



MAI CHEN
BARRISTER

Legal Submissions

TO: David Hill (Independent Hearing Commissioner)
FROM: **Restore Rotorua Incorporated**
DATE: 4 November 2024
SUBJECT: Seven publicly notified resource consent applications by Te Tūāpapa Kura Kāinga – the Ministry of Housing and Urban Development to the Rotorua Lakes Council

- 1 These submissions are filed further to the legal submissions filed by Bridget Bailey on behalf of Restore Rotorua Incorporated (**Restore Rotorua**) of today's date.
- 2 Despite these being new applications, it is important to frame these submissions in the light of the decision in 2022 on the applications by Te Tūāpapa Kura Kāinga Ministry of Housing and Urban Development (the **Applicant**) as agent on behalf of the motel operators for the use of 13 motels in Rotorua as contracted emergency housing (**CEH**) for a five year duration. These five year duration consents were declined by the Independent Hearings Panel in the decision dated 15 December 2022 (the **2022 Decision**) as:¹

In the end we find the term sought is not justified. The exit strategy, inasmuch as there is one, rests on assumptions regarding new buildings and affordable rentals that, at this stage, would be insufficient to satisfy present demand let alone any demand growth that might eventuate over the next few years. It is simply too conjectural in the face of the evident pain that the community presently experiences.

- 3 As a result, the Panel imposed a duration of only two years for all 13 resource consents, which was only 40% of the original duration sought. The detailed reasons given by the Independent Hearings Panel for this two year duration included that:
 - (a) The exit strategy “rests on assumptions” and was “too conjectural”;²
 - (b) There was no coherent strategy developed to assist the community³
 - (c) A shorter term provides breathing space to resolve the contradiction of using motels for EH at the expense of a significant segment of the immediate community;⁴
- 4 These two-year consents granted will expire on 15 December 2024.

Summary of submissions

- 5 The applications do not provide adequate information to determine them such that the Commissioner may decline the applications for a one-year extension under s 104(6) of the

¹ Decision on 13 bundled non-complying activity applications for contracted emergency housing, Independent Hearings Panel and Commissioners, 15 December 2022 (**the 2022 Decision**) at [209].

² At [209].

³ At [211].

⁴ At [212].

Resource Management Act 1991 (the **Act**). The “expressed intentions” in the exit strategies, replicated for all seven motels, are too generic to allow the consent authority to assess with any certainty that each one of the seven motels will be returned to commercial operation in a year. The exit strategy continues to be based on assumptions that do not evidence certainty of exit by 15 December 2025.

- 6 The supposed ‘exit strategy’ is effectively a list of the work that needs to be done to create an effective exit strategy. It is not an exit strategy itself. There also does not appear to have been any consideration of whether a shorter period of extension would be sufficient for some or all of the motels.
- 7 The exit strategy is still dependent on assumptions concerning the speed of “the supply of permanent market and social housing increases”.⁵ Restore Rotorua acknowledges that progress has been made in that 39% of currently consented CEH maximum occupancy has been returned to commercial operation over two years, but that still leaves 61% yet to be exited.⁶
- 8 Thus, what generic information is provided by the Applicant supports a two or more-year extension of the extant consents – not one year. Such generic information as the applicant has provided shows that the Applicant is still working to the original five-year extension sought in the July 2022 applications.⁷ In reality these applications are a two or three year extension application in disguise. The one-year extension application appears to be made to enhance the chances of success and to better allow an argument that the adverse effects are not more than minor.
- 9 This longer timeframe then affects all the factors that the consent authority is required to take into account under the Act, including adverse effects.
- 10 The Applicant stresses the counterfactual here - but what it is proposing will result in undermining the original decision of the consenting authority and will return us to the situation where residents are faced with a four or five year term (instead of the two year duration imposed by the 2022 Decision) before CEH ends in the majority or all of the 13 motels in Rotorua. That does not include the prior two year unconsented period.
- 11 This is not appropriate when the 2022 Decision called out the “evident pain that the community presently experiences”⁸ and the fact that the adverse effects are “significant”.⁹
- 12 The effect of s 124 of the Act means that residents will have to put up with seven CEH motels for up to another two years – even if the applications are declined the Applicant can continue to operate under the existing consents until all appeals are determined. However, these potential appeals cannot be a relevant consideration for the Commissioner to take into account. If the consent authority approves the one year extension applications, then there is likely to be another application for another year’s extension after 15 December 2025, and then another application after 15 December 2026.
- 13 The exit strategies lack the necessary detail, analysis and clarity – they are generic (consisting of the same three bullet points for each of the seven motels), not thought

⁵ Section 42A – Overview Report, Craig Batchelar, 8 October 2024 (**Section 42A Report**) at [57].

