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Affordable housing: AH:ETA RIP?

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looks at legislative attempts to influence prices

Of all the legislation rushed into force in the dying days of the last Labour government, the Affordable Housing: Enabling Territorial Authorities Act 2008 (AH:ETA) is perhaps the most obviously flawed. The purpose of the AH:ETA is to "enable a territorial authority, in consultation with its community, to require persons doing development to facilitate the provision of affordable housing". In essence, developers could be required to provide for affordable housing directly within a development or indirectly via land or a monetary contribution to the authority. Arguably any legislation that seeks to force the provision of a social good from a business whose purpose is profit, without revealing any apparent benefit to that business or providing a guarantee of incentives or compensation, is built upon questionable foundations. Clever developers, avoiding the burden, will simply pass the costs onto the other properties in any development and thus the average price of housing will not reduce. Alternatively, the AH:ETA will operate as a disincentive to development, exacerbating supply problems and again stimulating price competition.

REVIEW OF THE AH:ETA

The National-led government announced a review of the legislation shortly after being elected. Interestingly, there are few local authorities clamouring for its retention. The AH:ETA places a significant investigative and regulatory burden on authorities that seek to utilise its provisions. Authorities would have to conduct firstly an affordable housing needs assessment for their locality (that would include a specific, tailored definition of what constitutes affordable housing) and then, using the Local Government Act 2002 special consultation procedure, promulgate an affordable housing policy. Whilst the AH:ETA provides some guidance as to issues that authorities might include in any policy and / or assessment, that guidance is skeletal at best. Auckland City in particular has not shirked from revealing its enmity of the AH:ETA. Not surprisingly, the present government has decided that rather than "re-piling" the legislation it should be condemned in its entirety. Repeal of the AH:ETA is proposed by Part Four of the Infrastructure Bill 2009. The Infrastructure Bill has just received its second reading, however Labour and Green Party members of parliament have argued that Part Four should be separated from the Infrastructure Bill, voted upon separately and referred to the appropriate Select Committee for consideration. It remains to be seen whether this will transpire.

That New Zealand has a crisis in housing affordability (recession or not) is undisputed. The fifth Demographia survey of housing affordability places seven of the eight New Zealand markets studied in the "severely unaffordable category" (the most extreme classification); only Palmerston North escaped being classified "seriously unaffordable", the second highest classification ((2009) '5th Annual Demographia International Housing Affordability Survey' available at http://www.demographia.com/ (last accessed 6th March 2009)). The other localities were Hamilton, Napier, Dunedin, Wellington, Christchurch, Auckland and Tauranga. A Commerce Committee inquiry into the issue of housing affordability released in August 2008 made ten recommendations to the government. These recommendations range across a spectrum from the encouragement of shared equity schemes to the request for regional councils to reconsider metropolitan urban limits to a review of the Building Act 2004 consenting procedures ('Inquiry into housing affordability in New Zealand', Report of the Commerce Committee, August 2008). However, the most efficacious way to address the problem is still disputed and pending the ultimate outcome for AH:ETA, no local authorities have sought to commence an affordable housing needs assessment.

AFFORDABLE HOUSING AND THE RESOURCE MANAGEMENT ACT 1991

Against this backdrop however, it pays to consider the approach adopted by Queenstown Lakes District Council (QLDC). On 14th January 2009, utilising powers pursuant to the Resource Management Act 1991 (RMA), QLDC promulgated Plan Change 24 "Community and Affordable Housing". The Plan Change is part of a wider strategy promoting affordable housing in the District that includes, for example, a shared ownership scheme administered via the Queenstown Lakes Community Housing Trust. For the purposes of Plan Change 24, affordable housing has been defined to mean, "a Residential Activity whose cost to rent or own generally does not exceed 30% of the gross income of low to moderate income households [in the District]" (QLDC Plan Change 24, Part D, 'Definitions'. Low income means household income below 80% of the area median income and moderate income means that between 80% and 140% of the area median income.).

Essentially the Plan Change provides that any application for a qualifying development or subdivision, made via a proposed plan change or resource consents in respect of discretionary or non-complying activity status, must be accompanied by an "Affordable Housing Impact and Mitigation Statement" (AHIMS). In the AHIMS the developer must specify the requirements for affordable housing that flow from the development and, in light of this, must propose mitigation strategies. Calculators and suggested methodologies are provided. Appropriate mitigation strategies might include for example, the provision of "community housing" (to either be vested for nil consideration in the Council or made subject to retention mechanisms

such as covenants or encumbrances on title), increasing the supply of "affordable housing" (more modest homes suitable for low and moderate income households) or the provision of land or money to QLDC. Mitigation will be secured by conditions on any resource consents and by incorporating the appropriate provisions within any privately instigated plan changes.

