

**BEFORE AN INDEPENDENT HEARINGS PANEL
OF THE ROTORUA LAKES DISTRICT COUNCIL**

IN THE MATTER of the Resource
Management Act 1991
(Act)

AND

IN THE MATTER of an application for
resource consent to use
the site and existing
buildings at 7 Tyron
Street, Rotorua for
contracted emergency
housing for a period of
5 years

LEGAL SUBMISSIONS ON BEHALF OF NOAHS HOTELS (NZ) LIMITED

DATED: 14 OCTOBER 2022

 **Simpson Grierson**
Barristers & Solicitors

W S Loutit / C J Ryan
Telephone: +64-9-977-5092
Facsimile: +64-9-307 0331
Email: bill.loutit@simpsongrierson.com
DX CX10092
Private Bag 92518
Auckland

MAY IT PLEASE THE COMMISSIONERS:

1. INTRODUCTION

1.1 These submissions are made on behalf of Noahs Hotels (NZ) Ltd (**Noahs**) regarding the resource consent application made to the Rotorua Lakes District Council (**Council**) by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development (**MHUD**) on behalf of the operator of the Apollo Hotel (**Applicant**) seeking resource consent to use the site and existing buildings at 7 Tyron Street, Rotorua (**Apollo site** or **Apollo Hotel**) for contracted emergency housing for a period of 5 years (**Application**).¹

1.2 Noahs made a submission on the Application (submitter number 293).

1.3 These legal submissions address:

- (a) the conditions of consent included in the Application;
- (b) the Council officer's section 42A report regarding the Application (**s42A report**);²
- (c) the Council officers section 42A report regarding all 13 contracted emergency housing applications (**Overview Report**);³ and
- (d) the evidence on behalf of the Applicant regarding the proposed conditions of consent.

2. NOAHS' HOTEL OPERATIONS

2.1 Noahs is the operator of 10 Tryon Street, Rotorua (the **Property**). The Property is operated as a Rydges Hotel and is directly opposite the Apollo site.

2.2 The Property was formerly known as The Holiday Inn Rotorua, but on 1 July 2022, was rebranded as a Rydges Hotel, and is operated by Noahs pursuant to an operations and management contract.

1 Reference RC17892.

2 Dated 22 September 2022 and authored by Bethany Bennie.

3 Dated 22 September 2022 and authored by Craig Batchelar.

2.3 The Property is a 203 bedroom, 4+ star rated hotel, with a gift shop, comprehensive banquet facilities for events, and a restaurant. It is one of Rotorua’s largest hotels. A substantial investment has been made in the Property to refurbish and upgrade its facilities.

2.4 Prior to the imposition of border restrictions in March 2020, more than 50% of the guests at the Property were international visitors. Accordingly, it is a priority for Noahs to ensure that it offers its guests a premium experience.

3. PROPOSED CONDITIONS OF CONSENT

Consent duration

3.1 The Application seeks consent for a period of 5 years. In Noahs’ submission, that consent duration does not appropriately address the potential uncertainty of adverse effects from the use of the Apollo site for contracted emergency housing, given that any adverse effects may significantly affect Noahs. Noahs considers that a 2-year consent duration would be more appropriate.

3.2 The s42A report does not consider the duration of consent appropriate for the Apollo site. Instead, the Overview Report author’s position is that a 5 year duration for all 13 consent applications is “not unreasonable” given the ongoing demand for emergency housing.⁴

3.3 However, it is difficult to reconcile that position, with MHUD’s decision to contract with the Applicant for an initial period of one year.⁵ Clearly MHUD wishes to be able to reconsider “the ongoing demand for emergency housing” on an annual basis. In Noahs’ submission, the same should be true of the resource consents sought.

Scaling down contracted emergency housing over time

3.4 The evidence on behalf of the Applicant records that MHUD’s intention is that “[contracted emergency housing] activities will be wound down within the five year term of each consent as more suitable long-term accommodation options come on stream in and beyond the Rotorua district”.⁶ However, the Applicant

4 Overview Report at [128] and [205]-[209].

5 Overview Report at [30].

6 Overview Report at [31].

does not support the condition of consent that secures that outcome.⁷ If consent is to be granted for a 5 year term, Noahs supports a condition which is equivalent to condition 2 of the proposed strategic conditions included in the Overview Report, and which gives effect to MHUD's intention to reduce the scale of its contracted emergency housing activities over time.

