

**BEFORE AN INDEPENDENT HEARING PANEL  
APPOINTED BY QUEENSTOWN LAKES DISTRICT COUNCIL**

**UNDER** Resource Management Act 1991

**IN THE MATTER** of a Variation to the proposed Queenstown Lakes District  
Plan (Inclusionsary Housing) in accordance with Schedule 1  
of the Resource Management Act 1991

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**LEGAL SUBMISSIONS**

**Dated: 29 February 2024**

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## **MAY IT PLEASE THE TRIBUNAL**

### **Introduction**

1. The Queenstown Lakes District Council notified a variation to the district plan, which it asserts will provide affordable housing for the district.
2. Submitters 112, 113, 114, 115, 118 challenge the lawfulness and reasonableness of the proposed Inclusionary Housing Variation.
3. These legal submissions do not traverse the principles or details of the policy as the main failures of the Council's policy response and policy content are fully addressed in the evidence of Mr Allan.

### **Summary of Case for Submitters 112, 113, 114, 115, 118**

4. As outlined in the evidence and summary statement of Mr Allan, the concepts of affordable housing and inclusionary housing are separate and distinct and are terms which should not be used interchangeably as the Council has done.
5. It is acknowledged that section 75(3) of the Resource Management Act 1991 provides that a district plan must "give effect to", among other things, any national policy statement and any regional policy statement.
6. "Give effect to" is a directive statement creating a firm obligation on the territorial authority and the relevant NPS which must be had regard to is the NPS-Urban Development (NPS-UD).
7. However, that does not permit the territorial authority to "give effect to" an NPS by imposing a policy in a form that operates as taxation or imposes additional costs exclusively on the sector that is increasing the supply of housing.
8. Mr Allan in his evidence in chief outlines at paras 26 - 28 that the form of the proposed policy is essentially creating a form of taxation which applies to a specific category of activity, while excluding other activities that are drivers for the demand for housing.
9. The issue is that the Council is not authorised under its originating legislation the Local Government Act 2002 to impose a tax in order to give effect to the NPS-UD.
10. The submissions for the Council have outlined why it considers that the Council has a mandate to include district plan provisions for "inclusionary housing" by way of the Resource Management Act 1991. However, the Council has not outlined why this particular format of policy (which attributes the costs of achieving that policy outcomes exclusively to developers creating land and housing supply) is the most appropriate for achieving the purpose of the Local Government Act 2002 and the Resource Management Act 1991.

### **Local Government Act 2002**

11. The Queenstown Lakes District Council is a territorial authority constituted under the Local Government Act 2002.
12. Section 10(1)(b) of the Local Government Act 2002 states that a purpose of Local Government is to:
  - a. "promote the social, economic, environmental, and cultural well-being of communities in the present and for the future."

13. The key here is that it is the Council's role to "promote" those outcomes, this being permissive and enabling language.
14. The Local Government Act 2002 goes on to prescribe the methods of setting fees and charges for services performed by the Council (eg swimming pool entry fees) and the imposition of fees by way of a bylaw where a licensing cost is imposed.
15. There is no express provision within the Local Government Act 2002 permitting a local authority to implement a tax or otherwise redistribute the costs and burdens experienced by one sector of the community onto another.
16. In fact, particular enabling legislation must be enacted to empower a Council to impose a tax, which is why there is separate rating legislation for the purpose of imposing appropriate rateable charges.
17. Therefore, the Local Government Act 2002 does not provide any express authority for the imposition of the proposed policy.
18. While there is a provision within the Resource Management Act 1991 for the imposition of financial contributions, this may only occur where there is an express resource management purpose described in the district plan.

### **NPS - Urban Development**

19. The Council states that the resource management purpose underpinning its policy is the directive statements within the NPS-UD Policy 1, which refer to making decision such that there is a variety of homes that meet the needs of a community in terms of price, type and location.
20. However, Policy 1 of the NPS- UD is not exclusively directed at imposing supply side controls, but instead refers more broadly to achieve the Council making decisions in accordance with the outcome in Policy 1.
21. The proposed variation for inclusionary housing, which imposes a cost on developers through a resource consent process, means that the policy focus has become the nature and characteristic of a development proposal and the characteristics of the developer, rather than the effects on the environment of that particular development activity.
22. The Council's proposed change to the district plan will have the effect of making it mandatory for new development activity to fund the Council's aspirational policy for affordable housing and inclusionary housing<sup>1</sup>. However there is no other policy response, and therefore the whole of the burden of funding that policy response is targeted to one sector of the community – the actual sector that is increasing housing supply.
23. The Council has gone to some lengths to outline the policy framework in the legislation and the NPS-UD to create an impression that there is a causal nexus between the granting of a subdivision/landuse consent and giving effect to the NPS-UD policy directive in Policy 1.
24. However, it is necessary to come back to first principles when evaluating the content of the proposed variation. Firstly, the policy needs to achieve a resource management purpose. The activity of subdivision and housing construction are in themselves are improving the supply of housing, not diminishing supply. The experts are agreed that the factors causing the shortage of housing supply are not development activities, but rather are demand factors which they list as natural constraints to development location, diversion of housing to the short-term

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<sup>1</sup> As pointed out in the evidence of Mr Allan, these are not interchangeable terms as the Council has suggested

rental market and planning restrictions that limit flexible housing solutions and densities<sup>2</sup>.

