

**Before Independent Hearings Commissioners
Rotorua Lakes Council**

**In the matter of 13 applications for resource consent for
contracted emergency housing by Te Tūāpapa
Kura Kāinga Ministry of Housing and Urban
Development**

**Legal submissions in reply of Te
Tūāpapa Kura Kāinga Ministry of
Housing and Urban Development**

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Legal submissions in reply of Te Tūāpapa Kura Kāinga Ministry of Housing and Urban Development

1 Summary of reply submissions

1.1 These reply submissions cover:

- (a) The further evidence filed in reply;
- (b) An explanation of MHUD's position on conditions that should be imposed in the event that the consents are granted;
- (c) A summary of the reasons why the consents should be granted.

2 Evidence in reply

2.1 Alongside these submissions, MHUD is filing two brief statements of evidence:

- (a) Evidence from Nick McNabb responding to a number of factual issues that arose during the hearing which produced questions from Commissioners;
- (b) Evidence from Shamubeel Equb in response to the evidence by Kevin Counsell and the report tabled by RotoruaNZ in the course of its submission.

2.2 This evidence is discussed further below to the extent that it relates to the proposed conditions.

3 Conditions

3.1 The output of the planners' caucusing is a set of conditions with additional columns recording any points of agreement or disagreement. Below I set out MHUD's position on each of the conditions, by reference to the condition numbers in that document. By and large, that position naturally is closer to the opinions expressed by Ms Blackwell, though there are some points where MHUD's position is different.

3.2 As a general comment, the difference between MHUD's position and the Council's in respect of some conditions reflects a philosophical difference about the purpose of the consent and the wider goals that it is seeking to achieve in relation to emergency housing. MHUD understands the Council's desire to set out prescriptively the conditions of consents. Enforceability, comprehensibility, and clarity are important. But what may be lost in the prescription is the flexibility to deal appropriately with situations as they arise by the three service providers who have been selected for the expertise and dedication to resolving these difficult social problems.

3.3 A final set of conditions proposed by MHUD, broken into each of the 13 motels, is attached.

Condition 1

3.4 MHUD agrees that this condition is appropriate and notes Ms Blackwell's comment.

Condition 2

3.5 MHUD agrees that this condition is appropriate.

Condition 3

3.6 MHUD agrees that this condition is appropriate, and agrees with Ms Blackwell that the advice note is unnecessary. It is also nonsensical from a legal perspective as the contracts must address matters that are not consented activities. Paying the contractors, for example, is not a consented activity (nor does it need consent). But the issue is not just with how it is framed. The contracts may address wider matters as a matter for freedom of contract, such as, for example, provisions relating to services in other districts. There is simply no need for the consents to seek to control what any contracts cover. If the contracts provide for wider services than are contracted and those services are carried out, then that is a matter that the Council's compliance team can address.

Condition 4

3.7 MHUD agrees that this condition is appropriate. and agrees with the supplementary comments provided by Ms Blackwell.

Condition 5

- 3.8 MHUD agrees that this condition is appropriate.

Condition 6

- 3.9 MHUD agrees that this condition is appropriate, subject to the comments provided by Ms Blackwell. On the first day of the hearing Commissioner Te Pania had some questions about whether the then proposed condition (which did not include children under 18 months in the count) was consistent with fire regulations which do not exclude children from occupancy maxima. The exclusion of children under 18 months has now been removed, which should ensure no confusion between how occupants are calculated for the different regulatory standards. The consent holder will have to comply with whichever is the most restrictive (either fire regulations or this condition).

Condition 7

- 3.10 This condition is headed “Record Keeping and Reporting”. It requires the consent holders to maintain a record at all of times of several categories of occupant-related information.
- 3.11 MHUD has no objection to the categories of information except for (b) and (c). It considers that there is no proper basis to impose conditions to seek that the information at (b) and (c) be recorded and collected by the Council and in particular that it would be unlawful to impose condition 7(c).
- 3.12 The Council’s planners assert that the length of stay information “provides a basis for monitoring and assessing the impact of length of stay on occupant wellbeing outcomes.” We hit the philosophical difference identified above. While wellbeing outcomes are a legitimate RMA concern, what does the Council intend to do with the information? Do Council compliance officers intend to interview those who have longer periods of stay? How long is too long? Why does the Council consider that it can or should second-guess the decisions of the Te Hau Ki Te Kāinga service providers about when whanau are ready to move to the next stage in the housing continuum?
- 3.13 The Council’s planners assert that information about the last “permanent” address “provides a basis for monitoring and assessing impact of people coming to Rotorua, beyond site specific effects.”

