

Before the Independent Hearing Panel

In the Matter of the Resource Management Act 1991 (**RMA**)

And

In the Matter of Queenstown Lakes District Council's Proposed
Inclusionary Housing Variation to the
Queenstown Lake District Plan

Legal Submissions on behalf Ladies Mile Property Syndicate Limited Partnership

(Submitter 149)

Dated 5 March 2024

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Introduction

1. These legal submissions are presented on behalf of Ladies Mile Property Syndicate Limited Partnership (**LMPS**).
2. LMPS made a submission on Queenstown Lakes District Council's (**Council**) proposed Inclusionary Housing Variation (**Variation**). That submission opposed Council's proposed Variation.
3. LMPS has a relatively small landholding in the context of the District. Nonetheless, given the significance of the issues before the Panel it has made a commitment to be heard.
4. The Panel already has before it the opening of the Council's case along with legal submissions and evidence presented on behalf of a number of submitters in opposition including large landowners and developers in the District. There is significant alignment in the position of those opposing submitters.
5. Common threads can be drawn from the nature of submissions in opposition. While there is a concern that the proposal advanced by the Variation is unlawful, submitters in opposition submit that the Variation is underpinned by a flawed cost-benefit assessment, is contrary to the relevant provisions of the National Policy Statement for Urban Development 2020 (**NPS-UD**) and is not the most appropriate method to achieve the purpose of the RMA.
6. LMPS has provided evidence in support of its position from:
 - a. Hamish Anderson (development);
 - b. Fraser Colegrave (economic);¹ and
 - c. Hannah Hoogeveen (planning).

¹ Mr Colegrave is a shared witness with other submitters in opposition.

7. These witnesses have also produced summary statements which respond to matters raised during the presentation of the Council's case and hearing of submissions thus far.

LMPS' Position

8. It is acknowledged that Queenstown has faced, and continues to face, significant housing affordability issues. There is no dispute that action must be taken to address these issues.
9. However, LMPS shares the concerns of other submitters about the lightweight nature of key assessments undertaken by Council in the context of this process. The proposition before you is not one where the downside risk is neutral. There is a substantial body of evidence demonstrating that the position advanced by Council is likely to lead to perverse outcomes in the housing market. That outcome is neither efficient nor effective and would harm many more than it helped.
10. I have read comprehensive legal submissions presented by Anderson Lloyd on behalf of a coalition of 17 submitters (**AL Submission**).² In the interests of efficiency, and given the common position adopted, I refer to (and adopt) those submissions where appropriate.
11. I concur with the AL Submission that it is misleading to characterise the Variation as "Inclusionary Zoning" when the Variation does not contain methods that have the direct result of delivering a proportion of affordable housing in the targeted developments.³
12. The Executive summary set out in the AL Submission essentially captures the position adopted by LMPS.

Methods Proposed

13. LMPS is troubled by the limited and poorly focused 'solution' offered by the Variation to the core identified challenge of a projected undersupply in

² Dated 1 March 2024.

³ AL Submission, at [5].

affordable housing. There is agreement that causes of the problem are complex, but nevertheless identified culprits in the purpose statement for the proposed new chapter (such as high rates of residential visitor accommodation and holiday home ownership, geographic constraints and the need to protect value landscape resources) are not squarely engaged with. Nor are exacerbating factors and possible solutions identified at [15] – [17] of the AL Submission properly responded to and explored.

14. Ms Hoogeveen identifies the extremely limited nature of the contribution made by the Queenstown Lakes Community Housing Trust (**Trust**) to the District’s housing stock – of significant value to the golden ticket winners drawn from the Housing Trust waitlist no doubt, but virtually immaterial in the context of the District-wide challenge. Ms Hoogeveen must be correct in her observation that it would be more appropriate and effective to seek to make all housing less expensive.⁴
15. The evidence of Mr Anderson on behalf of LMPS is clear that the Variation may threaten the viability of development.⁵ That risk ups the ante significantly. As Mr Colegrave puts it, the Variation results in a “distortionary tax” which will make new housing more expensive and subsequently less affordable for all but a few helped by the Trust.⁶ Thus, to enable affordability for a few, the Variation will compromise the District’s ability to provide for increased housing supply by the private sector.