Clearly, QLDC has used the RMA to achieve the purpose of the AH:ETA albeit with less constrictors for the Council. In particular, whilst notification requirements are set out in ss 18–20 of AH:ETA, Plan Change 24 makes it clear that "affordable housing to the scale and intent as set out in that developments AHIMS shall be exempt from notification requirements if the affordable housing is the only matter that would trigger public notification of the development". Further, whilst the AH:ETA exhorts local authorities to "help a person to facilitate" affordable housing by, for example, providing development contribution relief or other "financial assistance" (rendering the scheme little more than a complex tax), QLDC staunchly ignores such feebleness. Thus, the RMA plan change process has proved more flexible for the Council and potentially onerous for developers than the AH:ETA.

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ARGUMENTS AS TO SCOPE

The Council received legal opinions as to the legitimacy of Plan Change 24 however, not unsurprisingly, the scheme is being appealed and whilst the focus of the appeals rests primarily on the merits, a number of points address ultra vires. Two points are of general interest.

First, appellants argue that the plan change exceeds the scope of the RMA. The purpose of the RMA, as contained in Part 2 Purpose and Principles, is to promote the sustainable management of natural and physical resources. Section 5(2) states that sustainable management means,

> Managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety **while –**
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment. (emphasis added)

Part 2, and s 5 of the RMA in particular, is notorious; the judiciary have at various times described the drafting of the RMA as "turgid" (*Auckland Regional Council v North Shore City Council* [1995] NZRMA 424, per Cooke P) and the language of s 5 as having a "deliberate openness … intended to allow the application of policy in a general and broad way" (*New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 per Greig J). Essentially however, given that the word "while" has been found to be a co-ordinating as opposed to subordinating conjunction; that the Courts have concluded the application of s 5 involves "an overall broad judgment"; and that the definition of "environment" in the RMA is so broad as to equate to pretty much everything, it is a brave appellant who launches an argument as to scope. Part of the basis for the appellants' assertion as to ultra vires rests upon comments concerning the RMA made at the Select Committee stage for the AH:ETA. Upon close reading however, the Commentary accompanying the Select Committee report simply states that whilst the principles of the RMA "make reference to enabling peoples and communities to provide for their well-being" and thus appear to "offer scope for the development of affordable housing initiatives … the RMA provides no weighting in favour of social initiatives". The concern appeared to be that, given competing values local authorities might be reluctant to prioritise affordable housing initiatives in resource management planning. The Select Committee did not suggest that local authorities would be *prevented* from promulgating such initiatives rather it was posited that the EH:ETA would provide a "clear mandate" for local authorities to prioritise the issue whereas the RMA does not.

CAUSAL NEXUS TEST

Opponents to Plan Change 24 also juxtapose arguments concerning the lack of a "causal nexus" with the more general arguments as to scope. The appellants argue that, in accordance with the causal nexus test, authorities must show that the adverse effect on the environment that they seek to control (the lack of housing affordability) results from development and thereafter, that the use of regulatory control managing that development is the most appropriate, effective and efficient way to address the problem. QLDC aver that Plan Change 24 meets these tests although the appellants disagree suggesting that development "follows and responds to growth rather than promoting it" and that increasing the supply of housing in particular does not lead to price increases, quite the contrary. This is likely to be an interesting argument before the Environment Court. Clearly, the reasons for inflation in the housing market are multi-faceted and complex and the evidence from economists is likely to point to factors such as interest rates, immigration, the desirability of an area, land supply and so on, as all potentially playing a role. A valid point might be that the actual growth of the area in terms of increased population, traffic, jobs, demand for services and infrastructure etc occurs once the development is occupied (post development) and that most developers respond to anticipated demand as opposed to following growth. The resulting growth post development will attract more service industry workers into the area, as occupants require increasing services. Is this the point that housing affordability issues come to the fore? The problem is exacerbated if developers cannot then be attracted to provide lower cost housing to meet this latter demand because the profit margin is too slender.