25. The increase in supply of allotments and houses does not have the adverse effect of preventing or excluding affordable housing (or inclusionary housing).
26. There is no legal requirement for a developer to avoid, remedy or mitigate any such outcome and therefore no causal nexus exists between the policy in the form proposed and the activities of developers such that the imposition of a resource consent condition or a financial contribution condition can be warranted.
27. The personal circumstances or the economic return (or loss) on a development is not a relevant consideration for the imposition of a resource consent condition.
28. In fact, the focus of this inclusionary housing policy and the thrust of the Council's evidence is a focus on the wealth or ability to pay based on asserted "windfall gains". The ability to pay is a personal characteristic of a community sector – it is not an adverse environmental effect. Further, the alleged windfall gains that Mr Eaquib proposes in his evidence arise from an incomplete analysis of development costs as set out by Mr Allan at paragraphs 17 – 30 in his summary of evidence.
29. The economic evidence for the Council cannot be relied on as proving there is a market failure as justification for the form of policy proposed.
30. The policy underpinning the Variation does not achieve the NPS-UD as it does not address the fundamental issues underpinning housing affordability. Supply is constrained by the limits on planning requirements that have not provided for flexible housing solutions and density<sup>3</sup> as well as delays in regulatory decision making outlined by Mr Allan at paras 23-24 in his summary statement.
31. As such, the inclusionary housing policy in the form proposed does not give effect to the NPS-UD as it is exclusively targeting one aspect of supply – the very aspect that is designed to alleviate the issue is targeted for a further tax as outlined in the evidence of Mr Allan.
32. The inclusionary housing policy in the form proposed by the QLDC does not address demand side factors, and a district plan cannot effectively influence demand side factors as it is exclusively regulating supply. Therefore, the policy in its current form as a variation to the District Plan it is not implementing the NPS-UD in an appropriate form.
33. The variation is therefore not achieving a resource management purpose, rather it is seeking to transfer the burden and costs of one sector of the community onto another.

### **Response to other issues in legal submissions for QLDC**

34. The Council's legal submissions at paras 10.2 – 10.4 point to submitters opposing the variation for inclusionary housing and preferring the rating system for addressing inclusionary housing interests. That position has been misconstrued by the Council.
35. In fact, the attraction of a rating system response to this issue is that the costs are distributed across the entirety of the rating units in the district, and not exclusively the sector of the community that is carrying out the activity (subdivision and housing) that is required to solve housing supply. The

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<sup>2</sup> Answer to question 6, Page 3 Inclusionary Housing JWS Economics Experts dated 30 January 2024.

<sup>3</sup> Ibid.

36. The Council has failed to demonstrate how introducing this form of proposed policy into the district plan (which only targets one part of the supply side factors) is the most appropriate way to implement housing affordability and inclusionary housing for the district.
37. The use of the district plan restricts the response to that policy issue to the grant of new resource consents – in other words the very sector of the economy that is increasing housing supply.
38. A counter factual scenario of a rating system response to assess the appropriateness of funding the Council's housing affordability policy should be considered by the Panel. A rating system response fairly attributes the costs of such a policy position across the entirety of the ratable units in the district. It therefore allocates the costs of funding the policy across demand side factors, not just the supply side factors.
39. The Court in Auckland Council v C P Properties Limited<sup>4</sup> held that it can be appropriate to impose a rate where there is a rational connection between the cost of funding a policy or activity and the generators of demand for that activity or policy. That case considered whether hotels could have a targeted rate applied to fund the costs of a CCO carrying out destination marketing activities. The Court held upheld the Council's targeted rate stating that there did not need to be a close connection between the activity rated for and the benefits received by the person paying the targeted rate.
40. A policy that is aimed at creating affordable or inclusionary housing is a public good which is consistent with the Council's wider statutory purpose under the Local Government Act 2002. Therefore, it is open to the QLDC to fund its policy position on affordable housing and inclusionary housing by means of a rate which is applied across all rating units throughout the district.
41. A rating system response would ensure that the demand drivers for housing such as commercial properties (which employ low wage earners), existing residential home owners (including those vacant houses and/or absentee owners who exclude housing from the rental market) are contributing to the costs of funding the Council's aspirations for inclusionary housing and affordable housing policies and programmes.

## Conclusion

42. This current proposed inclusionary housing policy is limited to contributing costs to a sector of the community, where there is no "user pays" rationale or any direct link to the costs and benefits as highlighted by Mr Allan's evidence.
43. The Council has not justified in evidence or legal submissions how or why the particular form of policy proposed, where only one sector of the community (developers and purchasers of new homes) are required to meeting the costs of a QLDC policy to provide housing at the lower price point of the market by paying for a programme that is not sufficiently certain.
44. The Council has not provided any rationale for the burden of funding such a scheme on the sector which is carrying out the very activity (subdivision and development) required to solve that issue. As pointed out in the evidence of Mr Allan, the specific nature of its proposed policy scope could have the effect of suppressing development, and the returns available to developers are already impacted by significant holding costs exacerbated by slow regulatory responses.

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<sup>4</sup> [2003]NZSC 53

45. The Council has not adequately addressed the issue of this policy format being the most appropriate or best practicable means of addressing the supply of housing at the lower price point of the market and it has not adequately demonstrated that the policy is giving effect to the NPS-UD.
46. Submitters 112, 113, 114, 115, 118 and 143 therefore request that this plan variation is declined.