan to impose these choices on property owners.

For these reasons the Panel considers that housing affordability is best addressed in the Plan as primarily housing supply and housing choice issues and that consideration of housing affordability needs to permeate the provisions throughout the Plan. This is in contrast to the retained affordable housing provisions in the notified Plan that treat affordability separately from other land use provisions. Furthermore these provisions would effectively be a tax on the supply of housing and therefore would tend to impede rather than assist an increase in that supply."

[emphasis added]

- 4.9 Imposing financial conditions on developments to fund affordable housing would be an unprecedented tax on developers, akin in alternative industries to either:²⁰
- (a) forcing supermarkets to give away 5% of all their goods because the price of food is unaffordable for many (which it is); or

20 Evidence of Gregory Dewe, at [4.2].

- (b) making fuel stations give away 5% of their fuel for free because the cost of fuel is too expensive.

4.10 In addition, we emphasise the following from Mr Colegrave's evidence:²¹

*"[21] While I agree that the district has a chronic housing affordability problem, I expect the proposed policy to make housing less affordable for virtually everyone, except the lucky few helped by the Queenstown Lakes Community Housing Trust (**Trust**).*

[22] This is because it wrongly blames developers for the issue, despite development being an integral part of the solution from an economic perspective, not the problem.

*[23] The policy also cannot be rationalised through any traditional tax lens. It is neither a corrective tax, like on smoking, nor a rent tax, like those imposed in return for (say) oil and gas permits. It also does not fit the typical definition or use of a financial contribution (**FC**) either.*

[24] Coupled with its inordinate complexity and high transactions costs, I expect the policy to have many unintended economic consequences, including Increasing the risk, cost, and complexity of development, which will erode financial viability, reduce likely future supply, and place even greater pressure on district house prices and rental values."

4.11 It is submitted that the blunt reactionary approach of the Variation:

- (a) cannot be considered fair and reasonable and is a redistributive tax in the same way that the proposed AUP provisions were; and
- (b) will impede rather than assist in increasing the supply of housing for the reasons stated in Mr Colegrave's evidence.

4.12 It is also submitted that, as with the AUP, the most appropriate way for the QLDP to address housing affordability is by enabling residential development capacity and a greater range of housing sizes and types. In that regard, we note the conclusion of Mr Colegrave at paragraph 30 in the summary of his evidence:²²

"The Queenstown-Lakes district is a highly desirable place to live and visit. Along with supply constraints, this enduring appeal has eroded district housing affordability. The best solution is likely to be multi-faceted and require coordinated input from Central Government and other key stakeholders. Options that encourage the provision of smaller homes on smaller sections, at both pace and scale, seem the most effective and efficient ways to address the problem, so I strongly support such initiatives on economic grounds."

5. THE NPS-UD

5.1 Council has submitted that the Variation does not need to achieve the purpose of the NPS-UD, as this will be achieved through the implementation of the QLDC's National Policy Statement-Urban Development (District Plan Amendments) ("NPS-UD Amendments") and that any consideration of the Variation under the NPS-UD must be considered in light of the NPS-UD Amendments.

21 Evidence of Fraser Colegrave, at [21]-[24].

22 Evidence of Fraser Colegrave, at [30].

5.2 This is incorrect. The panel cannot operate on the assumption that the NPS-UD Amendments will be successfully implemented into the PDP or will apply to the extent envisioned when the NPS-UD Amendments were notified in June 2023 – the NPS-UD Amendments will be implemented through a separate process from the Variation. The QLDC’s website states the following regarding the stage that process has reached:

"The formal submission period on the Proposed Urban Intensification variation is now closed. Submissions are now being processed and summarised. The submissions and a submission summary document will be made available early 2024, followed by a further submission process with the hearing likely taking place towards the end of 2024."

5.3 Given the above, the Panel cannot consider the NPS-UD Amendments on the basis that those provisions are not even before the Panel, the NPS-UD Amendments are at a much earlier stage in the statutory process than the Variation, and the decision of the Panel is likely to be given long before the hearing of the NPS-UD Amendments even takes place.

