

**BEFORE THE HEARINGS PANEL
APPOINTED BY THE QUEENSTOWN LAKES DISTRICT COUNCIL**

UNDER the Resource Management Act 1991

IN THE MATTER of submissions on a Variation to a
Proposed District Plan under schedule 1
of the Act

**SUBMISSIONS FOR WILLOWRIDGE DEVELOPMENTS LIMITED AND
OTHERS, UNIVERSAL DEVELOPMENTS LIMITED AND METLIFECARE
LIMITED**

Dated: 5 March 2024

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MAY IT PLEASE THE PANEL:

Introduction

- [1] These submissions are made jointly on behalf of Willowridge Developments Limited and others¹ (**Willowridge**), Universal Developments Limited (**Universal**), and Metlifecare Limited (**Metlifecare**) (together **the submitters**).
- [2] The submitters have each lodged submissions opposing the Queenstown Lakes District Council's (**Council**) Inclusionary Housing Variation to its Proposed District Plan (**Variation**). The submitters seek the rejection of the Variation in its entirety.
- [3] Counsel is aware the Panel has had the benefit of reading the submissions of and hearing from counsel for number of submitters opposing the Variation. The purpose of these submissions is to reinforce several of the matters previously raised by counsel, and to provide context for the submitters' evidence.

Executive summary

- [4] The Variation proposes to require that those subdividing land or developing land for residential purposes pay a "financial contribution" of money or land that is to be passed on to a third party to enable that third party to construct and maintain affordable housing. In short, the Council's proposed solution to the affordable housing crisis in the District is to impose an additional cost on those providing housing in the District – thereby making housing in the District more *unaffordable*.
- [5] The manifestly unfair aspect of the Variation is that, despite the affordable housing crisis having multiple and widespread causes and the provision of affordable housing having widespread social benefits, it is only one small sector of the community (the developers of certain types of land) that is being asked to fund the provision of affordable housing. (The bitter irony of the Proposal is that the Variation's target is the sector of the community that is trying to address the shortage of housing; rather

¹ Willowridge Developments Limited and its related companies Orchard Road Holdings Limited and Three Parks Properties Limited.

than a sector that is contributing to the demand for or shortage of housing.)

- [6] The Council staff and their experts have paid only cursory attention to reasonably practicable alternatives, and they appear reluctant to address the primary cause of a shortage of rental properties in Queenstown, namely short term rentals (**STR**) (such as Air BnB). Shortage of housing is not the issue – shortage of available rental properties is. The suggestion from Council officers and witnesses that identifying, rating or enforcing any controls on STR might be “too hard” is incredibly disappointing – the Council is required to address adverse effects even if doing so is “hard.”²
- [7] The proponents exhibit a reluctance to examine wider options for more equitably sharing the cost of providing affordable housing, such as through targeted rates or other mechanisms that more fairly share the cost across the community. In our submission, in order to be enduring and effective, planning provisions must be equitable. This has been expressly recognised by the Environment Court in at least two recent decisions on plan changes and one Court Minute.³ These cases concern environmental issues (water quality and air quality) that, like affordable housing, have multiple contributing factors that have occurred over a period of time, and yet addressing those effects is both essential and has widespread public benefits.
- [8] Little weight should be placed on suggestions that a targeted rate “might not” be lawful; the lawfulness of such an option should have fully and fairly explored before adopting the somewhat myopic approach of focusing on a small group of landowners/developers. And, to be frank,

² *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [29] and [72], in the context of a Council’s functions control the use of land to maintain and enhance the quality of water.

³ *Swap Stockfoods Ltd v Bay of Plenty Regional Council* [2023] NZEnvC 1 at [164], and *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZEnvC 136 noting that the focus on “equity” in *Federated Farmers* case was partly driven by a regional policy statement criterion. The recent hearing of the PC1 to the Waikato Regional Plan has been directly addressing questions of fairness, as highlighted by the Court’s most recent Minute to the parties, at para [3]: “An important underlying question that needs to be answered is ‘**What is the most equitable way to set drafting gates and associated provisions to ensure that different farming sectors contribute proportionately and equitably** towards achieving the Vision of Te Ture Whaimana and the objectives of PC1?’” [emphasis added].

even if such an approach were “unlawful”, the nature of the issue is such that the Government could be approached to resolve any such illegality.

