Enabling Inclusionary Zoning:

What can we learn from the repealed Affordable Housing: Enabling Territorial Authorities Act of 2008?

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Paper 2 in a series on Inclusionary Zoning

Prepared by:

COMMUNITY HOUSING SOLUTIONS

Authors:
Scott Figenshow
Chris Glaudel

Report pepared by:
Community Housing Solutions, Ltd.
Level 11 Ranchhod Tower
110 Lambton Quay / 39 The Terrace
Wellington 6142
04 385 8722

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Background

What we now call 'the housing crisis' had an earlier peak in 2008. Just before the global financial crisis hit New Zealand, house prices were rising faster than incomes, rents were rising, street homelessness was becoming visible. Our tourism regions struggled to retain key workers and more and more kiwis were finding that homeownership was out of reach. As this pressure built, Housing Minister Maryann Street believed that some of the solution sat with local leaders. She embarked upon a listening exercise to understand what territorial authorities[1] needed to support their work with their communities, in order to deliver affordable homes that their communities needed.

The Affordable Housing: Enabling Territorial Authorities Act 2008 (AH:ETA)[2] delivered that support. It received the royal assent on 16 September 2008, just weeks before the 8 November 2008 general election. During its term, the Government also delivered the New Zealand Housing Strategy 2005; AH:ETA was aligned with that Strategy.

The AH:ETA provided a framework for territorial authorities to assess housing need using an agreed, nationally consistent methodology; and to develop strategies and action plans to meet local housing needs, in consultation with their communities. It linked to the Resource Management Act (RMA) and related district planning. It allowed territorial authorities to capture value uplift associated with land-use planning changes and defined the mechanisms to ensure the retention of affordable housing and to promote housing affordability more generally. The AH:ETA reduced risks to territorial authorities wishing to implement local inclusionary or linkage zoning programmes, and allowed for actions to cancel private restrictive covenants hindering delivery of affordable homes.

With the change of Government following the November 2008 election, one of the first actions of the new Housing Minister, Phil Heatley, was a pledge to repeal AH:ETA. He delivered on this pledge and the AH:ETA was repealed on 6 August 2010, by Section 3 of the Affordable Housing: Enabling Territorial Authorities Act Repeal Act 2010 (2010 No 101).

The authors have found no evidence of any technical or policy reason for its repeal. It was likely seen as an intervention in the housing market, which at the time was inconsistent with the dominant narrative that Government's role was to remove barriers and the market would deliver affordable housing on its own.

This paper seeks to set out what AH:ETA offered, and suggests how its provisions could usefully inform the current Resource Management reform efforts in 2021.

Readers are encouraged to view AH:ETA side by side with this paper.

[1] Authors have chosen to use this term throughout to match the language of the Act. The term Territorial Authority includes City and District Councils, but not regional councils.

[2] Link embedded in text; access at www.legislation.govt.nz, using 'advanced search', select 'repealed acts'.

What issues did AH:ETA address?

In the 2005-2008 period, many territorial authorities were wrestling with an ageing pensioner housing stock and the rise of housing affordability issues for key workers as well as lower income households. Councillors were often debating the role of a local council in housing provision – should they get involved or was it really the responsibility and purview of central government? During this time, the Queenstown Lakes District Council was working its way through the Environment Court on its Plan Change 24: Affordable and Community Housing, which proposed to utilise the District Plan to assess development proposals for the impact they would have on housing affordability, and to make a contribution of land specifically for affordable homes to mitigate the effects of declining affordability. Appellants were challenging the Council's ability to implement this planning tool under the RMA.

Across the country, Councils were also observing an increase in new residential subdivisions where developers were attaching private, restrictive covenants on the newly issued titles. These covenants were often requiring minimum house sizes, setting design/material requirements, and in some cases preventing the sale of land to organisations who provide affordable or social housing (including then-Housing New Zealand). The cumulative effect of this increased use of private covenants limited the ability to integrate smaller units, and different design approaches into new subdivisions, further diminishing the supply of new build housing in the lower quartile of value.

The Government at the time observed these challenges and work on AH:ETA commenced.

AH:ETA provided a voluntary framework for territorial authorities, that if a council opted in and followed, would provide legal certainty to the council that its affordable housing policies were robust. It provided a key set of definitions in law. AH:ETA dealt with the covenants issue by providing legislative certainty that covenants are void if one of its purposes is to stop the provision of affordable housing or social housing.