5.4 In any event, at a fundamental level, the Variation runs directly counter to the imperative in the NPS-UD to support competitive land and development markets, as stated in Objective 2:

"Objective 2: Planning decisions improve housing affordability by supporting competitive land and development markets."

5.5 The Council’s assertion that the Variation is consistent with Policy 2 of the NPS-UD, as inclusionary housing may assist a territorial authority to provide sufficient development capacity to meet expected demand for housing over (at least) the short term,²³ is contrary to how the NPS-UD was intended to operate. In that regard, there is a strong directive in the NPS-UD for local authorities to deliver greater land supply and provide greater intensification through planning provisions to support housing affordability. Mr Thorne addresses that in his evidence where he states:²⁴

"I also note that the Regulatory Impact Statement states the following with regard to affordable housing:

"Addressing housing affordability

Several submissions expressed concern that the proposed NPS-UD did not explicitly signal that the NPS-UD is expected to help improve housing affordability. There is no consistently agreed upon definition of the term "affordable housing", so to avoid unintended consequences resulting from particular interpretations of the term we have included an objective that clearly states the intent of the NPS-UD is to support housing

I have also reviewed the Section 32 Evaluation Report for the NPS-UD (March 2020) and none of the evaluation contemplates that the NPS-UD would be used as justification for financial contribution rules that are levied off realised housing capacity. The Section 32 Evaluation Report characterises the intent of the NPS-UD as:

"Making room for growth in RMA Plans – requires local authorities to allow for growth up and out in a way that contributes to a well-functioning urban environment, and to ensure their rules do not unnecessarily constrain growth'."

23 Council’s Legal Submissions, at [6.5].

24 Evidence of Daniel Thorne, at [3.7]-[3.6].

- 5.6 In addition, the Environment Court has described the purpose of the NPS-UD as follows:²⁵

"The NPS-UD has the broad objective of ensuring that New Zealand's towns and cities are well-functioning urban environments that meet the changing needs of New Zealand's diverse communities. Its emphasis is to direct local authorities to enable greater land supply and ensure that planning is responsive to changes in demand, while seeking to ensure that new development capacity enabled by councils is of a form and in locations that meet the diverse needs of communities and encourage well-functioning, liveable urban environments. It also requires councils to remove overly restrictive rules that affect urban development outcomes in New Zealand cities."

[emphasis added]

- 5.7 Contrary to what the Council has submitted, the NPS-UD is explicit and directive in regard to how affordable housing should be provided for - enabling a responsive market.

- 5.8 The Variation enables less, rather than greater, land supply as some developers will be required to contribute a financial contribution of land. Instead of supporting plan-enabled capacity from materialising. That would result in a tax on developers, which the development community has told the Council will result in developers looking outside the Queenstown Lakes District to develop. That creates a scenario that is directly contrary to Objective 2 of the NPS-UD and how affordable housing was foreseen to be achieved.

- 5.9 Objective 1 of the NPS-UD is to ensure:

"New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future."

- 5.10 Policy 1 of the NPS-UD then expands on the minimum requirements that contribute to a well-functioning urban environment, including a range of different outcomes through planning provisions, including providing a variety of homes that meet the needs of the community in terms of "price, location and different households."

- 5.11 The Council's assertion that the NPS-UD supports the Variation to enable a "variety of homes that meet the needs ... of different households", allowing "communities to provide for their social, economic and cultural wellbeing", due to the supply of housing being terribly unresponsive and the affordable end of the market undersupplied, is a narrow oversimplification to what the NPS-UD was intended to achieve.

- 5.12 The NPS-UD, and, in particular Objective 1, was not designed nor intended to be used as a means to include financial contribution rules levied from allotment creation and home construction.²⁶ The NPS-UD Regulatory Impact Statement identified that implementation of the NPS-UD was expected to require increased spending, predominantly to be felt by the Council (some through growth-related infrastructure costs and others through plan changes and preparative work for these), but that it was expected that the Council would, in turn, seek funding through rates and development contributions.²⁷

- 5.13 It is submitted that the NPS-UD was never intended to support the implementation of a financial contribution for affordable housing for the reasons addressed above. Ironically,

25 *Middle Hill Limited v Auckland Council* [2022] NZEnvC 162 at [33].

