

**BEFORE THE INDEPENDENT HEARINGS PANEL - DAVID HILL (CHAIR), GREG HILL  
AND SHEENA TEPANIA**

**UNDER** the Resource Management Act 1991

**IN THE MATTER** of Various applications by Te Tūāpapa Kura Kāinga - the  
Ministry of Housing and Urban Development (MHUD) to  
the Rotorua Lakes Council

**BETWEEN** **MINISTRY OF HOUSING AND URBAN DEVELOPMENT**  
Applicant

**AND** **ROTORUA DISTRICT COUNCIL** Consent Authority

**AND** **SUBMITTERS**

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**OPENING LEGAL SUBMISSIONS  
ON BEHALF OF ROTORUA LAKES COUNCIL AS CONSENT AUTHORITY  
DATE: 14 OCTOBER 2022**

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## Introduction

1. In response to the expectations of the Independent Hearing Panel (**Hearing Panel**), these Submissions focus on key legal matters that are either:
  - (a) Not agreed between Rotorua Lakes Council (**RLC**) in its statutory role as Consent Authority, Te Tūāpapa Kura Kāinga Ministry of Housing and Urban Development (**MHUD**) as the Applicant, and / or a Submitter; or
  - (b) Require clarification.

## Non-complying activity status

2. While all planning expert witnesses agree that non-complying activity status applies to the use of land for contracted emergency housing (**CEH**) under the Operative Rotorua District Plan (**ODP**), there is a difference of expert opinion as to whether the 'gateway test' for non-complying activities in s104D of the Resource Management Act 1991 (**RMA**) can be satisfied:

### 104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) **the adverse effects of the activity on the environment** (other than any effect to which [section 104\(3\)\(a\)\(ii\)](#) applies) **will be minor; or**

(b) the application is for an **activity that will not be contrary to the objectives and policies** of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, [section 104\(2\)](#) applies to the determination of an application for a non-complying activity.

[Our emphasis added.]

3. Expert evidence called by Restore Rotorua Incorporated (**RRI**) concludes that the applications fail both limbs of the gateway test. Addressing specifically the second limb of the gateway test in these legal submissions, RRI's concludes that CEH at Malones Spa Motel, Ascot on Fenton, RotoVegas Motel, Midway Motel, Geneva Motor Lodge and Emerald Spa Motor Inn<sup>1</sup> (collectively referred to by RRI as the 'Fenton Street sites') is contrary to the relevant objectives and policies of the ODP.<sup>2</sup>
4. Taking into account guidance provided by the Courts, including that a consent authority considering a non-complying activity must:
  - (a) Read the objectives and policies as a whole;<sup>3</sup>
  - (b) Exercise a broad judgement; <sup>4</sup> and
  - (c) Take a holistic view of those objectives and policies,<sup>5</sup>

RLC's expert planning witnesses remain of the view, at the opening of this hearing, that the CEH activities are not contrary to the ODP's objectives and policies.<sup>6</sup> The second limb of the non-complying activity gateway is, accordingly, open under s104D of the RMA allowing the Hearing Panel to proceed to consider whether to grant land use consent for CEH under s104 of the Act.

5. RLC will, of course, maintain an open mind on this issue during the hearing and update the Panel on its position when it presents its final recommendations at the end of the hearing.

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<sup>1</sup> Statement of Evidence of Vincent John Murphy, 12 October 2022 at [77].

<sup>2</sup> Statement of Evidence of Vincent John Murphy, 12 October 2022 at [139].

<sup>3</sup> *Dye v Auckland Regional Council* CA86/01 at [25].

<sup>4</sup> *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council* W251/2002 at [735].

<sup>5</sup> *Clearwater Mussels Ltd v Marlborough District Council* [2016] NZEnvC 21 at [242].

<sup>6</sup> Section 42A Report, 22 September 2022, in particular the Overview Report, Appendix 2 and the individual sections of the Site-Specific Reports titled "Section 104(10)(b) – Objectives and Policies of the District Plan".

### **Joint consent holders**

6. RLC recommends that any land use consents granted in response to the 13 applications are issued in the name of both MHUD and the relevant motel operator as joint consent holders. This recommendation is made for two main reasons:
  - (a) The need for knowledgeable and reliable people to hold resource consents authorising a land use that has the potential to result in challenging effects on the environment if not adequately managed; and
  - (b) The need for appropriately resourced consent holders to successfully implement some of the recommended conditions of consent (if the Hearing Panel decides to impose those conditions).

#### *The need for knowledgeable and reliable consent holders*

7. Turning first to the need for knowledgeable and reliable people to hold any land use consent that the Hearing Panel decides to grant for CEH, the following points are submitted in support of RLC's recommendation that consents be granted to both MHUD and the relevant motel operator for each site as joint consent holders.
8. The 13 motel operators did not apply for and obtain the land use consent required under the ODP prior to commencing use of their tourist accommodation for CEH. Compliance with all relevant district plan rules prior to commencing a land use that requires resource consent under that plan is the usual and preferred approach under the RMA. To be clear, RLC does not advocate that the prior conduct of the motel operators should influence the Hearing Panel's decision, in a punitive manner, to grant or decline consent. To do so would be contrary to settled caselaw.<sup>7</sup> Rather, it is submitted that the motel operators prior conduct shows a

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<sup>7</sup> *Kemp v Rodney District Council* A087/2009.

lack of experience and knowledge regarding their legal obligations under the RMA that indicates it is not appropriate that they be sole holders of land use consents authorising CEH activities.