Importantly, it bridged key provisions across the Resource Management Act 1991, the Local Government Act 2002, The Building Act 2004, The Goods and Services Tax Act 1985 and the Housing Corporation Act 1974. In doing so, it resolved the legal uncertainty that council's face when working across these multiple acts.

In essence, it enabled local housing policies to be implemented, when they were developed in consultation with the community, consistent with local need defined through a national framework. It enabled well-designed inclusionary zoning policies, and the delivery of retained affordable housing.

Analysis of the AH:ETA provisions

This section will explore the content of the AH:ETA, and all references are to the Part and Section as listed in the AH:ETA 2008 Reprint as at 6 August 2010 (See Appendix 1)

Part 1: Meeting Housing Needs

Section 4 Interpretation: AH:ETA provided a set of definitions, notably the meaning of affordable housing and social housing which reflect the clarity of the time. Today these definitions can be advanced by the pricepointing work currently underway through the Affordable Homes for Generations workstream of the Building Better Homes, Towns and Cities National Science Challenge. These definitions would also be supported by the current place-based approaches being developed at the Ministry of Housing and Urban Development (HUD).

The overall frame is from the perspecitve of a local (council) housing strategy; therefore the household income level deemed to be 'low income' for the purpose of that housing strategy was set in context for the local incomes in that city or district. Today, it would be helpful if area median income levels were published by Government annually (or more frequently, if required) for every district in New Zealand, with agreed methodology for their use.

Section 5 Purposes: The purposes provide a strong logic where a territorial authority is enabled to require persons doing developments to deliver Affordable Housing consistent with those local needs documented through a housing needs assessment. This section also enables territorial authorities to take account of housing sizes, tenures and costs. A further enablement is that territorial authorities can void private covenants that stop the provision of social or affordable homes.

Section 6 What this Act does about affordable housing and social housing: The logic set out in subparagraphs (1)-(9) provide a roadmap of the actions that territorial authorities would follow if they chose to use the powers of the Act.

First, a council would complete a housing needs assessment. If the assessment showed there is not enough affordable housing in the district, then the council could make affordable housing policies.

When making affordable housing policies, the council needed to follow a set of defined steps, including community consultation and engagement.

If a person affected by the affordable housing policies wanted to object or appeal, the Act sets out those appeal rights (resolving inconsistency between the RMA and LGA, an important feature).

Section 7 Decision to Assess: This section grants territorial authorities the ability to assess the need for affordable housing at any time, but did not require them to do so. The National Policy Statement – Urban Development has revived this concept and made it mandatory.

Section 8 Method of Assessment: The assessment requirements granted flexibility to territorial authorities to choose a method of assessment that suits their community, utilising common supply and demand measures. It also required the assessment to include "an estimate of the number of households that currently need affordable housing, and the

number that are likely to need it in the reasonably forseeable future". This is a significant clarification, in that it requires housing needs assessments that set out the various cohort groups in a community, and the housing options that would work for them. It called for a level of household detail such as "stressed renters", "can rent but can't buy" and fostered development of tenure offerings such as Progressive Home Ownership and Affordable Rental as responses to the needs.

The Centre for Housing Research Aotearoa New Zealand (CHRANZ) published the 'New Zealand Manual for Housing Market Assessments' in July 2009 to provide practical support for their preparation. The methodology is still relevant today, and is being used for housing needs assessments prepared by Livingston & Associates. (Community Housing Solutions Ltd has partnered with Livingston & Associates on assessment for SmartGrowth Western Bay of Plenty, Hutt City Council, Waimakariri District Council and others).

It would be a practical step to bring Section 7 and 8 into the current RMA reforms

Section 9 Outcomes and objectives: When a territorial authority finds that it does not have enough affordable housing, based on the needs assessment, to meet the current and future needs of its people, this section requires the affordable housing policy to clearly state outcomes and objectives.

Section 10 Criteria for application of policy to development: read together with Section 11 Actions required of persons doing developments: Together, these two sections carry the general enablement of the Act, setting out precisely the criteria for applying the affordable housing policy to specific developments in the District.

11(1) together with 11(2)(a-e) enables the council to require the person doing a development to deliver affordable housing, when the policy applies to that development, and provides flexibility as to whether the specified affordable housing is delivered within the development or offsite, or at another development. Further these clauses enable a percentage methodology to be applied (so long as the detail of how the proportion is to be calculated is set out in the policy as per 11(3)(a-e).