26 Evidence of Daniel Thorne, at [3.5].

27 Evidence of Daniel Thorne, at [3.5]; Regulatory Impact Statement 2020 on the NPS-UD, at 2.

inclusion of such provisions in the Variation (if approved) threatens the ability of the Council to deliver infrastructure – if developers look to develop outside the Queenstown Lakes District the Council's ability to deliver the infrastructure to contribute towards the creation of well-functioning urban environments will be compromised due to the lack of development contributions.

6. ASSESSMENT OF ALTERNATIVES – SECTION 32 OF THE RMA

- 6.1 Under section 32 of the RMA, the Panel is required to consider whether the provisions are the most appropriate way to achieve the purpose of the plan change and the objectives of the PDP. There is no question that there is an issue with affordable housing in the Queenstown Lakes District; however, a far more comprehensive holistic approach to the issues is urgently required.²⁸
- 6.2 The Section 32 Report and associated supporting information, including information provided by the Council, has not adequately taken into account the costs of the proposal or undertaken a comprehensive assessment of alternative, reasonably practicable options, which we submit would more efficiently and effectively achieve the objectives of the Variation.²⁹
- 6.3 Under this section, we rely heavily on expert evidence provided by Fraser Colegrave and Daniel Thorne and lay evidence provided by Greg Dewe.

The inherent issues with the implementation and operation of the Variation

- 6.4 There is empirical economic evidence that the Variation will reduce the future number of district homes available, shifting the housing market away from its optimal future price/quantity combination and making them less affordable for virtually everyone except the small number of individuals who will be able to secure housing through the QLCHT,³⁰ ultimately resulting in circumstances which are counterproductive to the proposed strategic objectives for imposing the Variation.

Failure to adequately consider economic evidence, concerns expressed and economic rational.

- 6.5 There is a lack of rationale for imposing the Variation, which runs counterintuitively to how and why financial contributions have been imposed, and acts as a tax which is neither efficient nor equitable.³¹ The evidence of Mr Colegrave summarises the potential unintended consequences of the Variation, which include:³²

- "(a) Increasing the risk, cost, and complexity of development, which will erode financial viability, reduce likely future supply, and place even greater pressure on district house prices and rental values;*
- (b) Impacting the district's ability to meet its obligations to provide "at least sufficient capacity at all times" under the NPS-UD;*
- (c) Pushing some prospective first-home buyers out to other areas like Central Otago District, and/or into the rental market;*
- (d) Reducing the rate of future economic activity in construction, which is the district's third largest employer. This will have knock*

28 Evidence of Fraser Colegrave, at [95].

29 *Middle Hill Limited v Auckland Council* [2022] NZEnvC 162, at [29].

30 Evidence of Fraser Colegrave, at [39]-[42].

31 Evidence of Fraser Colegrave, at [43]-[48].

32 Evidence of Fraser Colegrave, at [51].

on effects for the numerous families reliant on the incomes that construction activity provides;

- (e) Potential reputational damage for QLDC, including undermining its relationships with stakeholders in the development community;*
- (f) Exposing QLDC to potential financial risk if a resulting slow-down in development activity causes an under-recovery of debt-funded growth infrastructure via lower DC revenues; and*
- (g) Reducing repayments, which lowers spending on local goods and services and hence ripples throughout the economy."*

6.6 Mr Colegrave, in his evidence has also identified numerous failures in relation to how the Variation has been constructed and the proposed implementation of the Variation, including that the:

- (a) Variation is too complex & will have high transaction costs;³³
- (b) Variation fails to identify the root causes of the problem;³⁴ and
- (c) Evidence base for imposing the Variation relies too much on overseas experiences.³⁵

6.7 These concerns are also mirrored in the evidence of Greg Dewe, who, from the perspective of a large-scale residential developer like FHL, has stated that QLDC will be worse off, with the approach being promoted by the Variation resulting in either:³⁶

- "(a) Fewer sections being developed in the Queenstown Lakes District if a developer has land in other locations where it is more favourable to develop – lessening supply within the Queenstown Lakes District area; and /or*
- (b) The remaining sections available for sale increasing in price to offset the Variation, which essentially acts as a new land tax."*

6.8 What is evident from the above extracts, from the comprehensive evidence provided by Mr Dewe and Mr Colegrave, is that there are serious concerns that the Variation will have a substantially negative effect on the Queenstown Lakes District, both in relation to the concept of affordable housing and/ or otherwise.