⁶ Section 42A Report at [15].

⁷ This builds on the Legal Submissions on behalf of Restore Rotorua Incorporated filed by Bridget Bailey at [37]-[39].

⁸ The 2022 Decision at [209].

⁹ The 2022 Decision at [240(a)].

through (there is no analysis or prioritisation between motels or a timeframe for the sequential exits only a promise to undertake this work in future) and again it is based on conjecture and assumptions.¹⁰ There is no specific detail or concrete practical steps to be undertaken for each motel and no contingency planning for risks or challenges that may arise for each motel.

- 14 A real exit strategy should include:
- (a) A bespoke analysis of each motel;
 - (b) Prioritisation between the motels as to which need to be exited first, including on the basis of adverse effects;
 - (c) List of risks for each motel that could prevent a timely and compliant exit; and
 - (d) Contingency mechanisms to address those risks (including increases in demand, delays in construction of alternative housing) to prevent compromising the exit.
- 15 This means that the neighbours of the seven motels and other affected residents do not have adequate information to make an informed response despite notification. They have no certainty as to which one of the seven motels will exit first or by 15 December 2025.

Inadequate information

- 16 Section 104(6) of the Act states:
- A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.
- 17 In *Davidson Family Trust v Marlborough District Council*, Cull J in the High Court considered s 104(6) of the Act and confirmed that:¹¹

[99] Section 104(6) states simply that “a consent authority may decline an application for resource consent on the grounds that it has inadequate information to determine the application.”

[100] Although it was open to the Environment Court on appeal to request further information or give an opportunity to the appellant to provide further information, it had the jurisdiction to dismiss the application where it considered it lacked evidence. Section 104(6) provides this jurisdiction. The Environment Court relied on the discretion under s 104(6) of the RMA to decline the consent, in the event that any of its other assessments are too inaccurate.

[101] If there is insufficient information upon which a consent authority can properly determine a resource consent application, the consent authority may decline the application. There is no additional onus on the applicant, particularly in these circumstances, where the opposing party called an avian expert at the appellate level. It was for the Trust to determine whether to adduce further evidence.

[102] However, the Environment Court was entitled to dismiss the application on the basis that it had inadequate information to determine it. This aspect of this ground of appeal is not upheld.

- 18 As detailed further below, the exit strategy proposed for how the Applicant will cease the use of the seven motels as CEH within 12 months does not provide adequate information

¹⁰ These are the terms used in the 2022 Decision at [209].

¹¹ *Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [99] – [102], footnotes omitted.

such that the Commissioner may decline the applications for the extensions for the seven motels under s 104(6) of the Act.

- 19 The exit strategy is summarised by the Section 42A Overview Report.¹² It is identical for each of the seven motels and consists of three generic bullet points setting out a programme of prioritisation and exit over time with no detail, customisation for the different motels and consent and no consideration of possible risks or challenges to be faced and overcome in those exits. It is effectively a generic template for work still to be done, it is not customised, has no detail and therefore is not real.
- 20 The Applicant was on notice of the inadequacy of their planning and preparation for an exit strategy from the 2022 Decision. They elected not to provide any more detailed information or analysis in these 2024 applications.

2022 Decision

- 21 The 2022 Decision stated:¹³

In the end we find that the term sought is not justified. The exit strategy, inasmuch as there is one, rests on **assumptions** regarding new buildings and affordable rentals that, at this stage, would be insufficient to satisfy present demand let alone any demand growth that might eventuate over the next few years. It is simply **too conjectural** in the face of the evident pain that the community presently experiences.

While we acknowledge MHUD's **expressed intention** to draw down the use of UCEH motels as a priority, that is not entirely within the present powers of MHUD but MSD (which did not appear before us). Presumably Mr Eaqub's counterfactual applies to that demographic equally, unless they are housed, and we assume, in the same new builds / rentals that we are told will assist the exit from CEH.

We think it important that a **coherent strategy is developed to assist the community. That is not presently before us.** We therefore find that a shorter term than 5 years is appropriate in the circumstance. Such is consistent with the overall s. 5 purpose of the RMA to "... enable[s] people and communities to provide for their social, economic, and cultural well-being and for their health and safety."