3.5 Noahs notes that the Apollo site is one of two located outside of the "Fenton Street Corridor".⁸ On a number of occasions the Overview Report refers to adverse effects arising from the concentration of contracted emergency housing along Fenton Street.⁹

3.6 Noahs strongly opposes any implication that contracted emergency housing sites located away from Fenton Street (for instance the Apollo site) should be lower priorities when MHUD seeks to reduce the scale of its contracted emergency housing activities. Noahs is concerned by the relative lack of weight given to the adverse effects arising from the location of contracted emergency housing at sites, including the Apollo site, that are proximate to the highly culturally significant Whakarewarewa site. As such, Noahs does not support the inclusion of "limiting the geographic concentration of [contracted emergency housing] sites relative to each other" as a matter to be considered when MHUD makes decisions to reduce the scale of its contracted emergency housing activities.¹⁰ Noahs submits that the matters to be considered should include:

- (a) the adverse effects of any changes to the distribution of contracted emergency housing relative to that approved as a part of these applications; and
- (b) feedback received by MHUD from the local community, including the tourism and accommodation sectors.

3.7 It is not appropriate, as the Applicant suggests, to leave these as matters "to be discussed between MHUD and the Council through the Taskforce".¹¹ The wider potentially impacted parties need to be consulted and involved in any such process, as suggested above.

7 Statement of evidence of Alice Blackwell (5 October 2022) at [13.7] and [13.8].

8 Overview Report at 1.

9 Overview Report at pages 4 ("adverse social effects are being caused by significant concentrations of [emergency housing] activity along Fenton Street") and 5 ("Notwithstanding the current over-concentration effects of [emergency housing], the Fenton Street corridor...") and [133], [134], [150], [165] and [214].

10 Overview Report, recommended strategic condition 1.

11 Statement of evidence of Alice Blackwell (5 October 2022) at [13.7].

Section 128 review

- 3.8** Noahs' submission sought a condition requiring review under clause 128 of the Act within 12 months of the grant of consent, and again after 36 months, to deal with any adverse effects (including on amenity, traffic, parking, security and health and safety) arising from the exercise of the consent and consider whether any amendments are required to the conditions of consent.
- 3.9** The s42A report recommends a condition with a broader power of review that was originally proposed in the Application.¹² Noahs broadly supports the condition as proposed in the s42A report. However, if consent is granted for the 5 year period sought by the Applicant, Noahs considers that a review should be provided for after 12 months and 36 months. The Court has been clear that a condition stating that the consent is subject to review "at any time that the council considers is appropriate" is inadequate.¹³
- 3.10** The Applicant does not agree that "the review condition should be able to reduce the term of the consent" on the basis that "the effects of the Proposals are known". Noahs does not agree on the basis that, as is set out in its submission, the adverse effects specific to the Apollo site have not been appropriately considered or are known. This is exactly why a review condition is required, as the effects are unknown. It is important that the Council has the ability to amend the term of consent if a shorter term is determined to be more appropriate in the light of the adverse effects on Noahs' operations.

Marketing of the Apollo Hotel

- 3.11** Noahs' submission sought a condition, which was supported in the s42A report, requiring removal of the Apollo Hotel signs and cessation of its all marketing of Apollo as a Hotel/Motel (including its presence on online booking websites) whilst it is being used as emergency housing, so that the site is not associated with tourism operations.¹⁴

12 Proposed condition 37, s42A report.

13 *Huffman v Queenstown Lakes District Council* PT Queenstown A145/92, 3 September 1992 at 2.

14 Proposed conditions 18 to 20, s42A report.

3.12 While the Applicant supports the removal of signage,¹⁵ it does not support the requirement that online advertising be removed on the basis that “implementation of this condition is difficult due to the nature of online advertising”.¹⁶ Instead, the Applicant only supports a condition that would require it to amend its website and book websites “to show no room availability”.¹⁷

3.13 It is unclear why implementation of the condition recommended in the s42A report would be difficult. It simply requires the Applicant to request that the Apollo Hotel is removed from booking platforms and/or to cease to pay to be hosted on those platforms.

Landscaping

3.14 Noahs’ submission sought conditions of consent to avoid, remedy or mitigate the adverse effects of the Application on amenity. As such, Noahs supports conditions 13-15, 22 and 30(d) as proposed in the s42A report.