Objectives of the PDP will not be achieved.

6.9 Specifically, the Variation will not achieve the proposed objectives for imposing the Variation. The proposed objectives of the Variation (as per Mr Mead's amendments outlined in his Section 42A Report) are:³⁷

"Proposed Strategic Objective: 3.2.1.10

Affordable housing choices for low to moderate income households are provided in new residential developments and redeveloping residential areas so that a diverse and economically resilient community representative of all income groups is maintained into the future.

33 Evidence of Fraser Colegrave, at [52] – [55].
34 Evidence of Fraser Colegrave, at [56] – [74].
35 Evidence of Fraser Colegrave, at [75] – [93].
36 Evidence of Gregory Dewe, at [4.6].
37 Section 32 Report, Appendix 3C at [22].

Proposed Chapter 40:

Objective 40.2.1 Provision of affordable housing for low to moderate income households in a way and at a rate that assists with providing a range of house types and prices in different locations so as to support social and economic well-being and manage natural and physical resources, in an integrated way."

- 6.10 Given the expert evidence that has been provided, the implementation of the Variation as proposed, does not result in the above objectives being achieved and ultimately may result in circumstances which are counterproductive to creating an economically resilient community or supporting the communities social and economic wellbeing.
- 6.11 Mr Thorne, following a review of Council's Section 32 Report analysis, consideration of evidence of Greg Dewe and Fraser Colegrave, and the Variations associated objectives, concludes:³⁸

"Although I do not disagree with Mr Mead's analysis of the mechanisms which allow financial contribution rules to be included in the PDP, I consider that the proposal does not sit comfortably with the PDP and its role as a regulatory tool to achieve Part 2 of the RMA. This is because the provision of housing is essentially recognised and provided for as a positive activity, subject to adverse effects on the environment being appropriate. The IZ provisions seemingly turn this concept on its head by rendering housing an adverse effect, with the avoidance, remediation or mitigation of adverse effects being alleviated or offset through a financial contribution. In short, the IZ provisions reconstruct housing, and in particular housing in urban environments as an adverse effect which is alleviated through financial compensation.

As I see it, the District Plan is a regulatory document but is being used as a relatively blunt tool to correct what the Council identifies as a broader market failure. This in my mind illustrates that the use of a district plan framework to implement affordable housing provisions is not the most appropriate way to achieve the purpose of the RMA."

Failure to adequately consider reasonably practicable alternative options

- 6.12 QLCHT is only a small player from an overall housing supply perspective, so it cannot be expected to address the problem in isolation; instead, a far more comprehensive holistic approach to the issue is urgently required.³⁹
- 6.13 As the costs of the Variation have been drastically understated, the Council's Section 32 Report has failed to evaluate alternatives efficiency and effectiveness and have instead taken a conclusionary approach to alternatives in determination of their preferred approach, which is creating rules in the PDP to levy financial contributions.⁴⁰
- 6.14 In assessment of the Section 32 Report provided by the Council, Mr Thorne states:⁴¹

"I am of the view that the costs of the IZ variation will exceed the benefits, and there are a range of more appropriate alternatives that should be considered. In this regard, I consider that there are a number of more effective and efficient approaches to supporting the provision of affordable housing, including through less restrictive land use controls, supporting infrastructure provisions (or financing

38 Evidence of Daniel Thorne, at [5.9].

39 Evidence of Fraser Colegrave, at [95].

40 Evidence of Daniel Thorne, at [4.1].

41 Evidence of Daniel Thorne, at [2.4].

mechanisms), general or targeted rates, and/or other methods that incentivise affordable housing provision within the market."

- 6.15 The preferred general direction is understood to be a supply-plus intervention approach, and this approach will be more efficient and effective than a voluntary approach to affordable housing. For these reasons, Mr Colegrave has suggested that the implementation of a rates-based approach for the QLDC may be the best option. He states:⁴²

"In my view, the Trust's funding and operations should be decoupled to enable the best long term funding source(s) to be objectively identified.