[9] Finally the suggestion that an approach (such as a targeted rate) has been put aside because it might be politically unpalatable is concerning. Councils represent the whole community and are statutorily required to act in the best interests of all its communities⁴ and they must act equitably as between those different communities. Councils will sometimes need to make politically unpalatable decisions. That is the burden of public office. It is the responsibility of this Hearing Panel to ensure that the Variation is tested against the relevant Resource Management Act (**RMA**) criteria, free from any concerns about political fallout.

[10] The primary questions are:

- (a) Is the Variation legal, given that:
 - (i) it requires a financial contribution and must meet the legal requirements of such a requirement in s 77E, RMA, and s 108(10), RMA; and
 - (ii) the financial contribution (either money or land) is transferred to a third party; and
 - (iii) the land may be sold on the open market, with the proceeds then put towards the Queenstown Lakes Community Housing Trust’s (**Trust**) objectives, without any formal control by Council as to how that money is used (and ironically any sale of land by the Trust would be competing any against the developer who provided the land!); and
 - (iv) there is no causal nexus between the activity for which the contribution is sought and the effect to be addressed by the financial contribution – the subdivision of land and development of housing does not cause or even contribute

⁴ Local Government Act 2002, s 10.

to unaffordable housing (this is the *Newbury* point that has been raised by a number of counsel).

- (b) Does the Variation give effect to the NPS-UD as required by s 75(3)(a), RMA? We say that because the Variation will, overall, decrease the availability of housing and increase its cost, the Variation is (overall) contrary to the NPS-UD.
- (c) Is it the most appropriate method of achieving the objective, in comparison to other reasonably practicable alternatives? The submitters say that there are other reasonably practicable alternatives, both within the scope of and outside the RMA, that will be more effective and efficient in addressing the housing affordability issue. We submit that the Council has not demonstrated that the provisions would be effective (in any material or definitive sense other than some additional housing will be provided). We submit that the Variation is not efficient as compared to other reasonably practicable alternatives, such as a rate/targeted rate.⁵ Finally, we submit that if the provisions are not equitable and fair, then they will not be effective and are not appropriate.

[11] The *Infinity*⁶ case does not assist the Council. That case was in the context of a quite different form of financial contribution provision, and is therefore distinguishable on its facts.

The submitters

[12] Willowridge and its related entities are well-known residential land development companies operating in the Queenstown Lakes District, in particular Wanaka, Hawea, and Luggate. Willowridge provides for a

⁵ Using “efficiency” as defined in *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZEnvC 136 at [331]: “For those reasons, we respectfully adopt the definition of *efficiency* used by another division of the Court in *Rogers v Christchurch City Council* [2019] NZEnvC 119, which is *the production of the required result with little or no wastage* (at [85]). The required result is to be identified by reference to the relevant planning provisions. Wastage includes adverse effects on the environment, as broadly defined under the RMA and as relevantly identified in the same planning provisions.”

⁶ *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2010-425-365, 14 February 2011.

significant range of developments at different price points. Included in these developments are those aimed at affordable housing.⁷

- [13] Universal is similarly a well-established residential developer in the district, including again in both Wanaka and Hawea. A number of Universal's developers are also aimed at providing affordable housing.⁸
- [14] Metlifecare is a retirement village provider, owning and operating 35 retirement villages and six greenfield sites across New Zealand.⁹
- [15] All of the submitters are heavily involved in the development and provision of quality, affordable residential land in this district. They are active users of the District Plan and consenting processes, are fully familiar with the operation and impact of Plan rules, and are well qualified to give an informed perspective as to what rules will work with respect to key issues of housing supply and affordability.
- [16] Each of the submitters have lodged corporate evidence which speak to the concerns they have with the Variation and the effect it will likely have on their developments and the issue of housing affordability from their perspective.¹⁰