NPS-UD

16. As experienced Commissioners, you will be familiar with sections 72 – 77 of the RMA which set the legal framework for the preparation, implementation, and consideration of district plans. In the interest of brevity, I do not repeat them.

⁴ Hoogeveen EIC at [3.8].

⁵ Anderson EIC at [13] and [17] – [22].

⁶ Colegrave EIC at [36].

17. There is a mandatory requirement for the Variation to give effect to (i.e. implement⁷) the NPS-UD.⁸
18. Council's position is that the Variation gives effect to Policy 1 of the NPS-UD because it enables a variety of homes that meet the needs in terms of type, price and location of different households. It is arguable that in reality the Variation will not do this.
19. I agree with the position advanced in the AL Submission at [19] – [36]. I too was struck by the essential indifference in Council's legal submissions to the key importance of Objective 2 and the requirement to support competitive land and development markets. That flows through to Policy 1 of the NPS – UD and in particular the obligation in (d) to “support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets”.
20. The evidence of behalf of LMPS identifies how the Variation and the proposed financial contribution it will impose will have adverse impacts on the competitive operation of land and development markets. The AL Submission quite rightly points out this effect is exacerbated by application of the contribution only to a subset of zones.
21. Ms Hoogeveen concludes that the Variation is contrary to the NPS-UD in reliance upon evidence from Mr Colegrave that a further tax will have the effect of reducing supply.⁹

Identify and evaluate reasonably practical alternatives - justify the Variation as efficient and effective (most appropriate) – s 32

22. This issue goes to the heart of the opposition by LMPS.
23. You will be familiar as experienced Commissioners with the assessment required. As summarised at [40] – [41] of the AL Submission, objectives are assessed on the extent to which they are the most appropriate way to

⁷ *Environmental Defence Society Inc v New Zealand King Salmon Company* [2014] 1 NZLR 593 (SC) at [77].

⁸ Section 75(3)(a).

⁹ Hoogeveen EIC at [3.13].

achieve the purpose of the RMA, with consequent provisions being examined as to whether they are the most appropriate way to achieve the objectives. This latter exercise includes identifying other reasonably practicable options for achieving the objectives and assessing the efficiency and effectiveness of the provisions in achieving the objectives.

24. I accept that the term “most appropriate” does not mean a singularly superior method but rather means “most suitable”.
25. The witnesses for LMPS have not proposed any changes to the key objectives – however LMPS is supportive of the minor changes proposed in the evidence of Mr Serjeant.¹⁰
26. LMPS shares with many submitters in opposition a core concern that it is the financial contribution method proposed which does not meet the requirements of the RMA. Not only is that method not efficient and effective, in LMPS’s view the problems with that method go beyond a failure to deliver the objective of affordable housing choices so that a diverse and economically resilient community is achieved and maintained into the future - the method as proposed may in fact actively worsen the position through adverse effects on land supply and housing development and increasing unaffordability.
27. The shortcoming referenced above is a cost of the method proposed. That issue surfaces in the context of the section 32 assessment required whereby section 32(2)(a) – (c) direct you to consider:
 - a. The benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the proposed provisions;
 - b. If practicable, quantify the benefits and costs;
 - c. The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

¹⁰ Serjeant EIC at [63].

28. The AL Submission identifies three key issues which fundamentally undermine the proposed provisions in the Variation, being:

- a. A failure to adequately consider reasonably practicable alternatives;
- b. Effectiveness; and
- c. Efficiency and failure in economic evidence to adequately consider and quantify costs and benefits.

