

**Before Independent Hearings Commissioners
Rotorua Lakes Council**

**In the matter of 7 applications for resource consent for
contracted emergency housing by Te Tūāpapa
Kura Kāinga Ministry of Housing and Urban
Development**

**Opening legal submissions by Te
Tūāpapa Kura Kāinga Ministry of
Housing and Urban Development**

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1 Introduction

- 1.1 HUD has applied for seven resource consents to operate Contracted Emergency Housing (**CEH**) at seven motels in Rotorua for one year following the expiry of its existing 13 resource consents. CEH provides wrap-around support services delivered by expert service providers to assist those living in contracted motels.
- 1.2 The Council's and HUD's expert economic, social, and planning experts agree that the consents may be granted. The effects are not more than minor and, as with the existing consents, on a fair appraisal the applications are not contrary to the relevant objectives and policies of the planning framework.
- 1.3 Because of the background of the existing consents, there is a set of reasonable consent conditions on which the Council and HUD are agreed. There are, however, some specific conditions recommended by the Council that HUD does not accept are appropriate.
- 1.4 These submissions discuss:
 - (a) the background to the housing need which prompted the 2021 applications for 13 resource consents, and the decision granting those applications for two years in 2022;
 - (b) the relevant decision-making framework;
 - (c) the evidence evaluating the effects of the applications; and
 - (d) the recommended conditions.

2 Background

- 2.1 The evidence provided by HUD at the hearing relating to the existing consents provided substantial information about the confluence of events that had led to a housing crisis in Rotorua. To some extent that evidence has been repeated to provide context for the evidence as to what has

happened over the past two years. I will not duplicate that evidence here,¹ except to say:

- (a) During the decade leading up to the applications, the market failed to supply sufficient new dwellings to accommodate Rotorua's population growth.
- (b) One element in that was regulatory failure brought about by the District Plan failing to enable sufficient housing capacity.
- (c) While the rental housing market was able to mask increasing housing demand, it could not do so forever.
- (d) Just as the gap between demand and available supply was becoming increasingly apparent, the Covid-19 pandemic hit.

2.2 The evidence at the hearing established that there was no easy fix, and that sustained construction of housing units was necessary for a prolonged period of time to catch up. At the time, HUD considered that the pipeline of work in train meant that it would take five years of construction to enable HUD to successfully manage down the need for operation of CEH.

2.3 In its decision granting the 13 existing resource consents, this background was accepted by the decision-making panel. But the panel declined to grant consent for the five year term proposed and instead granted consent for two years. Its reasoning can be summarised as follows:

- (a) HUD's proposal for the consents to have a duration of five years was based on an expectation that the proposed pipeline for new public housing would provide headroom to reduce the need for CEH motels.
- (b) The exit strategy rested on assumptions regarding new buildings and affordable rentals that the panel considered would be insufficient to satisfy that demand, let alone any demand growth that might eventuate over the next few years.
- (c) HUD's exit strategy of drawing down the use of CEH motels over time as a priority was not entirely within the powers of HUD.

¹ See Evidence of Will Barris, 22 October 2024.

- (d) Having regard to the effects on the community, a shorter term would provide breathing space in which to resolve the conflict between the needs of those living in CEH and the wider community. Resolving that contradiction may or may not involve further resource consent requirements.

2.4 In expressing its conclusion the panel highlighted that the decision was not an easy one. It noted that its ability to resolve the fundamental conflict was constrained and that by granting a realistic consent for a shorter duration, it was giving the parties an opportunity to find a better solution. In that regard it expressly noted that the Council was intending (as the Council had highlighted) to promote a plan change on the matter. The panel commented that amending the plan to directly address the matter with submitter input was one practical and appropriate way forward. In that regard, Plan Change 9 – Housing for Everyone, which had at the time just been notified, sought to enable greater housing capacity through zoning for medium and high density residential. But despite its name, it did not seek to tackle the fundamental problem raised by these consent applications of how to provide housing for those with unmet housing need until that housing capacity becomes reality through development. No other Plan amendment has been notified.