Although QLDC has many funding tools available to it, I consider rates the best option for the long-term funding of the Trust because rates:

- a) Provide a very wide tax base, thereby lowering the tax 'rate' required, and hence diffusing the financial burden equitably;*
- b) Do not perversely penalise developers for supplying new homes to meet ongoing growth in demand and hence aid affordability;*
- c) Are easy to design and implement, thereby minimising ongoing administrative costs; and*
- d) Can also be used to target specific groups within the community via targeted rates if deemed appropriate."*

Alterations to the Variation

- 6.16 As stated above, there is no evidential basis for the Variation's incorporation into the PDP; however, if the Panel elects to ignore sound resource management practices and approve the Variation, we request that the Variation be amended to better address the needs of the Queenstown Lakes District.

- 6.17 Mr Thorne has articulately suggested a number of amendments which are required to be incorporated into the Variation if you find the Variation can be accepted. Mr Thorne states:⁴³

"I recommend that if PDP Chapter 40 is confirmed then the following provisions (or similar compensatory or offset measures) are added to Chapter 40 as part of the IZ financial contribution rule framework. These provisions include:

"(a) That the LDSRZ enable a density of one residential unit per 300m² calculated as an average across the site and building height of 8m (this is consistent with the notified UI Variation PDP amendments);

(b) The MDRZ enable building height commensurate with the UI variation;

(c) That any application for resource consent under the IZ financial contribution rules is processed without public notification or limited notification; and

(d) That the activity status for any non-compliance with the IZ financial contribution rules is a Restricted Discretionary

42 Evidence of Fraser Colegrave, at [100].

43 Evidence of Daniel Thorne, at [7.10] –[7.12].

activity, with the matters of discretion restricted to the provision of affordable housing.

I consider that the benefits of the above will help temper the significant costs of the proposal. Further, the costs of the above are considered low because they are already evaluated and supported by the Council as part of its UI variation.²¹

The exceptions to this are the non notification pathway, for which I note the following:

(a) A 'complying' Controlled activity or Restricted Discretionary activity subdivision is generally treated as a non-notified activity (PDP Subdivision and Development Chapter 27 Rule 27.10). In this case, the rule incentivises applicants to otherwise ensure their subdivision or land use complies with the density outcomes (and if introduced, the IZ financial contribution provisions).

(b) LDSRZ Chapter 7 Rule 7.4.9 (under the UI variation) is a Restricted Discretionary activity which is designed to assess the bulk and location and urban design effects of infill development and residential activity on lots smaller than 450m², but not smaller than a 300m² average site area. Rule 7.4.9 (under the UI variation) is subject to Rule 7.6.1.1, which identifies that activities shall be processed without public or limited notification and without the written approval of persons."

- 6.18 These amendments also mirror the suggested amendments of Mr Dewe, who has attested that the development community would be more amenable towards the Variation:⁴⁴

"If the Variation, which essentially acts as a proposed tax, was offset by being able to increase density within the same development, the additional costs associated with the Variation could be offset rather than passed onto consumers. Alternatively, if the tax is only applied to land that is rezoned/upzoned after it becomes operative, then the 'planning gain' concept would apply, offsetting the tax. However, if there is no benefit to developers to accompany the implementation of the Variation, it is likely developers, if possible, will avoid developing in areas where the Variation applies or will pass on the additional 5% Variation tax to consumers."

7. **CONCLUSION**

- 7.1 In summary, while FHL D considers that there are housing affordability issues in the Queenstown Lakes District, it submits that the Variation:
- (a) Is contrary to the provisions and purpose of the RMA and NPS-UD, and that the inclusion of the Variation into the PDP would represent an error of law and be contrary to sound resource management practices; and
 - (b) Will not achieve the proposed objectives to the PDP, is not supported by evidence, and has the potential to further detriment QLDC's ability to provide for affordable housing.

44 Evidence of Gregory Dewe, at [7.3].

- 7.2 In conclusion, the Panel should decline the Variation and advise the QLDC to investigate alternative avenues to address housing affordability issues in the Queenstown Lakes District.

DATED at Auckland this 4th day of March 2024



S J Simons / T B Parker

Counsel for Fulton Hogan Development Limited