# FOCUS ON HOUSING
# THE NEW AFFORDABLE HOUSING LEGISLATION

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## Preamble

This paper begins with a warning! The Government has recently signalled its intention to review[1] the *Affordable Housing: Enabling Territorial Authorities Act 2008*[2]. Given National's opposition to the legislation when it was introduced, the prospect of repeal is a real likelihood. However, readers should note that arguably the *Resource Management Act 1991*[3] permits provisions for affordable housing to be included in District Plans in any event. Thus, local government may still have the power to legislate for affordable housing regardless of the fate of the *Affordable Housing: Enabling Territorial Authorities Act 2008*.

## Expensive New Zealand

In 2008, Demographia Research Centre for Public Policy confirmed that, in terms of housing, New Zealand was one of the least affordable countries in the world in which to live.[4] Of the eight New Zealand markets studied,[5] seven were classified as "severely unaffordable", (the most extreme measure of unaffordability); only Palmerston North escaped the classification but nevertheless was deemed "seriously unaffordable". These conclusions came as no surprise to those living in Queenstown. By October 2007 Queenstown Lakes District Council (QLDC) had already, pursuant to the *Resource Management Act 1991* (RMA), notified proposed Plan Change 24. This Plan Change would permit the District Council to require developers to provide affordable housing to the community. Controversy raged at to whether the scope of the RMA was sufficient to provide for this requirement however in December 2007 matters were overtaken somewhat by the introduction into parliament of the *Affordable Housing: Enabling Territorial Authorities Bill*.[6] In simplistic terms the Bill enabled local authorities to assess whether the district has a requirement for more affordable housing and if so, empowered those authorities to promulgate an affordable housing policy. That policy could require persons "doing development" to provide for affordable housing directly within a development or indirectly via land or a monetary contribution to the authority. At the Select Committee stage concerns were expressed by Local Government New Zealand as to the complexity of the legislation and the additional investigative and regulatory burdens to be placed upon local authorities. Revisions to the Bill attempted to alleviate some of these concerns but question marks remained as to the success or otherwise of these amendments. Despite continued vocal opposition from other political parties, the *Affordable Housing: Enabling Territorial Authorities Act 2008* came into force on 16th September 2008.

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[1] Hon Phil Heatley, Minister of Housing, 4th February 2009 available at http://beehive.govt.nz/release/affordable+housing+enabling+territorial+authorities+act+2008+be+reviewed (last accessed 6th March 2009)

[2] *Affordable Housing: Enabling Territorial Authorities Act 2008* (08/67). In force 16th September 2009.

[3] It should be noted that the *Resource Management Act 1991* is also being reviewed however the *Resource Management (Simplifying and Streamlining) Amendment Bill* introduced to the House on the 19th February 2009, does not directly affect the issue of affordable housing. Future additional amendments to the *Resource Management Act 1991* (particularly if a change is made to the definition of 'environment' in the Act) may well affect Councils' ability to provide for affordable housing.

[4] (2009) '5th Annual Demographia International Housing Affordability Survey' available at http://www.demographia.com/ (last accessed 6th March 2009)

[5] Hamilton, Napier, Dunedin, Wellington, Christchurch, Auckland, Tauranga.

[6] This was one of a number of initiatives the Government introduced to address the problem of affordable housing. Other measures included: shared equity schemes; consideration of the establishment of Urban Development Authorities; a review of public land holdings to identify land that could be suitable for residential housing; a review of building compliance costs; a review of residential-zoned land and how much is available for development, see Hon Helen Clark, Prime Minister, 12th February 2008 available at http://www.beehive.govt.nz/speech/statement+to+parliament+2008 (last accessed 6th March 2009). Further see 'Inquiry into housing affordability in New Zealand', Report of the Commerce Committee, August 2008.

## Main Provisions of the *Affordable Housing: Enabling Territorial Authorities Act 2008*

Must a local authority assess the need for affordable housing in its district?
The first point to note is that the Act *empowers* not *requires* local authorities to assess the requirement for affordable housing in their districts. Thus, local authorities response to the legislation will vary.

The Act provides a definition of affordable housing[7] that means housing that,

> (a) is for persons living in households that—
> (i) have low to moderate income; and
> (ii) have no, low, or moderate legal or beneficial interests in property; and
> (b) is priced so that the persons are able to meet—
> (i) their housing costs; and
> (ii) their other essential basic living costs; and
> (c) is within the regulatory criteria for determining what affordable housing is, if regulations setting criteria exist.

It is for the relevant local authority to fill in the figures and to determine what equates to "low or moderate" income, capital equity and the costs of living in the local context.[8] If an authority determines to undertake a housing needs assessment,[9] the Act provides the essential principles that must be incorporated into that assessment but local authorities may incorporate wider criteria. The Act lacks specific details and is left deliberately broad:

> S 8(2) The authority must choose a method that gives results for the authority's district that include—
> (a) a description of the current balance between supply and demand in the housing market generally and, if relevant, in different sectors:
> (b) the identification of land available for housing development:
> (c) an estimate of the number of households that currently need affordable housing and the number that are likely to need it in the reasonably foreseeable future.