29. Commencing with reasonably practicable alternatives, I do not propose to make lengthy submissions with respect to that matter. It is addressed in evidence for LMPS.¹¹ LMPS supports the AL Submissions at [49] – [63], with respect to which I make the following observations:

- a. LMPS is firm in its view that the Variation is too narrowly focused and has not adequately addressed combined planning responses such as increased supply, continued development agreements at the time of planning uplift, and further regulation of residential visitor accommodation.
- b. Turning to the alternative of a targeted rate, I agree with the AL Submission’s criticism that simply advising elected councillors of the alternative of a rating method does not satisfy the requirement in section 32. Council’s legal submission states:¹²

Those elected in this district have been advised of the availability of this alternative and have chosen to notify the Variation. It is not for the Panel to second-guess that assessment.

- c. On the basis that an “assessment” reflects the act of making a judgement about something, the Council’s legal submission does not disclose what material was put to the councillors or the reasoned basis for any assessment made. Furthermore even if the councillors did make a judgement on the basis of information provided to them, it is fundamental to the section 32 process that this panel is required

¹¹ Hoogeveen EIC at [3.10] – [3.12]; Colegrave EIC at [108] – [128].

¹² At [10.3].

to consider, assess and make their own determination about the efficiency and effectiveness of what is before them.

- d. The absence of any financial analysis of alternative funding mechanisms to assist affordable housing provision is referred to in the evidence of Mr Yule.¹³ The quality of Council's analysis is a matter of concern to Mr Colegrave.¹⁴ There is agreement in submitters evidence that the proposal as advanced in the Variation does not reflect an equitable apportionment of costs given its narrow focus on a restricted section of the community¹⁵ – and conversely there is agreement that theoretically a rating alternative does offer a more equitable apportionment dependent on its ultimate form.¹⁶
- e. In my submission achieving efficiency and effectiveness is highly challenging whereas proposed only a small proportion of the community is affected by provisions which require financial contribution to an issue which affects the community more broadly. The implication is that a shallow well is being drawn upon, and (at the risk of overextending the metaphor) the potential benefits of accessing a deeper and more resilient reservoir of funding ignored without proper analysis.

30. The question of effectiveness is directly engaged with by Ms Hoogveen¹⁷ with reliance on evidence of Mr Colegrave with respect to costs and benefits. The evidence of Mr Anderson, with respect to the real-world adverse implications for feasibility of development,¹⁸ throws a shadow of doubt over Council's position that the method in the Variation will not result in unintended consequences for development.

¹³ Yule EIC at [18].

¹⁴ Colegrave Summary at [15].

¹⁵ Paragraph [61] of the AL Submission summarises those sectors of the community to whom the Variation does not apply. See Colegrave EIC at [45], Hoogveen EIC at [3.4], and Ferguson at [105].

¹⁶ Hoogveen EIC at [3.11].

¹⁷ Hoogveen EIC at [3.7] – [3.9].

¹⁸ Anderson Summary at [3] – [12].

31. There is no certainty as to the likely scale of revenue to be gathered, nor as I understand it is there any real attempt to quantify what quantum might be likely. Even where revenue is gathered, it does not directly and with certainty provide for the outcome of delivering affordable housing. I agree with the AL Submissions at [64] – [70] in this regard, in particular the observations at [69] and [70].
32. The concerns above flow to the adequacy of the analysis and consideration of costs and benefits. There is agreement between Mr Osborne and Mr Colegrave that short-term effects will be adverse,¹⁹ that the variation will result in either a decrease in residential supply or an increase in prices,²⁰ and that the Variation will reduce affordability, increase the cost of supply and reduce the number of future homes available in the district.²¹
33. I accept that a cost benefit analysis is not required to be exhaustive. However in my submission there is a clear imbalance as between the extent and quality of evidence regarding the nature and scale of benefits which is inadequate in contrast to the evidence advanced by submitters in opposition to the Variation with respect to adverse effects and costs which will arise. Thus, I align with the AL Submissions at [72] – [92].
34. Fundamentally I say:
- a. The proposed financial contribution rules (creating a financial burden) will deter or delay development with consequent adverse effects on housing supply.²²
 - b. The adverse effect referred to above when it occurs cuts both ways, in that an adverse effect is generated without any benefit resulting.
 - c. In circumstances where some financial contribution is paid, there is no quantification of the relative benefit versus cost.