We believe that the overall enablement set out in Sections 10 and 11 enable value capture for affordable housing, and enable both inclusionary zoning and linkage zoning approaches. Linkage zoning usually starts with the premise that there is a link between particular types of development, the likely income profile of the workforce who would use that development, and the resulting demand for affordable housing that is generated by the development. For example, a retail complex is likely to generate a high percentage of entry level, lower-wage jobs, resulting in a profile of affordable housing demand needed to adequately house those workers. This approach has been found to be most consistent with the RMA, however is more complicated and difficult to implement.

In contrast, Inclusionary Zoning approaches usually take a community-wide view of both social need and workforce needs, and allocate affordable housing requirements across all residential development in the district. In this approach, commercial developments aren't

usually assessed specifically for needing to meet affordable housing requirements, a reason that this approach has been subject to challenge under the existing RMA.

For clarity, below is a summary of the similarites and differences of these two approaches:

Inclusionary Zoning	Linkage Zoning
An approach where a proportion of all residential development includes affordable homes (as defined) in the development, whether on-site or through an agreed off-site arrangement.	An approach that analyses the demand for affordable housing in the district, and allocating that demand across all land uses: Residential, Commercial and Industrial.
Used under HASHAA (see page 14) in the Queenstown Lakes Distric and Auckland	Uses the approach argued under QLDC's Plan Change 24
More simple to apply in a consenting setting, a less easy option under the RMA	More complex to apply in a consenting setting, a more obvious fit for RMA
The RMA allows mitigating the effects of constrained land use on people and communities, as confirmed in the 9 July 2010 Environment Court Case for PC24	
Likely subject to court challenges as there is no current central government guidance or policy support in place.	

Some also ask how inclusionary zoning or linkage zoning approaches fit with the concept of 'betterment'. Subpart 4 of the Urban Development Act allowed for betterment, but only for transport, not helpful for affordable housing. Given this limited use in New Zealand, we don't explore betterment further in the context of AH:ETA.

Section 12 Actions Required of territorial authorities: This section enables territorial authorities to provide assistance to affordable housing developments under their housing policies and explicitly authorises tools such as density bonuses and relief from development contributions, to name a few. This is an important feature of the Act, as these incentives are not otherwise enabled under the RMA or LGA. This is an important consideration for inclusionary zoning going forward as the RMA replacement Acts are anticipated to remove barriers to development. The ability to provide incentives as outlined in Section 12 may be limited in the future.

Section 13 Criteria for Allocation: This section enables a local approach to housing need, consistent with HUD's place based approach, and would support the range of local housing needs that goes beyond the levels of need recorded under the current Public Housing Register. AH:ETA also set out that the allocation criteria in the territorial authority housing policy should fully address local need, which suggests that the affordable housing delivery should not be constrainted to only those funding settings available at a given time through central government.

Section 14 Methods of Retention: Baked into the fabric of AH:ETA is a requirement that a territorial authorities' affordable housing policies "must state how affordable housing is to remain subject to the affordable housing policy". Section 14(2) then sets out a range of options for what a policy can include that would be compliant with this retention clause. It also explicitly enables both affordable rental as well as what is known today as Progressive Home Ownership, including shared ownership, rent to buy, and secure home / leasehold

programmes. Because of this focus on retention, this section fully enabled the kind of retention offered by not for dividend community housing providers and iwi/Māori housing organisations.

Section 15 Objections and Appeals, together with Sections 17-24: These sections set out who can appeal, the process for doing so, and what legislation governs those provisions. The authors leave these as written, since any forward application of the principles in AH:ETA would require a fresh consideration of how objections and appeals would be handled in context of the current legislative and legal settings. AH:ETA doesn't offer anything new here, other than the clarity of stating how such provisions are to work across multiple pieces of legislation.

It is worth noting that Section 21(2) clarified that if a person own land, or borders land on which an affordable housing development is proposed, the grounds to object to council were wide ranging, yet their first port of call was to object to the council, and only if the objection was not resolved, would the person need to go to the Environment Court for appeal.