2.5 In the intervening two years, the Government, through Kāinga Ora, Council and iwi added materially to Rotorua’s social housing stock. Since December 2022, when the existing consents were granted, the number of active social housing places in Rotorua increased 19% from 914 to 1087 (as at August 2024).² Transitional housing also increased by a net 88 places. This, has reduced the total number of households needing emergency housing from over 700 in March 2022 to under 190 as at the end of August 2024.³

2.6 The number of households requiring emergency housing grants from the Ministry of Social Development (**MSD**) has reduced from 138 across 17 motels at the time that the existing consents were granted to 24 across four motels as at the end of August 2024.⁴

² Evidence of Will Barris, 22 October 2024, at [5.3].

³ Evidence of Will Barris, 22 October 2024, at [5.6].

⁴ Evidence of Will Barris, 22 October 2024, at [5.7].

- 2.7 Despite the substantial direct investment by the state in increasing the social housing stock, two years has not been enough to fully overcome the accumulated housing shortfall.⁵ However, Kāinga Ora has a net pipeline of 310 social houses programmed for delivery by December 2025. It is expected that community housing providers will add around 40 social housing places as well. The Government has introduced a Priority One category, which puts whānau with dependent tamariki who spend longer than 12 weeks in emergency housing and are on the social housing register at the top of the social housing waitlist.
- 2.8 Of course, as the panel noted in its decision, HUD applied for the existing consents as agent for the respective motel operators and as an action allocated to it by the Rotorua Housing Taskforce. It was therefore correct that HUD would not be able to control the assumptions that underlay its exit strategy. While that position remains true today (as it is inherent in HUD's role), it is submitted that the Commissioner will be able to have confidence that the exit strategy is concrete and achievable, and that accordingly the proposed duration of consent of one year is appropriate. That is because of the evidence relating to the performance of CEH during the past two years both in transitioning whānau into other housing and reducing the number of motels in use. The exit strategy is no longer "conjectural" as was concluded in the decision.
- 2.9 Finally, under this head, it is worth highlighting the independent evaluation of CEH undertaken by Te Paetawhiti Ltd. At the hearing relating to the existing consents all parties were concerned about the appropriateness of CEH as a suitable option for children. HUD's position was not that CEH was an entirely suitable living solution, but that it was preferable to the alternative of insecurity and risk.
- 2.10 The independent report noted that:⁶

Contracted emergency housing provided whānau with respite from a range of challenges and trauma they were experiencing in their lives, including homelessness. The secure accommodation provided whānau with the time and space to settle and stabilise. The wrap-around support provided whānau with the opportunity to re-orientate themselves and plan towards a positive future inclusive of finding a place they can call home. As a result of the support whānau were rediscovering their confidence to inspire and achieve some of the aspirations.

⁵ Evidence of Will Barris, 22 October 2024, at [5.15].

⁶ Evidence of Will Barris, 22 October 2024, at [5.20].

3 Decision-making framework

- 3.1 While one way of thinking about these applications might be as a variation of the existing consents, s 127 of the RMA does not permit variations to the duration of consents. Accordingly, the applications fall to be determined as new applications and considered under ss 104 and 104D.
- 3.2 In its decision on the existing consents, the panel also considered Part 2 because it decided that there was incomplete coverage of the matter in the District Plan. As that gap has not been filled in the intervening period, consideration of Part 2 will again be appropriate.
- 3.3 A significantly contested issue in determining the existing consents was how to conceive of the environment for the purpose of assessing the effects of the proposed activity on that environment.
- 3.4 As the Panel was told by all parties at that hearing, the environment must be cast in real world and realistic terms.⁷ It must also be assessed in the present and with a future focus. The applications are not an occasion to argue that the consents should be declined because two years ought to have been enough time to wind up the CEH operation. HUD has undoubtedly had substantial success in implementing the consents, and the impact it has had on reducing the numbers of whānau in CEH speaks for itself. But even if it had not had this success, and assuming the Commissioner agrees that the applications pass through one of the s 104D gateways, the fundamental question is whether, having regard to the section 104 considerations and Part 2, it would be better to allow CEH to continue until 15 December 2025 so that HUD can gradually manage down the operation as new social housing comes on stream.
- 3.5 As with the earlier applications, a key reasoning tool in answering that question is the counterfactual of not granting the consents. That is because this is not a situation of seeking permission to introduce a new activity to an environment, but instead one of seeking permission to continue to implement a method of managing an existing resource management problem so that it has reduced environmental effects, or causes reduced environmental harm, to the point where it no longer has a substantial operating effect on the environment. Much of the expert