Whether the Variation is permitted under the Act

- [17] The submitters say the Variation is not permitted under nor within the scope of the RMA, for two main reasons.
- [18] First, it is clear that the financial contributions are intended to be passed onto a third party, the Trust.¹¹ The Trust then decides, based on its own purpose and objectives, how it is spent.
- [19] The payment of a financial contribution to a third party is not in itself (provided the money goes to the Council first) necessarily unlawful.¹²

⁷ Submission by Willowridge Developments Limited and others, 23 November 2022, at 4.1 to 4.2.

⁸ Submission by Universal Developments Limited, 23 November 2022 at 4.2 to 4.2.

⁹ Submission by Metlifecare Limited, 24 November 2022 at 1.2.

¹⁰ Statements of evidence of Alan Dippie, Lane Hocking and Michelle van Kampen, 21 December 2023.

¹¹ 40.1 purpose section.

¹² *Central Otago District Council v Otago Regional Council* C204/04, 23 December 2004 at [12] and [31].

However, there is a real issue, given the Council's obligations to particularise the purpose for which the money is received, if the money is going to a third party who then has autonomy and discretion as to how that money is used. There is a lack of oversight by the Council in that regard or any accountability of the Trust to the Council in exercising its decision making with regard to how, when, and where, it spends the money it has received. In the case of when land is given by the developer to the Council to be used by the Trust, there is a further issue if that land is then on-sold by the Trust, and what remaining accountability the Council would have over the funds obtained by the Trust on such a sale.

[20] Whilst there is an agreement entered into between the Council and the Trust, which the Council submits provides accountability of the Trust to the Council,¹³ there is little ability for landowners to have confidence in such agreement when it is a private contract that does not form part of the District Plan. The public has no say in its contents, whether it will be enforced, or any changes that might be agreed to it. They also have no ability to assess the Trust's performance in regard to delivery of affordable housing or understand whether the outcomes it has achieved are successful or otherwise. This is in contrast to the developer agreements that have been entered into with the Trust, where those developers retain a degree of oversight and accountability as to the delivery of affordable homes resulting from contributions.

[21] Second, the Variation proposes a blanket and automatic requirement for a financial contribution to be paid. There is no link between the contribution and the effects of a particular activity which triggers the contribution. This is in contrast to Plan Change 24, which was the subject of the *Infinity* decision,¹⁴ discussed at some length in the Council's submissions¹⁵ (and which, as the Panel is aware, was never finally determined by a higher court after leave to appeal was granted).¹⁶ In that case, an assessment of effects in terms of demand for affordable

¹³ Oral submissions for the Council on opening day of the hearing.

¹⁴ *Infinity* above n 6.

¹⁵ Submissions for the Council at 4.1 to 4.22.

¹⁶ *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2012] NZHC 750.

housing was required to be undertaken before the contribution requirement was triggered.¹⁷

- [22] This distinction is important because it means the necessary causal link between the effects of a particular activity on housing affordability, and the requirement to make a payment of money to be used to help housing affordability, is removed. It could mean a development which was neutral or indeed positive in terms of effects on housing affordability could nonetheless be declined consent on the basis of a refusal by the developer to pay a contribution. This demonstrates a lack of an identified nexus between the rules and their purpose.

Section 108(10) and Newbury

- [23] For the reasons set out by counsel for earlier submitters, the submitters say the Variation fails to comply with the requirements of s 108(10).¹⁸ As there is no nexus between the imposition of a financial contribution and the effects of development which triggers such a contribution, the contribution would not be for a purpose specified in the plan.
- [24] Equally, on *Newbury* grounds, the financial contribution is unlawful on the basis it has not been demonstrated to be for a valid planning purpose.¹⁹

The merits of the Variation under s 32

- [25] As well as their concerns as to the legal validity of the Variation, the submitters in any event do not consider the Variation to be able to withstand any reasonable s 32 analysis.
- [26] The submitters say:
- (a) The evidence shows the rules sought to be introduced through the Variation will not achieve (and will be directly counter to) its objectives of increasing the provision of affordability of housing.