- 3.14 To begin with, by definition, any previous address of a person was not “permanent” because it is no longer their address. Nor is something like “last known address” any better, because it will over-capture people who may have lived in various addresses in Rotorua for their entire lives, and then moved somewhere else to be better supported during Covid. It is highly unlikely that any information recorded will clearly present any particular picture, and that is confirmed, or exacerbated, by condition 8, which proposes that information is not recorded in a way that does not identify individuals. This means that clarifying the picture being presented would be impossible for the Council. The information will not therefore achieve the purpose the Council identifies.
- 3.15 Before turning to the RMA reasons why collecting this information is unlawful, it is important to consider the Privacy Act and New Zealand Bill of Rights Act.
- 3.16 Under Information Privacy Principle 1, “personal information must not be collected by an agency unless the information is collected for a lawful purpose connected with a function or an activity of the agency, and the collection of the information is necessary for that purpose”. The consent holder, who will not be able to avoid collecting information in a way that identifies the individuals from which it comes, is in the business of offering accommodation. Collection of former address information is not “necessary” for that purpose. This makes the proposed condition inconsistent with the Privacy Act. And even though condition 8 suggests that when the information is transferred to the Council it will not identify individuals, that does not make its collection by the motel operators at the instigation of the Council any better from a privacy perspective.
- 3.17 The Ombudsman has previously highlighted in decisions the privacy interest of people in emergency or transitional housing to keep their addresses private. The following is extracted from decision 518770 (13 May 2021), a request for the names of motels providing transitional housing in Auckland:

The Chief Ombudsman has previously considered that a privacy interest in property information can exist in certain circumstances.

You requested the names of the motels that provide transitional housing in the Auckland region. In the context of your request, I am satisfied that there is a privacy interest in the motel names. This is because people using transitional housing are often in a particularly vulnerable or exposed situation. They require

assistance from the government to provide them with a basic need, during what can be stressful and difficult times.

In seeking and obtaining this assistance with their housing from the government, they have a reasonable expectation that their request will remain private, and that generally they will not find themselves in a situation whereby their life circumstances could be the subject of unwarranted commentary or scrutiny by others.

Release of the motel names could readily result in wider publication and discussion about transitional housing in Auckland. This would potentially expose the transitional living arrangements of many people in a way that could foreseeably bring a degree of insecurity for them, and unwarranted scrutiny into their lives. For this reason, section 9(2)(a) applies.

We have consulted with the Privacy Commissioner's office about the merits of the withholding, in accordance with section 29B of the OIA. It commented that there is a privacy interest in the information.

Countervailing public interest

Section 9(1) of the OIA requires consideration of the public interest factors in release of the information. In cases such as this, where an agency has contracted services to private businesses, there is a general public interest in the disclosure of information which illuminates how public funds are used. However, this countervailing public interest does not appear relevant in the context of your request or the information at issue.

- 3.18 The NZBORA concerns relate to the freedom of movement protected by s 18. Seeking and recording this information engages s 18, especially when the proposed powers in the review condition are considered. Accordingly, before imposing the condition Commissioners will need to be satisfied that the condition is prescribed by law (ie, well within the scope of s 108AA of the RMA) and demonstrably justified in a free and democratic society under s 5. I address s 108AA next, but in my submission it is plainly not so justified.
- 3.19 Section 108AA of the RMA relevantly provides that a condition must be directly connected to an adverse effect of the activity, or relate to administrative matters that are essential for the efficient implementation of the relevant resource consent. Neither of these tests are met. Collecting this information in a way that does not identify individuals necessarily means that it cannot be directly connected to an adverse effect of the activity. Nor is there some reason relating to the efficient implementation or administration of the consent that make it *essential* to collect this information.

Condition 8

- 3.20 MHUD agrees that condition 8 is appropriate. It notes that the condition records that information should not be recorded in a form that identifies individuals. MHUD agrees that this is important. That being the case, this is a further reason why the categories of information to be recorded at condition 7(b) and (c) above are not appropriate. If such information cannot identify individuals, then what value would the information be to the Council to assess the impact of people coming to Rotorua.

Condition 9

- 3.21 MHUD agrees that this condition is appropriate.