9. CEH activities on the 13 sites have continued for between 14 months and nearly three years, with no land use consents in place allowing RLC, as Consent Authority, to regulate the effects of those activities under the ODP through enforcement of consent conditions.
10. CEH as a land use activity resulting in effects on the environment is not a simple or straightforward land use in the way that, for instance, the establishment of an office in a commercial zone is. This is reflected, ultimately, in the non-complying activity status of CEH under the ODP.

*The need for appropriately resourced consent holders to implement consent conditions*

11. Some of the conditions recommended by RLC, and this remains RLC's position at the opening of this hearing, will require a consent holder with appropriate access to administrative and technical resources. These conditions have been categorised as 'strategic conditions' in the s42A Report.<sup>8</sup>
12. Unless evidence is presented during the hearing to confirm otherwise, it appears reasonable to conclude that individual motel operators will not have access to appropriate resources to comply with these conditions which RLC submits are essential to any grant of land use consent for CEH.

*An alternative approach to joint consent holders*

13. If RLC's recommended joint consent holder proposal is not acceptable to the Hearing Panel, RLC submits that it will be essential, if the Panel is minded to grant land use consent, to consider imposing the following conditions on any motel operator acting as sole consent holder:

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<sup>8</sup> Section 42A Report, Overview Report, 22 September 2022, Appendix 4.

- (a) Issuing the land use consent personal to the consent holder (recommended Condition 3)<sup>9</sup>; and
  - (b) Requiring a bond (recommended Conditions 32 to 36)<sup>10</sup> pursuant to s108(2)(b) and s108A(2)(c) of the RMA.
14. Imposing a condition that the consent is granted personal to the motel operator as sole consent holder ensures that the statutory presumption that a land use consent attaches to and runs with the land for its term<sup>11</sup> will not apply and, accordingly, will not then allow a third party to take ownership or occupation of the site in the future and commence operating the consented CEH activities. This is a safeguard that is both provided for under s134(3) of the RMA and that RLC considers reasonable and appropriate to adequately manage the environmental effects of CEH in circumstances where any land use consent granted by the Hearing Panel is held by a motel operator as a sole consent holder.
15. The imposition of a bond will ensure that RLC can step in and achieve performance of all consent conditions without penalising ratepayers by diverting public money to achieve that compliance. The bond quantum proposed is based on RLC's current estimate of the approximate cost of the works that would need to be undertaken if the consent holder failed to comply with recommended consent conditions.
16. If the Hearing Panel was minded to impose one, but not both of these currently recommended conditions, RLC considers that priority consideration should be given to the imposition of the bond condition.

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<sup>9</sup> Ibid.

<sup>10</sup> Supra at Footnote 4.

<sup>11</sup> Section 134(1) of the RMA.

### **Rotorua Housing Taskforce**

17. To provide clarification in response to a matter raised in the evidence called by MHUD,<sup>12</sup> RLC is a territorial authority which performs many statutory functions simultaneously under several statutes. In particular, RLC performs three key statutory functions in the CEH space:
- (a) RLC is a consent authority under the RMA, enforcing compliance with the ODP<sup>13</sup> and deciding resource consent applications<sup>14</sup> to use or subdivide land in Rotorua which are regulated by the ODP. This is the function it is performing in this hearing through the appointment of, and delegations to, the Hearing Panel;
  - (b) RLC performs the functions of a building consent authority pursuant to s12(2) of the Building Act 2004. These functions include deciding when buildings must comply with the Building Code because of a change of use as well as when buildings are dangerous or insanitary. RLC has recently exercised both functions in the context of uncontracted emergency housing.
  - (c) RLC is a local authority under the Local Government Act 2002 (**LGA**). One of RLC's statutory roles under s11(a) of the LGA is to give effect to the purpose of local government in the Rotorua District. The purpose of local government, pursuant to s10(1)(b) of the LGA, is to "promote the social, economic, environmental, and cultural well-being of communities in the present and for the future." This statutory role and purpose govern RLC's participation in the Rotorua Housing Taskforce.
18. RLC performs each of these statutory functions in a separate and independent way, as required by the relevant statutes.

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<sup>12</sup> Statement of Evidence of Nicholas McNabb, 5 October 2022 at [7.6].

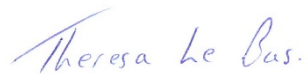
<sup>13</sup> Section 84 of the RMA.

<sup>14</sup> Section 104 of the RMA.

**Conclusion**

19. If further commentary on a legal matter addressed in these Submissions or a new legal matter emerges during the hearing, and it is considered necessary to address these, RLC seeks the leave of the Hearing Panel to provide that update during RLC's presentation of its final recommendations on the last day of the hearing.

Dated 14 October 2022



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