¹⁷ *Infinity* above n 6 at [11].

¹⁸ Submissions for Glendhu Bay Trustees Limited and others, 1 March 2024, Appendix 1 at paragraphs 3 to 12.

¹⁹ Representations for Cardrona Village Limited and others, 28 February 2024 at paragraphs 27 to 34, submission by Metlifecare Limited, 24 November 2022 at 2.7 to 2.10.

They are an inefficient, ineffective and inappropriate way of seeking to achieve those objectives.

- (b) There are other reasonably practicable alternatives, both within the scope of and outside the RMA, that will be more effective and efficient in addressing the housing affordability issue.

Housing supply and affordability

[27] The submitters agree with other submitters that the goals of the Variation are laudable.²⁰ Housing affordability is one of the most pressing issues facing New Zealand. This is particularly so in the Queenstown Lakes District.

[28] Clearly, then, the issue is not whether the Council should be seeking to achieve the goals of the Variation. Rather the issue is how it should be funded, by whom and over what time, and whether this particular mechanism will achieve the goals or whether it will, as is the submitters' position, likely make matters worse.

[29] The economic evidence of Mr Colegrave for the submitters and others is that the Variation will:²¹

- (a) be a blunt, ineffective and inefficient tool;
- (b) make housing generally less affordable;
- (c) have high complexity and transaction costs; and
- (d) have a number of unintended consequences.

[30] The lack of a direct link between the financial contribution and the exercise of the Trust's decision making, as well as being relevant to the lawfulness of such a contribution, is directly relevant to the issue of its effectiveness.

[31] This is all the more important given the clear potential costs that have been identified. All economic experts appear to agree there will be some

²⁰ Submissions for Glendhu Bay Trustees Limited and others at paragraph 7.
²¹ Statement of evidence of Fraser Colegrave, 23 December 2023 at [20]-[28].

costs associated with the Variation.²² Messrs Colegrave and Osborne set out a number of examples of these.²³

- [32] There is no clear evidence that they will be outweighed by any benefits associated with the potential increase in land or money to be able to be used by the Trust. This is given the (at best) uncertainty as to whether that benefit will improve housing affordability overall, and (at worst) the detrimental effect it will have on affordability and supply in the aggregate.
- [33] No quantitative analysis has been carried out as to the respective costs and benefits of the proposal. Whilst it is accepted such an analysis is not always required by s 32, given the nature of the proposal (a direct taking of money) it is incumbent on the Council to at least assess whether this direct financial cost can be offset by a direct financial benefit. It is not sufficient to rely solely on qualitative or indirect benefits.
- [34] There has also been no analysis of the benefit of the funds received through the Variation by reference to a comparison with other funding sources.
- [35] Further, the costs are not equitable. They are proposed to be incurred only by a select type of development, residential development, and not targeting a particular type of development that is more likely to cause adverse effects on housing affordability.
- [36] Mr Eaqub was only to a limited extent prepared to accept there would be costs and what they would be.²⁴ The submitters consider his analysis to be deficient and selective, particularly when it comes to his citing of overseas examples and his reliance only on those that suit his opinion when the evidence shows the results overseas are mixed at best, and there are difficulties in applying those overseas scenarios to Queenstown-specific factors.
- [37] Importantly, the economic experts accept they:

²² Economic joint witness statement at 24.

²³ Ibid.

²⁴ Rebuttal evidence of Shamubeel Eaqub, 13 February 2024 at 8.

...do not have sufficient information to comment on whether the variation may or may not result in net more affordable houses under the control of a community housing provider than would otherwise been created.