- 22 The 2022 Decision went on to specifically note the "absence of an explicit, time-related, exit strategy."¹⁴
- 23 The 2022 Decision criticised the exit strategy – stating that "inasmuch as there is one" and describing it variously: "rests on assumptions", "simply too conjectural", and stating that a "coherent strategy", "is not presently before us." At that time this was a key part of the reason for a two year duration being imposed (and a five year duration declined).
- 24 A clear exit strategy was not presented to the Panel in 2022 and it is still not before the Commissioner now in 2024.

Conditions for existing consent

- 25 We understand that the conditions in the existing consents to provide an exit programme for each of the CEH sites were not complied with. Condition 5 of Attachment 1 to the 2022 Decision stated:

¹² Section 42A Report at [57].

¹³ The 2022 Decision at [209] – [211], emphasis added.

¹⁴ The 2022 Decision at [224].

No later than 6 months prior to the consent expiry under Condition 4(a), the consent holder shall submit to the Manager, Planning & Development Solutions, Rotorua Lakes Council, or their delegate, for certification, an exit programme to end the use of the site and buildings for CEH within the timeframe granted under this consent. The exit programme shall detail matters such as - the plans to have the residents relocated from the site at the expiry of the consent, when the CEH will not be accepting further residents, and details of any required works to reinstate the buildings as a motel.

- 26 Although six of the motels have been or will be exited by 15 December 2024 this exit programme condition applied to all 13 motels.
- 27 The 2022 Decision weighed and balanced all the factors in coming to the decision to impose a two year term. This was characterised by the Panel as “realistic short-term consent(s).”¹⁵

Five Year consent by increments

- 28 This application under s 124 of the Act for an extension of the consents for seven motels for another year is likely to result in the Applicant achieving the originally sought five year duration consents by increments – the original two-year term granted and then applying for further one year extensions (in 2025 for 2026 and in 2026 for 2027) if these applications are granted. This is especially concerning given that the Applicant and the motels chose not to appeal the original decision to grant a two year consent.
- 29 The Section 42A Overview Report states that the total maximum occupancy of the 13 original motels was 868 people while the maximum occupancy proposed for the seven motels subject to the one-year extension application is 529 people. This is only a **39%** reduction in currently consented occupancy achieved over a 24-month period.¹⁶ It is therefore unlikely that the further necessary **61%** reduction can or will be achieved in a single year. Given it has taken 24 months to exit **six motels** by the end of their consents, it is unlikely the Applicant will be able to exit the final **seven** if given an additional 12 months. The final removal of motels as CEH will always be harder than the early decreases in occupancy, which tend to be lower hanging fruit.
- 30 The Commissioner cannot be certain, based on the information in the applications by the Applicant, that a further 12 month extension will be sufficient for all seven motels to return to commercial operation. In reality these applications are a two or three year extension application in disguise. The one-year extension application is to enhance the chances of success and better allow an argument that the adverse effects are not more than minor.

‘Exit Strategy’ does not provide adequate information

- 31 The Section 42A Overview Report says:¹⁷

For the remaining seven motels, the current applications for a further one year consent duration represent the exit programme to end the use of the sites and buildings for CEH.

Each application includes an “Exit Strategy”. This “Exit Strategy” does not meet the terms of the cessation condition within the current consents. However, the Applicant lodged its applications six months prior to the expiry of existing consents. In accordance with s124 of the RMA, the Applicant is entitled to continue to operate under each consent until the replacement application for that consent is determined and any appeals in relation to the decision are resolved. The Applicant must continue to adhere to the scope of the consent and all conditions of consent. However, it would not be

¹⁵ The 2022 Decision at [238].

¹⁶ Section 42A Report at [15].

¹⁷ Section 42A Report at [34]-[35].

appropriate to enforce a condition that requires the operation to cease if the consents applied for now are granted, allowing the CEH operation to continue. This would not constitute a sustainable use of resources and would arguably be contrary to the policy basis underpinning s124 of the RMA.

32 The Section 42A Overview Report further states:¹⁸

An “Exit Strategy” is included in each of the applications. The exit strategy will progressively return the facilities to tourist use as the supply of permanent market and social housing increases. The main measures of the exit strategy are to:

- Prioritise all CEH motels in Rotorua to determine the most appropriate motels to exit and the order in which these exits occur;
- Exit one motel at a time to ensure the market is not flooded with multiple motels returning to the tourism market at the same time;
- Work alongside MSD to actively manage exits by stopping new referrals into CEH motels by 30 June 2025; and
- Issue a 90-day notice period to motels being exited to allow sufficient time for restoration work, if necessary, to take place before the motels return to tourism use.