⁷ See cases following *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815.

evidence has addressed the environmental effects through a counterfactual lens.

4 Section 104D gateways

- 4.1 The Commissioner will be familiar with the s 104D gateways for non-complying activities. HUD considers that both gateways are satisfied – the effects are no more than minor, and the application is not contrary to the objectives and policies of the District Plan.
- 4.2 When determining whether a proposed consent is contrary to the objectives and policies in a plan, what is required is “a fair appraisal of the objectives and policies read as a whole”.⁸ To be “contrary” for the purposes of s 104D(1)(b) means that it must be “...opposed in nature, different to or opposite ... repugnant and antagonistic”.⁹
- 4.3 In its decision granting the existing consents, the Panel concluded that there were points of inconsistency with some of the objectives and policies of the plan framework relating to the commercial zone, but that they did not rise to the level of being contrary to those objectives and policies on a fair appraisal and when read as a whole. Because the applications passed through that gateway, the Panel did not need to consider the second gateway though it recorded that it would have considered the adverse effects to be more than minor.
- 4.4 Given the reduction in the number of motels, and the substantial reduction in the use of motels for emergency housing overall, it is submitted that the effects of the present seven applications are not more than minor. I turn now to consider those effects.

5 Evidence of the relevant effects

- 5.1 Without undue repetition, the evidence to be heard on each of the main categories of effect is summarised briefly below.

⁸ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25]; see also *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 and *Royal Forest and Bird Protection Society of New Zealand v New Zealand Transport Agency* [2021] NZHC 390.

⁹ *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC) at [11].

Economic

- 5.2 Expert economic evidence on behalf of HUD will be given by Shamubeel Eaquad.
- 5.3 The economic evidence of Mr Eaquad and the Council's economist, Natalie Hampson, is clear. They agree that while there are economic effects from the operation of CEH, these are substantially reduced from two years ago. More importantly, the economic effects of granting the consents will be substantially better than declining the applications. It is put by Ms Hampson quite strikingly: the potential economic costs for Rotorua of the counterfactual of not granting the consents (increased homelessness, domestic harm, and use of EH-SNGs) *would be far worse* in the short term than granting the consents.¹⁰

Social

- 5.4 HUD engaged Jo Healy to undertake a social impact assessment of CEH to assist in evaluating the social effects of operating CEH and Ms Healy will give evidence of her conclusions.
- 5.5 Consistently with the economic experts, Ms Healy considers that the counterfactual of not granting the consents would be a majority of CEH residents having to access EHG through MSD, seek alternative housing, return to unsuitable accommodation (eg, unsafe or overcrowded dwellings), live in vehicles, or be homeless.¹¹
- 5.6 The main adverse social effect is the existence of anti-social behaviour or crime, though it appears that Ms Healy and Rebecca Foy, the Council's social expert witness, differ on the question of attribution of those effects to the operation of CEH. Ms Healy considers that this is largely occurring offsite, and is not a direct result of the activity. This is behaviour that is likely to occur, and to a greater extent, if the guardrails of CEH are removed. Further, given the substantially reduced level of emergency housing overall, it cannot be said that there will be an accumulative effect from the concentration of motels.

¹⁰ Evidence of Natalie Hampson, 8 October 2024, at [92].