Condition 10

- 3.22 MHUD agrees generally with this condition. It also agrees with the position taken by Ms Blackwell that in relation to the Union Victoria Motel further shared open space is not necessary and repurposing the carpark is a poor use of that open space.
- 3.23 Further, MHUD does not understand the reasoning behind requiring trees to be established at 2 metre intervals along the boundary with between Malones Motel and the Arawa Bowls Club. The area behind the motel building and the boundary with the Arawa Bowls Club was recently blocked off by the motel operator. Planting trees in the space between the southern motel building and the boundary fence makes little sense. No further landscaping is necessary.
- 3.24 In respect of Lake Rotorua Hotel, bollards are not necessary to demarcate the pedestrian accessway.

Condition 11

- 3.25 MHUD agrees with condition 11.

Condition 12

- 3.26 MHUD agrees with condition 12.

Condition 13

- 3.27 MHUD agrees with condition 13 and is comfortable with the proposed advice note of the Council.

Condition 14

- 3.28 MHUD opposes condition 14 in its entirety on the basis explained in section 4 of its initial legal submissions. There has been no cogent response to MHUD's submission that imposing the proposed condition to account for asserted legal right of the child to play would amount to an error of law. I do not replicate my explanation of that position here but invite you to reread that portion of the earlier submissions in particular.
- 3.29 Further, when compared to the counter-factual, of the children that this condition is aimed at supporting living in motels under EH-SNG conditions, it is not clear how the condition meets the test in s 108AA(1)(b). As MHUD has said throughout, no one believes that children should be living in motel accommodation, but they are better off compared to relying on EHSNGs or having nowhere.
- 3.30 Nor is this an administrative condition essential for the efficient implementation of the consent.
- 3.31 In the Council's final oral presentation Mr Batchelar maintained his opinion that such a condition was appropriate because it would be a pity for Ms Collins' work not to have been wasted. That is not a good enough reason to impose conditions of this nature on the consent holders. Ms Collins' evidence has been provided to MHUD's three service providers who are able to take it into account in making allocations based on the particular needs of each whanau and having regard to the ages of the relevant children. That is as far as it should go.

Condition 15

- 3.32 MHUD agrees that this condition is appropriate.
- 3.33 The process by which the particular motels to be used for CEH were contracted was explained in the evidence of Lyall Wilson. How that fitted in to the wider workstream of the Rotorua Housing Taskforce, including representatives from the Council and iwi was discussed in both evidential

statements of Nick McNabb (the second of which is filed alongside these submissions).

- 3.34 As noted in my oral remarks at the end of the hearing, MHUD does rely on the involvement of iwi in the Taskforce to demonstrate the consultation that occurred. As far as MHUD was concerned, it was fulfilling a role that the Taskforce had asked it to. This was a locally led solution to address the impact of emergency housing on whānau and children. It was asked to design and implement the solution at pace and it responded to that request with due urgency. It consulted with the Taskforce, including iwi, on both design and on the identities of the contracted motels.
- 3.35 As Israel Hawkins discussed on behalf of Te Hau Ki Te Kāinga at the hearing, service providers have taken some steps to build relationships with neighbours of the 13 contracted motels.
- 3.36 It is not clear that consultation would have led to less community opposition. Consensus was not likely to be built. But recognising that, and considering that the solution had been implemented quickly, MHUD itself elected to have the applications publicly notified. It did so even though the applications are, in the context of the operation of emergency housing in general in Rotorua, of relatively narrow scope.
- 3.37 It would have been preferable to consult more directly with Whakarewarewa Village given the proximity of the Apollo Motel to the village. MHUD accepts that. As such, the condition proposes to strengthen the role of the Whakarewarewa Village and Te Puia in influencing the mitigation employed by the consent holder in the operation of CEH, particularly at the closest motels to these culturally significant sites.
- 3.38 Incomplete consultation is not a basis to decline resource consents. It can be more significant for notification decisions, but that was not in issue here where MHUD elected public notification to ensure that all parties, including any iwi or hapu entities were able to give their views.
- 3.39 The proposed cultural effects condition is an appropriate way to ensure that the effects on Whakarewarewa Village are better mitigated.

Condition 16

- 3.40 MHUD agrees that this condition is appropriate. MHUD would be comfortable with the suggestion of Mr Murphy being added if considered appropriate and has included this in the final set of conditions.