33 This is effectively a list of the work that needs to be done to create an effective exit strategy. It is not an exit strategy itself. There is no detail, no consideration of possible challenges and how they will be addressed and is not applied to the specific facts of the seven different motels and consents. The commitment is only to consider prioritisation at some unspecified point in the future.

34 The exit strategy, such as it is, is just three generic bullet points replicated for each of the seven motels where consents are applied for.

35 The expressed intentions in the replicated exit strategies are too generic to allow the consent authority to assess with any certainty that each one of the seven motels will exit in a year.

36 The lack of motel-specific information in the exit strategy means that neighbours and other residents affected do not have enough information to make an informed response despite notification.

37 A real exit strategy should include:

- (e) A bespoke analysis of each motel;
- (f) Prioritisation between the motels as to which need to be exited first, including on the basis of adverse effects;
- (g) List of risks for each motel that could prevent a timely and compliant exit; and
- (h) Contingency mechanisms to address those risks (including increases in demand, delays in construction of alternative housing) to prevent compromising the exit.

38 The major problem is that the speed of the exit strategy is dependent on a key assumption as to the timeline of an increase in supply of permanent housing (both from the market and in the form of social housing).¹⁹

39 There is no guarantee the estimated time frames for the provision of alternative permanent housing will be met and the Applicant cannot ensure it as it is outside of its control and that

¹⁸ Section 42A Report at [57].

¹⁹ Section 42A Report at [22].

of the motels – it relies on other entities including the Ministry of Social Development and other private developers.

- 40 There is no backup plan or contingency in place if the forecasts and estimates of provision of new permanent housing are not met. The consenting authority therefore cannot be certain the assumptions made will allow the exit from all seven motels to take place within one year.
- 41 There does not appear to have been any consideration to date of the differing impacts of the seven motels on the community and which should be the highest priority to be returned to commercial operation. There also does not appear to have been any consideration of whether a shorter period of extension would be sufficient for some of the motels (three months or six months instead of 12). If all seven motels will be returned within a year it clearly cannot be the case that all seven will be returned at the end of the extension or it would flood the market, which goes against even the three generic bullet points of the exit strategy. However, the Applicant is seeking a full one year extensions for all seven motels so the consideration of staging and prioritisation clearly has not yet begun.
- 42 The exit strategy relies on a huge number of complex moving parts such as the provision of social housing, priority categories on the housing register, alternative solutions such as private rentals or whānau accommodation, reducing referrals and demand for emergency housing²⁰ but there appears to be no detailed planning or preparation completed for possible contingencies. Three generic bullet points gives no certainty of exit.
- 43 This “planning” such as it is raises more questions than answers. What if demand increases significantly, what if political priorities change, what if social housing construction and development falls behind schedule. All of these significant possibilities have not been addressed or even considered by the Applicant.
- 44 The detailed work and analysis simply has not been done to allow a one year timeframe for the termination of CEH in Rotorua to be real, believable and able to be relied on and now it is too late. There is no specificity in the exit strategy, if it was real there would be a detailed plan for each motel.
- 45 The Commissioner cannot have confidence that any conditions imposed on these new extended consents as to exit strategies and return of the motels to commercial operation will be met and the current consents expire in just over a month.
- 46 The Applicant has had almost the full two years to prepare for the end of the consents so to propose that the counterfactual of granting these new consents would be detrimental just incentivises applicants to not comply with the conditions of consents granted to them and to leave preparation to the last minute.

Effects more than minor

- 47 The Applicant has submitted that the effects of the consents are not more than minor. This fails to take into account the findings in the 2022 Decision and the actual period of time that will be needed to exit based on the generic information submitted by the application as opposed to the one year extension that has been applied for.
- 48 The 2022 Decision held that the effects were significant. Only six motels have exited, resulting in a reduction of 39% to the maximum occupancy for CEH in central Rotorua.

²⁰ Evidence of Will Barris, 22 October 2024 at [6.1] to [6.14].

However, that leaves the adverse effects of 61% of the maximum occupancy for CEH. As a result, this application cannot be viewed in a vacuum but must be seen in the context of the impacts of CEH on the Rotorua community over the past four years (two of which were unconsented).

- 49 These impacts should mean that much more detail and information is required for the Commissioner to be satisfied that the applications should be granted under s 104 of the Act.

DATED this 4th day of November 2024



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