
Memo

To: Blair Devlin
From: Anna Walker
Date: 6 September 2017
Client: Queenstown Lakes District Council
Matter Number: QLD001551

Subject: Reducing Property Speculation for Vacant Sections

Introduction

1. You have asked us to advise on possible mechanisms to prevent property speculation occurring in relation to bare sections created within Special Housing Areas.
2. In our opinion there are three possible mechanisms (or a combination of each) which could be used as follows:
 - (a) Means tested eligibility criteria;
 - (b) Restricting the on-sale of bare sections; and
 - (c) Vetting process for prospective purchasers.
3. We comment on each mechanism in more detail below.

Special Housing Area Process

4. The Housing Accords and Special Housing Areas Act 2013 Implementation Policy (**Policy**) provides that developers must identify appropriate mechanisms to ensure that housing developed in special housing areas address the district's housing affordability issues. Examples of mechanisms to achieve affordability may include "*methods to reduce property speculation of vacant sections*". Accordingly, Council may require developers to address such methods when they submit their expression of interest for a special housing area.
5. The Policy provides that if an expression of interest is accepted in principle then an appropriate legal mechanism is to be negotiated prior to the expression of interest being recommended to the Minister. We understand that in practice such legal mechanism takes the form of a stakeholders deed which sets out certain commercial terms which are agreed between Council and the developer in relation to the proposed development (for example infrastructure upgrade requirements and contributions to the Queenstown Lakes Community Housing Trust). In our opinion, any mechanisms to prevent property speculation should be negotiated with the developer and included in this stakeholders deed.

Means tested eligibility criteria

6. Council could require developers to sell an agreed percentage of properties in the development to a category of persons who meet certain eligibility criteria such as:
 - (a) New Zealand citizen;
 - (b) First home buyer;
 - (c) Having a gross household income that does not exceed [X]% of the Queenstown Lakes District median; and

- (d) Intending to own and occupy the property exclusively as their residence for no less than [X] years following purchase.
7. The developer would be required to obtain a declaration from prospective purchasers confirming the above prior to entering into a sale and purchase agreement. An instrument (such as a covenant, encumbrance, or caveat – refer explanations below) could also be registered on the title prior to settlement recording that the declaration given is true and correct and to prevent any on-sale within [X] of years following purchase. There would have to be some exceptions to the on-sale restriction such as a mortgagee sale or significant change in circumstances.
8. This eligibility criteria is used for many special housing areas in Auckland, refer the below link:
<http://www.thefirsthomebuyersclub.co.nz/who-is-eligible-for-special-housing-area-houses/>

Restricting on-sale of bare sections

9. A slightly more limited mechanism would be to require developers to restrict the on-sale of bare sections within the development. This would require the developer to register an instrument against the title (such as a covenant, encumbrance, or caveat) which would prevent the on-sale of a section until a residential dwelling has been constructed on the land and code compliance certificate issued for that dwelling. Again, there would have to be some exceptions to the on-sale restriction such as a mortgagee sale or significant change in circumstances.
10. An example of this mechanism being used is at Hanley Farm, an excerpt from the relevant covenant is set out below:

5. Use Covenants

5.1 Subject to clause 5.2 below, the Grantor covenants in respect of any Lot, where the Grantor is either:

- (a) the first purchaser of a Lot from RCL ("First Purchaser"); or
- (b) the owner of a bare lot ("Bare Lot Owner") other than RCL,

not to sell its Lot ("Bare Lot Sale") until a residential dwelling has been constructed on the Lot and a code compliance certificate under the Building Act 2004 for that residential dwelling has issued, unless the written consent of RCL to the Bare Lot Sale has first been obtained, which RCL may give in its sole and absolute discretion;

5.2 Nothing in clause 5.1 shall apply to any Bare Lot Sale completed by any mortgagee of that Lot in exercise of its power of sale.

Vetting process

11. Council could require developers to undertake a vetting process to ensure that land was not being sold to speculators. This would be a similar, but more limited obligation than the means tested eligibility criteria noted above. Council could require developers to put in place a process that prospective purchasers would have to go through before being given the opportunity to submit an offer for a property. This process would be subject to the prior approval of Council and would be aimed at ensuring that speculators were not given the opportunity to purchase. This process would however be implemented by the developer and so Council would have limited ability to enforce compliance.
12. We understand that an informal vetting process is used by the developers of Shotover Country.

Covenant, Encumbrance, Caveat

13. If Council wanted to formally secure compliance with the above mechanisms against certificates of title then the following methods could be used. The vetting process is a more informal process and would likely not involve any registration of instruments against the title.
 - (a) *Covenant*: A land covenant is enforceable between certain parcels of land. Ordinarily when developers register covenants they register them so that all the land in the development is both subject to, and benefits from, the covenant. Accordingly the terms of the covenant are enforceable as between each land owner in the development. Because Council will not be a landowner in the development, it would not be able to enforce the terms of a covenant against the landowners and would need to rely on other landowners, the developer (if it still retains sections in the development), and the market to self-enforce the terms of the covenant (refer the paragraphs on enforcement set out below).
 - (b) *Encumbrance*: An encumbrance is essentially a covenant that is enforceable against a landowner by a named third party (this could be Council). Performance of the covenant is secured by a rent charge that is payable each year, although in reality if the terms of the encumbrance have been complied with then no rent charge is payable. Encumbrances are often used by Council to ensure compliance by landowners with certain obligations that apply to the land (for example an encumbrance not to build over a certain area where Council infrastructure is located).
 - (c) *Caveat*: A caveat prevents the transfer of land and registration of any instruments against the land without the consent of the party who has lodged the caveat. You are only able to lodge a caveat against the land in certain limited circumstances and we would need to carefully consider how to document the above mechanisms to ensure that they could give rise to a caveatable interest.

Enforcement

14. The stakeholders deed will require the developer to implement those mechanisms recorded in the deed. To ensure developers comply with the stakeholders deed Council could require implementation as a precondition to titles issuing (for example, in relation to a covenant restricting bare section on-sales, Council could require the developer to register this covenant as a pre-condition to titles issuing). In the event that a developer did not comply with its obligations under the stakeholders deed, Council would also have an action against the developer for breach of contract.
15. However, once the developer has implemented the mechanisms it will then likely be up to the developer to enforce those mechanisms as against prospective purchasers (unless Council decides to require an encumbrance to be registered in favour of it securing compliance). Council should think about whether it wants to be involved in enforcement as against prospective purchasers or whether this responsibility should lie with the developer. Council could include in the stakeholders deed a requirement on the developer to actively enforce as against prospective purchasers.). The market may also to some extent self-enforce in relation to covenants registered on the title as individuals should be deterred from breaching a covenant registered against their title, and may find it difficult to on-sell land in breach of a covenant.

Other considerations

16. It is likely that Council will encounter some resistance from developers in relation to the above mechanisms being included in the stakeholders deed. Council will need to be careful that insisting on these mechanisms does not dissuade developers from proceeding under the Special Housing Area process. If developers decide to proceed with their developments under the ordinary resource consenting process then Council has no ability to insist on such

mechanisms being included as part of that process unless a developer volunteered a condition. Council only has the leverage to insist on inclusion of such mechanisms through the negotiation of the stakeholders deed as part of the Special Housing Area process.

Conclusion

17. We trust the above information has been of some assistance. Please let us know if you have any further queries or would like to discuss any of the above in further detail.

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