In 2010, the Environment Court, in addressing the Queenstown Lakes District Council's (QLDC) Plan Change 24, accepted that the AH:ETA was complementary to RMA processes and that affordable housing was not prevented from being addressed under the RMA ([2010] NZEnvC 234). This case however only tested the QLDC proposed affordable housing provisions under the RMA; QLDC had not at that time proposed a housing policy under AH:ETA. Section 29 confirms that the Environment Court is the entity that would resolve any disputes related to the application of AH:ETA. Since the legislation was never tested in court, it is unknown whether this was the right place for resolving disputes arising under AH:ETA.

Section 16 Making, reviewing and amending policy: This section reinforces the logic cycle of AH:ETA – that being a recurring cycle of housing needs assessment which then updates and adjusts the affordable housing policy, to ensure adequate affordable and social housing is delivered in the district. As economic and market conditions change, the affordable housing policy was designed to adjust. This self-adjusting feature of the Act appears to support a rights-based approach to housing policy, in that it allows for those affected by limited housing to be consulted, and counted, and the policy designed to meet their needs, appropriately with community support.

Part 1: Implementing Affordable Housing Policy

Section 25 Binding Commitments may be required: This section is a core innovation of AH:ETA, because it sets out so clearly the process for how a development proposal moves through its stages of consenting, to ensure that retained affordable housing is actually delivered. At 25(8-9) it clarifies the trigger, in the granting of resource consent and building consent, that there is a legally defensible mechanism in place to ensure the affordable housing will result.

Section 26 No payment of compensation: This section affirms the territorial authorities' legal authority for capturing increases in land value for affordable housing, and confirms that there is no obligation for compensation to the landowner for such action. It squarely places any perceived or real cost of delivering the affordable housing on the landowner. A critical success feature of AH:ETA, this certainty that affordable housing policy can be implemented without legal challenge (on this matter of compensation) is an essential lesson that can be learned for upcoming legislation.

Section 27 Use of land and money: Subparagraphs 1-9 expressely enable territorial authorities to acquire land or money to provide affordable housing (under its affordable housing policy) and that they can either deliver that housing or transfer it to another entity. This expressely enables councils to partner with their local Community Housing Provider, rather than deliver, develop or operate that housing itself. It also enables a council to "give the land, or sell it cheaply, to a body to use to provide affordable housing". This means the council can elect to elevate its wellbeing objectives above its financial return objectives – releasing the council from obligations under the LGA to sell land at highest and best use price.

Sections 28 Policies must be aligned: instructions are provided on the sections of the Local Government Act 2002 which must be followed to use the powers on land or money set out in Section 27. This is a good example of the legislation giving express instruction on what it must do to use the powers, which is very important when multiple pieces of legislation govern different powers available.

Section 29 Environment Court to decide: if a conflict arises between a territorial authority's affordable housing policy and its district plan, this section confirms that the Environment Court is the entity to decide the issue.

Part 1: What AH:ETA does about Covenants

AH:ETA took the groundbreaking step at Sections 30 and 34 of setting clear authority for Councils to void covenants if one of its purposes is to stop the provision of affordable housing or social housing on the land. The repeal of AH:ETA left these void covenant provisions in law, transferring them to the Property Law Act 2007[3]. Its unclear today whether councils are aware of their ability to prevent private covenants from being placed on residential subdivisions. A 2018 BBHTC Research Bulleting "Covenants and risks to the Supply of Land for Modest Homes and Affordable Housing"[4] suggests that if there is awareness that certain covenants are void, then little is being done to prevent their use.

For clarity, below is the language currently in effect for preventing restrictive covenants:

8 Amendment to Property Law Act 2007

1. *(1) This section amends the Property Law Act 2007.*

[3] See Appendix 2, Affordable Housing Enabling Territorial Authorities Repeal Act 2010, Section 8.

[4] See Appendix 3, Covenants and Risks to the Supply of Land for Modest Homes and Affordable Housing, 2018, C. Frederickson and K. Saville-Smith.