Condition 17

- 3.41 MHUD agrees generally with this condition. However, it considers it important that the purpose of the provision is kept fairly in view. Removal of all signage relating to these motels changes the visual nature of Fenton Street in particular with its plethora of signage, which is not what the evidence establishes should happen. The signage is part of what has made it “the gateway”, and “motel mile” and there is no intent to change this (though that is what the Council’s 2018 Spatial Plan directs).
- 3.42 As I understand the evidence, the issue is not that the signage detracts from the physical amenity of the site, but more that we do not want visitors’ experiences affected by pulling into, or calling, CEH motels seeking accommodation and finding their time was wasted because there is no vacancy. Removal of signage with contact details, highlighting motel amenities, or vacancy/no vacancy signs achieves that purpose.
- 3.43 There can be no objection to signage displaying the name of the motel remaining. At the end of the day these motels are still being operated as such. As it was put by the High Court in *Annie Enterprises Limited v Cho*,¹ this is a change of business model for these motels, not a change of use.

Condition 18

- 3.44 MHUD agrees that this condition is appropriate.

Condition 19

- 3.45 MHUD agrees that this condition is appropriate.

¹ *Annie Enterprises Limited v Cho* [2018] NZHC 2962 at [31].

Condition 20

- 3.46 MHUD agrees that this condition is appropriate, but does not agree with the additional requirement relating to the Lake Road frontage for the reasons expressed by Ms Blackwell.

Condition 21

- 3.47 MHUD agrees that this condition is appropriate.

Condition 22

- 3.48 MHUD does not agree that this condition is appropriate, noting the reason expressed by Ms Blackwell. It may be true that because compliance is possible there is no difficulty, but that does not mean it meets either of the two applicable tests under s 108AA.

Condition 23

- 3.49 MHUD does not agree that this condition is appropriate, largely for the reasons expressed by Ms Blackwell. As a general principle, I do not consider that it is good practice to simply replicate permitted activity standards as conditions in resource consents. I disagree with Mr Loutit that it is helpful.
- 3.50 More generally, as the condition simply replicates a permitted activity standard, how can it be said that it either is directly connected to an adverse effect of the activity for which consent is sought, or that it is an administrative matter *essential* for the efficient implementation of the consent? It cannot.
- 3.51 MHUD would be comfortable with this information being included as an advice note.

Condition 24

- 3.52 For the same reason as for condition 23, MHUD does not agree that this condition is appropriate.

Condition 25

- 3.53 For the same reason as for condition 23, MHUD does not agree that this condition is appropriate.

Condition 26

3.54 MHUD agrees that this condition is appropriate.

Condition 27

3.55 MHUD agrees that this condition is appropriate.

Condition 28

3.56 MHUD agrees that this condition is appropriate.

Condition 29

3.57 MHUD agrees that this condition is appropriate, except in respect of written endorsement by MHUD. It is not at all clear why that is considered necessary by the Council. MHUD does not agree to it. It is for the motel operators, together with service providers, to provide an appropriate SMP.

3.58 What adverse effect of the activity does that condition seek to mitigate?
What administrative matter is MHUD's endorsement *essential* for?
Section 108AA is not met.

Condition 30

3.59 MHUD agrees that it is appropriate to impose this condition in the specific circumstances of the Apollo. This has been recorded as an *Augier* condition in the heading to condition 30, but it is not an *Augier* condition. It seeks to mitigate an adverse effect of the activity on the amenity of the Whakarewarewa Village public carpark as the rubbish in the carpark was a common area of concern raised by residents of the Whakarewarewa Village who spoke at the Hearing.

Condition 31

3.60 MHUD consents to this condition as an *Augier* condition and agrees with the points expressed by Ms Blackwell.

Condition 32

3.61 MHUD consents to this condition as an *Augier* condition.

Conditions 33-37

3.62 MHUD does not agree that it is appropriate to impose a bond condition.

- 3.63 This started off as an unconstrained \$100,000 bond and has become a \$10,000 bond limited to ensuring compliance with condition 21 (though some comments suggest condition 22 which relates to accessible carparks).
- 3.64 Condition 21 requires consent holders to tidy the site and immediate adjacent street berm, removing rubbish and graffiti, and remove shopping trolleys *daily*. How that will be accomplished is to be set out in the SMP. In the event of non-compliance the Council will have all enforcement options available and consent holders will have to comply. But the existence of graffiti or shopping trolleys does not amount to non-compliance. For example, if the SMP says that tidying and cleaning will occur at 10am, and a shopping trolley appears at 4pm, that does not amount to non-compliance with the condition, at least until after 10am the next day. Why would an abatement notice not be enough should some graffiti remain stubbornly on a fence?
- 3.65 I simply fail to see why a bond is an appropriate course here. Is there some concern that operators are going to wind themselves up leaving the Council to clean graffiti off fences? There is no evidence of that. Recall too that the Council already has a policy of charging consent holders for monitoring and enforcement.
- 3.66 Just as significantly, why does the Council want a bond of \$10,000 *per year*? Is the Council expecting \$50,000 to be necessary by year five? If anything, the bond sum should be a sinking lid, so that each year, assuming no calls have been required on the bonded sum, \$2,000 is released to the consent holder. In other words, it reduces by \$2,000 a year.
- 3.67 A bond should not be imposed.