Housing New Zealand has developed additional guidance material[10] however it is perhaps trite to state that the detail included in any assessment is likely to vary significantly between authorities.

What must an affordable housing policy address?
If an authority determines that additional affordable housing is required it may promulgate an affordable housing policy.[11] Essentially, the authority must decide which types of development will be effected by the policy. Again, a wide discretion is afforded to the authority in this regard with the Act providing a non-exhaustive list of criteria for the authority to consider:

> S 10 (2) The criteria that the authority must consider for inclusion in its affordable housing policy include—
> (a) the proposed location of the development:
> (b) the kind of development proposed, whether commercial, industrial, or residential, or a sub-group of commercial or industrial:
> (c) the potential of the development to generate a need for affordable housing:
> (d) the desirability of the community having a variety of housing sizes, tenures, and costs.

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[7] Section 4
[8] For example, within the context of Plan Change 24, QLDC define affordable housing as meaning a "residential activity whose cost to rent or own generally does not exceed 30% of the income of low to moderate income households ... " and low income means " household income below 80% of the area median income", and moderate income "between 80% and 140% of the Area Median Income", see QLDC Plan Change 24.
[9] Sections 7, 8
[10] See http://www.hnzc.co.nz/hnzc/web/councils-&-community-organisations/councils/affordable-housing-enabling-territorial-authorities-act/affordable-housing-enabling-territorial-authorities-act_home.htm (last accessed 6th March 2009)
[11] Sections 9 – 15 and the *Local Government Act 2002* s 5 special consultative procedure must be followed in the adoption of such a policy.

The criteria for inclusion that are adopted may have a direct effect on the types and sizes of developments that developers are prepared to undertake; could this exacerbate supply and affordability problems?

What can be required of developers?

More detail is provided in the Act as to the *tools* available to the authority via a list of what might be required of the person "doing a development"[12] (although, again this list is non-exhaustive and authorities will be able, with reason, to add to these requirements):

> S 11 (2) Without limiting what the policy may state, things that the policy may state that the person must do include—
> (a) including a proportion of affordable housing in the development:
> (b) including a proportion of affordable housing in another development that the person is doing or is to do:
> (c) including in the proportion of affordable housing a particular kind of housing:
> (d) giving the territorial authority some land in its district:
> (e) giving the territorial authority an amount of money.

Clarity is essential and authorities must show clearly how quantities are calculated. If they do not, the content of the policy will be susceptible to challenge.[13] The authority can require the developer to enter into a contractual arrangement or deed (supported for example by a "bond, guarantee, indemnity, mortgage or security interest") to ensure the provision of the affordable housing requirements.[14] The Act mirrors the RMA in declaring that land subject to any affordable housing policy is not deemed to be "taken or injuriously affected" and thus owners and / or developers cannot apply to receive compensation for any economic loss.

Can developers be offered incentives?

Of particular interest is the fact that, in conjunction with a policy, authorities may offer incentives to developers to "facilitate the provision of affordable housing":

> S 12(2) Without limiting what the policy may state, things that the policy may state that the territorial authority may do include—
> (a) excusing the person from paying some or all of the person's development contribution under its policy on development contributions:
> (b) giving the person a density bonus:
> (c) giving the person financial assistance under an applicable funding or financial policy:
> (d) giving the person rates remission under its rates remission policy:
> (e) giving the person rates postponement under its rates postponement policy.

Depending upon the economics of the situation these incentives could be highly valuable to developers. As an aside, the obvious point to note about such measures is that the costs of providing for affordable housing will be borne by the community rate payers or will allow denser development to occur in areas containing affordable housing. Authorities will have to carefully consider the social implications flowing from this latter result. This is particularly so because the class of persons who can object to any decision about affordable housing in a specific development is restricted. The Act only identifies:

> S 19(2) (a) the person doing the development:
> (b) the owner of the land on which the person proposes to do the development:
> (c) the owners of land bordering the land on which the person proposes to do the development

[12] There is no definition of "doing a development".
[13] Although it is not possible to object to the existence per se of a policy, s 22.
[14] Section 25

as "affected persons" whom must be notified of decisions by the authority. For example, if you live near to a development that will include dense affordable housing, as opposed to on land directly bordering the development, you may not fall into the category of persons to whom notice must be given and as a result you will not be able to object to the local authority nor bring an appeal to the Environment Court.[15] There is obviously nothing to prevent authorities from widening the definition of "affected person" but given the plethora of disputes concerning lack of notice in resource consent applications, there may be few local authorities willing to adopt such a generous practice.

Must affordable housing be retained as such into the future?