Against this backdrop, the Environment Court may well examine the causal nexus test in some depth. The RMA requires authorities to evaluate the extent to which the objectives in plans are the "most appropriate" to achieve the purpose of the Act and further, having regards to their efficiency and effectiveness, evaluate whether the policies and rules in that plan are the "most appropriate" ones for achieving the objectives (s 32(3)). This test is clearly one open to review by an objective Environment Court (*Gisborne District Council v Eldamos Investments Ltd* HC Gisborne CIV 2005-485-1241, 26 October 2005) but just how onerous will the test prove to be? Previous case law has suggested that the court must decide whether "on balance, implementing the proposal would more fully satisfy the statutory purpose than would cancelling it" (*Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145). If, however, there is no categorical or singular explanation for the lack of housing affordability, will authorities be able to regulate to control one suggested, potential reason for the problem? What if other non-RMA methods are available to the authority? Will that be a factor in determining the most appropriate methods available to the authority? Although this later point seems unlikely, it is to be hoped that the Environment Court will provide additional guidance into the law in this area generally.

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FINANCIAL CONTRIBUTIONS

The second appeal point of general interest is that Plan Change 24 is simply a defective financial contributions regime and in this regard, the case highlights the present unsatisfactory state of the law with regards to planning contributions. Both the RMA and the Local Government Act 2002 (LGA) empower local authorities to require valuable "contributions" from developers. The provisions in Part 8 of the LGA, empowering authorities to charge development contributions, are specifically directed at compensating Authorities for the increased costs of infrastructure that flow from development and the High Court in *Neil Construction v North Shore CC* [2008] NZRMA 275 confirmed that there must be a direct causal connection between the development and the effects that the Authority wanted to manage in this context. However, as an alternative source of contributions, s 108 of the RMA provides that a resource consent may be granted on any condition that, "the consent authority considers appropriate". The purpose of the condition must simply be to counter any adverse environmental effects on the environment. All conditions must be levied for a planning purpose not for any ulterior one; fairly and reasonably relate to the development in question; and must not be so unreasonable that no reasonable planning authority would have imposed them (*Newbury District Council v Secretary of State for the Environment* [1981] AC 578) and it should be noted that an incredible variety of conditions have been found to be valid. The Supreme Court has set the bar low in confirming that the law does not require a greater connection between the proposed development and RMA conditions than that they are "logically connected"; there is no direct causal test in this regard (*Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149). It is for the authority to determine whether to utilise its powers under the LGA or the RMA to secure contributions and the differing applicable tests create an anomalous situation. Relying upon its RMA powers affords QLDC much greater flexibility in addressing affordable housing issues in the district plan and renders the carefully constructed tests under the LGA impotent in this scenario.

Further, contributions under the RMA may include for example, the provision of services or works, covenants in favour of the consent authority or "financial contributions". Financial contributions are defined to mean land and/or money (s 108(9)). The RMA treats financial contributions differently from other contributions. They must be imposed for a purpose and calculated in accordance with criteria specified in the plan (presumably to ensure that they are being used for a valid environmental purpose and not simply lining the authority's coffers). This particular care and transparency is not required with other types of conditions. The appellants to Plan Change 24 argue that the existing QLDC plan provisions are an inadequate basis for requiring affordable housing financial contributions. However, a preliminary point must be determined. Clearly, any contribution of land or money must comply with these requirements but do the provisions of community housing fall within the definition of financial contribution or is community housing rather a "work or service"? The Supreme Court in *Waitakere* had little difficulty in finding that the provision of a road to be vested in the Local Authority fell within the phrase "works or services". The deciding factor appeared to be that the developer, rather than the authority upon receipt of funding and land, was to construct the required infrastructure. If this rationale can be applied to the provision of community housing in QLDC, the RMA would not require the authority to make specific provisions and calculations in the district plan for this aspect of the affordable housing policy (although it could do so if it chose). Theoretically, if QLDC abandoned Plan Change 24 and simply made carefully formulated community-housing requirement conditions on relevant resource consents the only way for the appellants to challenge this would be against the test set down in *Newbury* and difficult arguments as to scope and causation would again come to the fore. The authority is unlikely to take this course of action but the simple fact that this route would be available to a local authority highlights that the entire parliamentary input into the AH:ETA thus far, has been an unfortunate waste of energy and resources.

CONCLUSION

In summary, the appeal against Plan Change 24 should be eagerly awaited. It promises to test the seemingly ever-elastic scope of the RMA; it is likely to put greater pressure on the government to "simplify and streamline" the law concerning planning contributions; and it will address whether the present parliamentary wrangling over the AH:ETA is, to all intents and purpose, completely irrelevant. ❐