2. *(2) The following section is inserted after section 277:*

"277A Certain covenants void

1. *"(1) A covenant concerning land is void if a principal purpose of the covenant is to stop the land being used for housing for—*
    1. *"(a) people on low incomes; or*
    2. *"(b) people with special housing needs; or*
    3. *"(c) people whose disabilities mean that they need support or supervision in their housing.*

2. *"(2) Without limiting the covenants that are void under subsection (1), covenants to the following effect are void:*
    1. *"(a) a covenant that the transferee will not directly or indirectly convey the land to Housing New Zealand Corporation, any other central or local government body, or a private body that may facilitate the occupation of housing on the land by people selected by the corporation or the body:*
    2. *"(b) a covenant that the transferee will not directly or in-directly convey the land to Housing New Zealand Corporation, a subsidiary company of Housing New Zealand Corporation, any other central or local government body, or a private body that provides housing to tenants on a subsidised basis:*
    3. *"(c) a covenant that the transferee will not directly or indirectly convey the land to a central or local government body or a private body for the purposes of public or institutional housing.*
3. *"(3) This section applies only to covenants entered into on or after the day on which this section comes into force.*
   "Compare: 2008 No 67 ss 30, 34".

It is suggested that further work be done to determine whether these provisions have been used to void such covenants, and if not, that a process be developed to support councils to implement its use. From limited discussions, it appears difficult for councils to intervene, as the covenants are essentially private agreements between parties, and few are written to be explicitly violating the provisions of Section 277A. In other words, no one is writing covenants that say "low income people are not allowed" in a given development. Instead, we see covenants that are cumulatively impactful on affordability, and are cloaked in concepts of amenity protection. Covenants that require use of certain materials, minimum size, etc may have a cumulative impact on affordability.

But for a council to use the powers in Section 277A, they would need clear guidance – a clear position that illustrates what is and is not acceptable, instead of the shades of grey at present. One option may be to set out how Section 277A powers could be used if the covenant does not align with other planning documents (for example, a local housing strategy or district plan provision), or may breach legislation such as provisions under the Urban Development Act, the NPS – urban development, or other such legislation.

The remaining sections of AH:ETA are operational in nature and have not been analysed further: Section 31 Regulations, and Transitional Provisions Sections 32 Building Consents and 33 Resource Consents.

Part 2: Amendments to other enactments

Sections 35 through 38 include the necessary consequential amendments to enable AH:ETA to work, and included changes to the Building Act 2004, Goods and Services Tax Act 1985, Housing Corporation Act 1974 and Local Goverment Act. Similar amendments relevant for today's resource management reforms would also be necessary to give full effect to an enabling framework.

Possible application of AH:ETA- type provisions in the 2021 Resource Management Reforms

AH:ETA's policy logic was simple and easy to follow, and we suggest mirroring its overall approach is a sound place to start:

1. Assess housing need using a robust, nationally-consisten methodology
2. Develop an affordable housing policy to meet the identified needs, with clearly stated outcomes and objectives.
3. Determine the types and locations of development to which the policy applies, and ensure that its application is sufficient to meet the stated needs.
4. Set out the actions required of persons doing development, so that the affordable housing policy will be achieved, and be clear about what the council will do to assist in supporting the development to deliver on the outcomes and objectives.
5. Set out the criteria for allocation of affordable housing, ensuring that the stated needs are met.
6. State how the affordable housing will be retained and kept fit for purpose for the long haul.
7. Consult with the community, build community support, and set out how objections and appeals will be handled.
8. Implement the policy and review it to ensure it works and achieves the outcomes and objectives.

Further, the following specific areas from AH:ETA are suggested as key components of any new enablement legislation:

1. Define the Housing Needs Assessment methodology, and its application across NZ.
2. MHUD's place-based approach, connecting local housing needs assessments with local housing strategies that document the place-based approach for a given region
3. Define Housing Market Areas that may cross local authority boundaries.
4. Publish area median household incomes for each Housing Market Area across New Zealand annually (or if required, quarterly) using a consistent methodology.
5. Clear authority that binding commitments are required and that there is no compensation required to the landowner for requiring affordable housing under a qualified affordable housing policy
6. Enable both inclusionary zoning and linkage zoning approaches
7. Enable land to be sold or granted to a Registered Community Housing Provider, for either nil consideration or at a submarket price to achieve the affordability outcomes set out in an affordable housing policy

On the covenants issue, as the void provisions remain in effect through the Property Law Act 2007, we recommed a programme for removing those private covenants which came into effect since AH:ETA was passed in 2008 that are determined to be void. This programme should provide resources to assist councils to implement the void process.

Importantly, AH:ETA enabled territorial authorities to look after the intermediate market, those households who are not eligible for the Public Housing Register, but for whom their local housing market was simply too expensive or lacking in suitable choices.