One obvious problem foreseen by the drafters of the Act was the risk that recipients of affordable housing would simply on-sell the property for a profit. The Act states that authorities must determine how the affordable housing is to remain affordable at first point of sale (or rent) and into the future. The Act suggests that, for example,

> S 14 (2) (a) Without limiting what the policy may state, things that the policy may state include the following:
> (a) the person doing the development must sell or rent the housing to a person who meets the criteria specified in the provisions of the policy that reflect section 13:
> (b) the person to whom the housing is allocated must offer it first to the territorial authority or a council-controlled organisation, a council organisation, or a trust if the person decides to sell it.

Again, authorities should seriously consider the social-equity implications of such measures suggested by s 14 (2) (b). In a buoyant property market will owners of affordable housing be restricted from making the same sort of capital gains on their property that other property owners might benefit from? Whilst keeping that housing affordable for others, this may also ensure that present owners remain forever in 'affordable' or subsidised housing.

Objections and Appeals

'Affected persons' (see above) may object to the local authority in relation to any provision in a policy (but not to the existence of a policy per se) or any specific decision concerning affordable housing.[16] If that person is not satisfied with the response from the authority, they may then appeal to the Environment Court.[17]

Covenants

Existing covenants designed to restrict affordable housing will be void even if only one purpose of the covenant has this aim.[18]

**Other Legislation Affected**

The Act provides that the Goods and Services Tax Act 1985 is amended to ensure that land transferred under any affordable housing policy does not attract GST.

In terms of the Local Government Act 2002, the Act only requires a high level summary of any affordable housing policy to be included in the long term council community plan (thus avoiding the need for the special consultative process to be undertaken each time a minor amendment is made to the policy).

Section 29 of the Act purports to deal with the relationship between the Affordable Housing Act and the RMA. If the Environment Court finds that there is a conflict between the District Plan and the

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[15] The only option open to such a person would be to apply to the Environment Court to challenge any conflict between the Affordable Housing Policy and the District Plan (s 29). In the event of a conflict it will then be open to the Court to either amend the policy or the plan.
[16] Sections 21 - 22
[17] Sections 23 - 24
[18] Section 30

Affordable Housing Policy, it may amend either the Plan or the Policy. Part 2 of the RMA provides the legal guidance for making the decision (interestingly, the general maxim of *generalia specialibus non derogant* would not therefore apply).

**Local Authority Action To Date**

None of the authorities included in the Demographia survey have, as yet, decided to undertake a housing needs assessment. Given the Government's recent announcement, this is unlikely to change in the near future. However, it is important to consider the approach adopted by Queenstown Lakes District Council in Plan Change 24 'Community and Affordable Housing'.[19] Plan Change 24 is part of a wider strategy promoting affordable housing (that includes, for example, a shared ownership scheme administered via the Queenstown Lakes Community Housing Trust). The Plan Change requires applicants for new developments, plan changes and subdivision consents[20] to provide an 'Affordable Housing Impact and Mitigation Statement' (AHIMS) that assesses the demand for affordable housing to be generated by the development. The Plan Change outlines the methodology for this. If additional affordable housing is required a mitigation plan must be prepared by the developer. Again, detailed guidance is provided in the Plan Change. The onus is therefore upon the developer to provide all relevant information within the application for consent. It must be noted that whilst QLDC received legal advice that the Plan Change was within the scope of the RMA,[21] four appeals to the Plan Change have recently been lodged.[22]

**Conclusion**

Of all the legislation rushed into force in the dying days of the Forty-eighth Parliament, the *Affordable Housing: Enabling Territorial Authorities Act 2008* is perhaps the most obviously flawed. Faced with requirements to include affordable housing in developments, it would be surprising if developers did not recover any costs or loss of profit from the other properties in their development. If this occurs, other property owners will simply be met with higher property costs and thus average prices will not fall. In addition, it is inevitable that applications for subdivisions will become more complex and the costs of some resource consents will increase as a result.

If the legislation does survive a review, the willingness of Councils to use the provisions of the Act will vary enormously. Some authorities, such as Auckland City Council, have expressed clear opposition to utilising the Act stating a primary belief that it is for central government to promote affordable housing. No doubt, the Environment Court decision in relation to QLDC Plan Change 24 will be awaited by many with interest.

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[19] Approved plan change notified on 14 January 2009

[20] For discretionary and non-complying activities.

[21] See Legal Opinion from J Macdonald, Macalister Todd Philips, received 30th June 2008, available at http://www.qldc.govt.nz/Default.aspx?tabid=335 (last accessed 6th March 2009)

[22] See http://www.qldc.govt.nz/Default.aspx?tabid=335. Appeals noted on the QLDC website on 16th March 2009 from 'Five Mile Holdings', 'Infinity-Willowridge-Orchard', 'Queenstown Airport' and 'Remarkables Park'.