¹¹ Evidence of Jo Healy, 22 October 2024, at [5.5](a).

Play

- 5.7 While these are new applications for consent, given the context of the existing consents and the purpose of the present applications being to provide a further year of operation to provide time to manage down contracted emergency housing, there is an air of unreality about the Council's approach to the issue of play space for children and the conditions it seeks to impose on the allocation of whānau and tamariki within certain motels.
- 5.8 The Council provided "right to play" evidence at the hearing relating to the existing consents. Other than listing that evidence in its decision at [17], the evidence is not referred to once in the decision granting the consents. That is likely because, for the reasons explained by HUD in its legal submissions at that hearing, the evidence was entirely unhelpful. The same reasons that were expressed then apply equally now.
- 5.9 First, as was the case in the earlier hearing, HUD does not wish to be taken as, nor is it, minimising the importance of play to children's development. But it is also imperative that children have a bed to sleep in, which is what HUD is trying to achieve by making these applications to operate CEH for one year to enable sufficient social housing to become available so that the scheme may end.
- 5.10 Nobody thinks that children should be living in motels permanently. In an ideal world the District Plan would have enabled sufficient housing and the market would have provided it, so that the Rotorua Housing Taskforce was not faced with the prospect of having to contract motels to provide a roof for whānau with children.
- 5.11 Just as Ms Collins did last time, Mr Peacocke seeks to give evidence outside his area of expertise. He purports to establish a duty to give effect to a right to play through the application of international law. The scope of any right incorporated into New Zealand law in that manner is a matter of law, not landscape architecture. And just as Ms Collins did last time, he asserts, without explanation, that a landscape architect is trained to review and respond to how people connect and socialise and interact with the landscape as a key response to how a site is designed and used.¹²

¹² Evidence of Matthew Peacocke, 9 October 2024, at [5].

5.12 He defines “play” by reference to a Wellington City Council policy rather than commentary on Article 31 of UNCROC.¹³ The relevance of this policy is not explained. Based on its name, it relates to the provision of play spaces in Council-provided recreation reserves.

5.13 There is an element of capture in a landscape architect believing that a “right to play” is given substance by requiring designed play spaces. As HUD explained last time, the UN Committee on the Rights of the Child’s General Comment 17 (2013) suggests the following factors relevant to providing an optimum environment:

- Freedom from stress;
- Freedom from social exclusion, prejudice or discrimination;
- An environment secure from social harm or violence;
- An environment sufficiently free from waste, pollution, traffic and other physical hazards to allow them to circulate freely and safely within their local neighbourhood;
- Availability of rest appropriate to their age and development;
- Availability of leisure time, free from other demands;
- Accessible space and time for play, free from adult control and management;
- Space and opportunities to play outdoors unaccompanied in a diverse and challenging physical environment, with easy access to supportive adults, when necessary;
- Opportunities to experience, interact with and play in natural environments and the animal world;
- Opportunities to invest in their own space and time so as to create and transform their world, using their imagination and languages;
- Opportunities to explore and understand the cultural and artistic heritage of their community, participate in, create and shape it;
- Opportunities to participate with other children in games, sports and other recreational activities, supported, where necessary, by trained facilitators or coaches;
- Recognition by parents, teachers and society as a whole of the value and legitimacy of the rights provided for in article 31.

5.14 There is no focus here at all on the provision on physical space immediately adjacent to houses or dwellings. The significance of space is

¹³ Evidence of Matthew Peacocke, 9 October 2024, Annexure A at [1.2.1].

on its freedom from hazards, freedom from adult management and control, and that *opportunities* to play outside are available.