We recommend that enablement provisions going forward explicitly confirm that a council must assess two key presumptions about workforce housing:

- The first is a presumption that the workforce is a proportion of the total residents who call the district their home
- The second is a presumption that this workforce is essential for the effective functioning of its economy, and therefore must live within the district

Therefore, achieving policy certainty that a proportion of all residential development could be afforable to this cohort of residents indicates that a policy environment should support this enablement approach, and allow a territorial authority to mandate or require what the proportion should be in their district. Doing so ensures that the local housing policy serves both those in highest need, as well as looking after its workforce housing needs.

Given the situation where current Government housing policy is focused primarily on social and public housing, this 'missing middle' is a point of difference where AH:ETA was designed to asssist. Thus, enablement provisions should be seen as a complimentary suite of tools alongside existing policy, part of a well-functioning housing system.

Case Study: How Inclusionary Zoning delivers Retained Affordable Housing

In the Queenstown Lakes District, the successful application of affordable housing policies started in 2003 with the first developer-led commitment, leading to the 2005 development of the Housing Our People in our Environment (HOPE) Strategy. What started as voluntary contributions became District Plan provisions.

The Housing Accords and Special Housing Areas Act 2013 (HASHAA), whose purpose is to enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts, was shaped to further support the Districts aims. This District is the only one in New Zealand where its Housing Accord included a mandatory, measurable contribution towards retained affordable housing; its Housing Lead Policy required a 5%-10% contribution *of the residential component of the development by developed market value or by area (depending on the nature of the development)*[5] on developments which meet its criteria. Approved developments then receive the benefit of fast-track approval. These provisions expired in September 2019, as required by Government legislation. The previous District Plan provisions remain in effect to this day, although are voluntary rather than mandatory requirements.

Nevertheless, the QLDC experience has resulted in a consistent pipeline of land contributions for retained affordable housing, developed by the Queenstown Lakes Community Housing Trust (QLCHT)[6]. This experience provides New Zealand-based evidence stretching well over a decade on which to learn and build a future enabling framework that could result in a similar level of success in communities around the country.

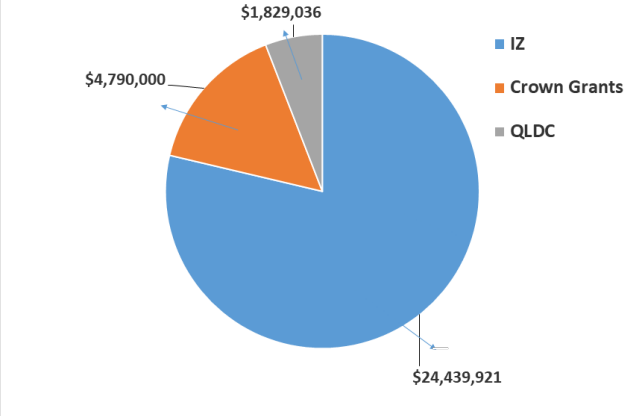

Figure 1: Queenstown Lakes inclusionary zoning contributions, held by QLCHT as of May 2021. The $24.4m have assisted 222 households into retained affordable housing.

The Queenstown Lakes experience also illustrates that when land value is held by not for dividend community housing providers, they can turn $1 of investment into at least $2.90 of housing, through the retention of inclusionary zoning land value, philanthropic investment, local government, and local community support, thus delivering more housing for the same amount of central government investment. Furthermore, this investment – including the land value – is held, in trust, by a locally-governed entity (QLCHT), regulated by the Community Housing Regulatory Authority.

[5] see the complete Housing Lead Policy for further detail. https://www.qldc.govt.nz/planning/special-housing-areas/

[6] A more fullsome history can be found in "Social Policy Practice and Processes in Aotearoa New Zealand, Eds Hassall and Karacaoglu, pp 302-306 Figenshow and Saville-Smith.

Appendices (embedded links)

1. Affordable Housing Enabling Territorial Authorities Act 2008 Reprint as at 6 August 2010

2. Affordable Housing Enabling Territorial Authorities Act Repeal Act 2010

3. Covenants and Risks to the Supply of Land for Modest Homes and Affordable Housing. C Fredrickson and K. Saville-Smith, 2018.

4. Inclusionary Zoning and Assisted Ownership in Queenstown Lakes, July 2019

Context about this article:
https://www.communityhousing.org.nz/our-place/the-current-environment