¹⁹ Osborne EIC at [58](b) and [66].

²⁰ Joint Witness Statement of Economics Experts at [23.b].

²¹ Colegrave EIC at [36] – [42].

²² Colegrave EIC at [40] and [51].

- d. While as above there is no certainty as to relative benefit versus cost, it is known that whatever financial contribution is recovered will not directly translate into affordable homes.
- e. It is also known that notwithstanding the failure to forecast with any meaningful measure of accuracy the likely number of affordable homes which will result, based on past performance and a real-world consideration of feasible Trust capacity to construct buildings that the number of beneficiaries of the proposed process are both very limited in number and constrained by the Trusts waiting list parameters to a limited proportion of those who need the benefit of improved affordability.
- f. The implication then is an uncertain quantum of funding on the benefit side of the ledger, in circumstances where there is certainty that affordable homes will not directly occur as a result, and the certainty that such homes as are constructed will be so limited in number as to be arguably immaterial in the context of the societal challenge.
- g. Set against the above is the clear and present danger that the operation of the market will be adversely affected in a manner which will have much more widespread effects for the community. Ultimately the Variation on its own terms seeks to reward a limited number of 'winners' whilst gambling that the community more broadly will not pay a price that in the aggregate far outstrips the limited upside. In my submission, there is simply not the evidence before you to justify such a leap of faith.

35. The matters I submit upon above go to consideration of what contributes to well-functioning urban environments (Objective 1 NPS-UD), decisions which improve housing affordability by supporting competitive land and development markets (Objective 2) and supporting and limiting as much as possible adverse impacts on the competitive operation of land and development markets (Policy 1(d)). These considerations directly link to your assessment of the risks of acting or not acting.

36. With respect to the above considerations, approving a Variation which is likely to impose costs for almost all purchasers in the market (and would adversely affect those of modest means most significantly) in pursuit of a subsidised gain for an acknowledged tiny proportion of those who need the benefit of affordable housing does not reflect a planning decision which contributes to a well-functioning urban environment. It raises the prospect of widespread pain for limited and lesser gain.
37. Objective 2 and Policy 1(d) do not support a simplistic submission that the market will simply provide – and that is not my position. Those provisions do however acknowledge the reality that competitive operation of land and development markets is a fundamental part of delivering a well-functioning urban environment overall. There is express direction that as much as possible adverse impacts on the competitive operation of these markets should be limited. The Variation goes too far in that context.
38. In my submission the risks of acting as Council propose outweigh the risks of not acting. If this Variation does not pass the legislative hurdles it faces, then it can and should be declined. This is not a scenario where a “something is better than nothing” approach validly applies because LMPS says the choice is not between (limited) benefit and the status quo. Rather I say the evidence establishes that this Variation is likely to generate a net adverse outcome. In addition this Variation does not represent a singular opportunity to engage with the issue with no future opportunity for Council to revisit an appropriate approach – the choice before you should not be cast as a binary one.

Conclusion

39. Approval of Council’s methodology is not a consequence-free decision. LMPS submits that it will have significant adverse flow-on consequences for the feasibility of new housing developments in the district by disrupting developers’ ability to invest and fund new developments. Without appropriate cashflow, developers cannot advance development. There is the prospect of adverse effects on affordability resulting, affecting a broad swathe of the community.

40. In my submission the Variation:

- a. Is contrary to the NPS-UD;
- b. Is not the “most appropriate” method to achieve the objectives of the RMA (s 32);
- c. Is not supported by quantified economic assessment and fails to appropriately consider reasonably practicable alternatives; and
- d. Is not a valid or lawful financial contribution.



Jeremy Brabant

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