- 5.15 Mr Peacocke does not explain whether, or how, a landscape architect is trained to evaluate the impact of space on the psychological, physical, and social development of children specifically. Instead, he quotes an “International Play Association” Declaration which suggests that “if children are kept in and not allowed out to play, they are likely manifest symptoms ranging from aggression and repressed emotions and reduced social skills, to inactivity and an increased risk of obesity.”¹⁴
- 5.16 But there is no evidence that in CEH children of any age are “kept in and not allowed out to play”. There is no evidence that Mr Peacocke has sought to engage with the service providers to seek information about how opportunities for play are provided to children. One reason for that is that as a landscape architect Mr Peacocke is absolutely not qualified to evaluate whether sufficient *opportunity* is being provided for children to play. To the contrary, the evidence is that the service providers have the wellbeing of tamariki as a core concern and that children are encouraged to attend after school and extra-curricular activities.
- 5.17 Finally, Mr Peacocke’s methodology appears to be of his own devising. He does not explain whether it is supported by literature or recognised by any industry bodies. Nowhere does his methodology appear to recognise school as an appropriate location for play and social development.
- 5.18 The conditions sought by the Council based on this evidence should be rejected. In addition to the above reasons, there will be downstream effects from the proposed conditions. The message HUD is hearing from submitters is that they want the operation of CEH to be managed down as quickly and efficiently as possible. HUD’s exit strategy involves the staged exit of motels during the course of the one year duration of the proposed consents. That exit strategy is imperilled by the imposition of conditions which seek to control the allocation of whānau and tamariki within certain motels. Such conditions will necessarily affect whether HUD is able to exit motels during the course of the year (because it may be forced to maintain contracts to ensure availability of certain rooms suitable for children of specific ages), and, even if it can, the order in

¹⁴ Evidence of Matthew Peacocke, 9 October 2024, Annexure A at [1.2.4].

which motels are exited. It will also mean HUD is unable to fully utilise rooms even through there is a need, so that tamariki are placed in less safe housing situations because of a concern about suitable play space. The reality is that, for example, if HUD is required by the conditions of consent to construct a play area at the Apollo Hotel, the costs of doing so will incentivise using the Apollo to the very end of the year to maximise the benefit from that expenditure. But the message from submitters due to the proximity of Whakarewarewa Village is that the Apollo should be one of the first motels exited.

Part 2

- 5.19 Angela Jones, HUD's expert planner gives evidence of her assessment of the applications against Part 2 of the RMA.¹⁵ This remains appropriate, indeed necessary, because the Council has not filled the gap in its planning framework identified in the earlier hearing. Her evidence is consistent with the Council's s 42A report that the applications align with sustainable management purpose of the RMA.

6 Proposed conditions

- 6.1 In its applications, HUD proposed conditions that were based largely on the conditions of consent imposed on the existing consents.
- 6.2 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.
- 6.3 It will be apparent from the above, and the evidence of Angela Jones,¹⁶ that HUD does not consider that it is appropriate for the Council to seek to control, through conditions, the allocation of residents of CEH based on the characteristics of particular whānau. The same point was made at the earlier hearing that in the quest for prescription what is lost is the flexibility for the three expert service providers to deal appropriately with situations as they arise.
- 6.4 Mr Peacocke's evidence provides an unreliable basis on which to impose such conditions. But even if the Commissioner decides that it is

¹⁵ Evidence of Angela Jones, 22 October 2024, [15.1]-[15.15].

¹⁶ Evidence of Angela Jones, 22 October 2024, [13.4]-[13.6].

appropriate to put any weight on the evidence of Mr Peacocke, that does not mean that conditions of consent are the most appropriate way for that issue to be dealt with. Allocation of whānau is still a matter best left to the expert service providers. As HUD said at the earlier hearing, the proposed “unit allocation” and “right to play” conditions are overly prescriptive in a way that detracts from the objective that CEH seeks to achieve.

- 6.5 Further, when the counterfactual is recalled, it is not clear how the condition meets the test in s 108AA(1)(b). As HUD 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. Nor are the proposed conditions administrative conditions essential for the efficient implementation of the consent.

7 Conclusion

- 7.1 HUD respectfully submits that it is appropriate to grant the seven consents sought on the conditions proposed in the applications (and with the minor changes otherwise proposed through the s 42A report).

Date: 4 November 2024



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