[38] Accordingly, there is no clear basis on which to confidently predict the measures proposed through the Variation will in fact achieve the purpose it is seeking to achieve. This, combined with the clear costs and adverse consequences that have been identified, mean the Panel cannot be satisfied the provisions are the most appropriate way to achieve these objectives under s 32.

[39] As the various corporate submitter evidence statements also point out, given the nature of the required financial contribution any gains, and the associated impact of the contribution, will need to be assessed as part of the feasibility of each project. On the basis of the figures calculated by Ms van Kampen for example for Metlifecare:²⁵

The reality is that the additional cost imposed by a financial contribution, either at subdivision or on land development, will be imposed on developers and will need to be covered either by increasing sales prices or, if the market cannot support the additional increased sales price, then the development will be abandoned.

[40] Mr Dippie, director of Willowridge, and Mr Hocking for Universal, are of a similar view. Mr Dippie succinctly puts the issue when he says any additional housing produced under the Variation would “come at a considerably increased cost to the majority of buyers whom are effectively having to subsidise the Inclusionary Housing levy”.

[41] All corporate evidence, and Mr Colegrave’s expert evidence, consider the Variation to be inequitable in targeting the sector providing a solution towards increased supply of housing.

Reasonably practicable alternatives

[42] Whilst not defined in the RMA, the term “reasonably practicable” has been held in similar contexts to mean reasonably able to be done in

²⁵ Statement of evidence of Michelle van Kampen, 23 December 2023 at 5.7-5.8.

relation taking into account and weighing up all relevant matters, including:²⁶

- (a) the nature of the activity and its effects;
- (b) the sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;
- (c) the likelihood of adverse effects occurring;
- (d) the financial implications and other effects on the environment of the option compared to other options;
- (e) the current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;
- (f) the likelihood of success of the option; and
- (g) an allowance of some tolerance in such considerations.

[43] The submitters agree there are alternatives which, based on the above criteria, the Council was required and failed to properly consider under s 32(1)(b)(i).²⁷ Specific examples of these include through rates, either via general rates or targeted rates on activities such as STR.²⁸ They also include other supply-side mechanisms to drive down the costs of housing which are yet to be fully implemented.²⁹

Whether the Variation gives effect to the relevant higher order planning provisions

National Policy Statement on Urban Development 2020

[44] The submitters do not consider the Variation will accord with the directions of nor achieve the objectives of the NPS-UD relating to

²⁶ *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 051 [46]-[53].

²⁷ Submissions for Glendhu Bay Trustees Limited and others at paragraphs 46-60.

²⁸ At paragraph 52.

²⁹ At paragraph 50.

housing affordability. Instead, they may in effect result in a direct contravention or contradiction of its policy intent.

[45] Mr Williams in his evidence sets out the relevant directives of the NPS-UD.³⁰ It directs the improvement in housing affordability through increasing supply and supporting flexibility and competition.³¹ Mr Williams and the other planning witnesses for submitters on the Variation consider the Variation will be inconsistent with this direction.³²

[46] The Council seeks to give the impression that all supply-side measures to improve affordability have either been exhausted or are ineffective.³³ The Council's Housing and Business Capacity Assessment (**HCA**) 2021, referred to by Mr Mead in his evidence, indicates ample supply of residential land.³⁴ Mr Mead on the basis of this impression considers supply is "not sufficient by itself to deliver on affordability".³⁵

[47] The problem with this analysis, as well as that raised by other submitters,³⁶ is that pointed out by Mr Williams – the HCA assesses *zoned* land which the Plan anticipates as being suitable for residential development. It does not assess actual land available to be put to residential use. As Mr Williams notes, theoretical zoned capacity is not the same as supply.³⁷ There are a number of constraints other than zoning that prevent otherwise suitable land from being able to be developed. As Mr Williams sets out, probably the key one is infrastructure constraints. Another is consenting: as even for land within areas identified through the Plan, subdivision requires consent as a restricted discretionary activity.³⁸

[48] These concerns are echoed by Mr Dippie, who notes:³⁹

³⁰ Statement of evidence of Tim Williams, 21 December 2023 at [13]-[15].