Condition 38

- 3.68 MHUD considers that a review condition is appropriate, but considers that the condition proposed as part of the applications is better than the condition as now framed. It agrees with the criticisms made by Ms Blackwell in the caucusing document.
- 3.69 It also considers it particularly relevant that these 13 applications have, in the context of emergency housing generally, a narrow scope, and that

while it is difficult to distinguish the effects of CEH from emergency housing generally, the evidence was clear that the effects of CEH are better overall. It follows that any review condition needs to be more narrowly confined than the versions first proposed by the Council and now reflected in the caucusing document. To that end I have proposed in MHUD's proposed conditions an updated draft review condition.

4 Conclusion

- 4.1 I consider that based on the evidence it is appropriate to grant all 13 consents subject to the proposed conditions.
- 4.2 The conditions will adequately mitigate the adverse effects of the activity, contracted emergency housing with provision of wraparound services for the occupants.
- 4.3 The existing environment has significant *demand* for emergency housing. This application, relating to 13 motels focused on whānau and children, does not drive that demand, but seeks to meet it. That demand will remain if these consents are not granted, resulting in, based on the evidence you have heard about emergency housing in general, greater adverse effects.
- 4.4 The evidence is that some of the demand may have come from outside Rotorua, but nowhere near the numbers being suggested by some submitters. In my oral remarks at the conclusion of the hearing I commented that MHUD did not know where the "bussing fallacy" had come from or why such a rumour was circulating in the community. I have since been alerted to a New Zealand Herald article recording that one of the Code of Conduct complaints that Councillor Reynold MacPherson spoke about in his personal submission was for posting on Facebook that the *Council* had been bussing homeless people from outside Rotorua in when that was not true.² We do not of course know whether that is the origin of the rumour, but that could explain why it appears to have taken such a hold in the community.
- 4.5 Regardless, even if you were to remove from your assessment a proportion of that demand, there is plainly substantially more than 13

² [Rotorua councillor Reynold Macpherson facing three new code of conduct complaints - NZ Herald](#)

motels worth of Rotorua-originating demand for emergency housing as the evidence of Nick McNabb, Natalie Hampson and Shamubeel Eaqub demonstrates.

- 4.6 That is not an approach I invite you to take to your assessment because in my submission it poses unnecessary issues relating to the freedom of movement protected by NZBORA. But the point is that even if you adopt that approach it does not affect whether the consents should be granted.
- 4.7 As to cultural effects, Councillor Te Pania comments at the hearing that the cultural effects are really the same social effects that everyone else is feeling, but these manifest as cultural effects because of the proximity of CEH to culturally significant sites. MHUD has proposed additional requirements through the conditions which seek to mitigate the effects, including:
- (a) Condition 7 (Apollo only): Details of any complaints in relation to CEH occupants' behaviour in the Whakarewarewa Village carpark area and responses undertaken by the consent holder.
 - (b) Condition 15: Meetings with Whakarewarewa and Te Puia to discuss issues / initiatives that can be implemented to improve relationship between CEH and Village / Te Puia
 - (c) Condition 16: Information about Whakarewarewa and Te Puia and expectation provided to residents on arrival and on the walls of Pohutu, Alpin, Apollo.
 - (d) Condition 29: SMP -
 - (i) Triaging of people using Ngā Pou e Rima cultural framework developed by WERA
 - (ii) Primary placement of people in Apollo
 - (iii) Roaming security for Whakarewarewa and Penny Haka gallery
 - (e) Condition 30 – daily tidying of the Whakarewarewa Village public carpark.

4.8 One of the outcomes submitters have sought is that consents are granted for a reduced period. It will have been apparent that the science behind the five year period sought is that this will provide time for the pipeline of housing to start having an effect. Granting the consents, or some of them, for a shorter period will mean that we may be left with a disconnect between the on-stream of housing and the managing down of emergency housing in motels. As many recognised, these consents are not about solving the crisis. Only building enough housing will reduce reliance on emergency housing. The consents are about providing time for construction to occur.

Date: 15 November 2022



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Nick Whittington