³¹ Ibid.

³² Planning joint witness statement, 30 January 2024.

³³ Submissions for the Council at 3.5.

³⁴ Evidence of David Mead, 14 November 2023 at 4.13.

³⁵ At 4.14.

³⁶ Submissions for Glendu Bay Trustees Limited and others at paragraph 50-51.

³⁷ Evidence of Tim Williams at [25].

³⁸ At [29].

³⁹ Evidence of Alan Dippie at [10]-[11].

The existing land resources owned by Willowridge has the potential to provide over 4,000 housing units to the district over the next 15 to 20 years and an even greater number of units (up to 5,000) beyond that timeframe...

However, these numbers are very unlikely to be realised and the reasons for that are largely around the difficult development environment in the District. There are large barriers around infrastructure, and it has become a very frustrating and drawn-out process to obtain resource consents then engineering approvals to proceed with development. What used to take 12 to 18 months from a project starting to titles being issued is now taking at least 30 to 36 months, many projects even longer.

- [49] It is these constraints which the Council should (and which the NPS-UD directs) be seeking to address to resolve issues of housing affordability. It is not correct to suggest that these measures have already been or cannot be attempted. Indeed, the Council in its submissions acknowledged the separate planning process (the intensification variation) is only underway. That process cannot be relied on in any real sense when assessing the merits of this proposal.
- [50] Nor is it appropriate (particularly after the *King Salmon* decision)⁴⁰ for the Council to seek, as they do, to overcome the lack of consistency with the NPS-UD by resorting to the provisions of Part 2.⁴¹
- [51] The submitters say by initiating mechanisms such as financial contribution requirements before implementing those measures that are expressly directed by the NPS-UD, the Council is not acting in accordance with, nor giving effect to, the clear direction in the NPS-UD. This is contrary to its obligations under s 74(1).
- [52] To the extent it was argued for the Council that the NPS-UD does in fact (through policy 1) direct inclusionary housing-type provisions by reference in the policy to meeting “the needs, in terms of type, **price**, and location, of different households” (emphasis added),⁴² the submitters agree with counsel for submitters in response that this is a

⁴⁰ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38.

⁴¹ Submissions for the Council at 2.3, rebuttal evidence for David Mead at 3.3.

⁴² Submissions for the Council at 2.5.

”quite a leap”.⁴³ The NPS-UD seeks to improve housing affordability. A policy that seeks to subsidise a type of housing but decreases the supply and availability of housing overall cannot give effect to the NPS-UD direction.

Section 31(1)(aa) of the Act

[53] The Council submits an inclusionary housing proposal “is a mechanism for ensuring a district has sufficient development capacity and, therefore, is consistent with the functions of a territorial authority”. Those functions, set out in s 31(1)(aa), include ensuring “there is sufficient development capacity in respect of housing”.

[54] For the same reasons as those set out in respect to the NPS-UD, inclusionary housing of the sort proposed is not in fact a mechanism for ensuring sufficient housing capacity. It is the favouring of one type of housing at the expense of others. This is not what s 31(1)(aa) directs. It does not, contrary to the Council’s position, direct targeted approach of the sort suggested.⁴⁴ Nor is it appropriate to read such a direction into the section.

Conclusion

[55] For the reasons set out above, those set out their submissions, and the evidence in support, the submitters say the Variation should be rejected in its entirety.

Witnesses to be called

[56] The submitters intend to call:

- (a) Alan Dippie, director of Willowridge;
- (b) Lane Hocking, director of Universal; and
- (c) Tim Williams, planner.

⁴³ Submissions for Glendhu Bay Trustees Limited and others at paragraph 22.
⁴⁴ Submissions for the Council at 5.20.

[57] Ms Michelle van Kampen and Mr Colegrave were called earlier in the hearing.

Dated: 5 March 2024



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