3.15 The Applicant supports conditions 13 to 17 as proposed in the s42A report,¹⁸ and does not state its position in respect of conditions 22 and 30(d). Clarity is sought from the Applicant on its position on these additional conditions.

Site Management Plan

3.16 Noahs’ submission included a number of suggested conditions of consent, particularly relating to site security, community consultation and complaints, and the site management plan. The conditions of consent proposed in the s42A report propose addressing those matters in a site-management plan (**SMP**).

15 Statement of evidence of Alice Blackwell (5 October 2022), annexure 13 at [7.8].

16 Statement of evidence of Alice Blackwell (5 October 2022), annexure 13 at [7.9].

17 Statement of evidence of Alice Blackwell (5 October 2022), annexure 13 at [7.9].

18 Statement of evidence of Alice Blackwell (5 October 2022), annexure 13 at [7.7].

3.17 Case law regarding conditions of consent that provide for the preparation of management plans, set out a number of principles that guide the drafting of those conditions. In particular:

- (a) conditions of consent must be certain and may not delegate the making of substantive decision-making to the Council through an approval process on matters that should have been decided at first instance;¹⁹
- (b) the purpose of a management plan is to “provide the consent authority and anyone else who might be interested, with information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent”;²⁰
- (c) while the methods by which adverse effects will be mitigated may be left to management plans, the consent authority must still be satisfied that adverse effects can and will be adequately avoided remedied or mitigated.²¹ In some cases that will require bottom line conditions, however, in other instances it will be sufficient for the management plan to set out the objectives and scope of the plan;
- (d) objectives in a management plan condition must be capable of being set by qualitative criteria in appropriate circumstances and not solely by quantitative criteria;²²

3.18 Although the SMP is “critical to mitigating adverse effects of the Proposals”,²³ the proposed condition of consent regarding the SMP is not sufficiently precise.²⁴ It does not:

- (a) specify purposes or objectives of the SMP;

19 *Mount Field Ltd v Queenstown Lakes District Council* [2012] NZEnvC 262 at [77].

20 *Wood v West Coast Regional Council* [2000] NZRMA 193 (NZEnvC) at [19].

21 *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [175] and *Re Canterbury Cricket Assn Inc* [2013] NZEnvC 184 at [125] and [130].

22 *Northcote Point Heritage Preservation Soc Inc v Auckland Council* [2016] NZEnvC 248 at [48].

23 Statement of evidence of Alice Blackwell (5 October 2022) at [13.28].

24 Proposed condition 30, s42A report.

- (b) include any detail as to the staffing and security requirements or the process for dealing with complaints;²⁵
- (c) include any detail as to mitigating cultural effects on Whakarewarewa;²⁶
- (d) specify any particular outcomes that the SMP is to achieve;
- (e) address how the community is to be consulted during the preparation of the SMP; or
- (f) include a process by which the SMP will be reviewed and updated by the Applicant during the duration of the consent.

3.19 As such, the conditions of consent as drafted provide no basis for a conclusion that the adverse effects the SMP seeks to manage will be adequately avoided remedied or mitigated.

3.20 While the proposed condition requires that the SMP be based on the draft that was provided with the Application, that draft SMP was deficient for the various reasons set out in Noahs' submission on the Application.

3.21 In Noahs' submission, the condition of consent regarding the SMP should specifically address the matters specified in paragraph 45(c) to (f) of its submission to ensure they become the fundamental requirements of any SMP and are therefore enforceable

3.22 Noahs also does not agree that "there should be standardisation of 'house rules' and complaints procedures across the 13 CEH sites".²⁷ The circumstances of the other MHUD applications do not determine what site management measures are required to avoid, remedy or mitigate the adverse effects of this particular Application.

25 Noting that some details as to a general process for complaints regarding all 13 of the proposed contracted emergency housing sites are included in condition 3 of the Strategic Conditions: Overview Report, Appendix 2. Note also that MHUD does not support that condition as drafted, and considers that complaints should be addressed by the operator of the Apollo site rather than MHUD: Statement of evidence of Alice Blackwell (5 October 2022) at [13.9] to [13.11].

26 Both the Property and the Apollo Hotel are located in proximity to the culturally significant Whakarewarewa site. The Overview Report (at [197]) and the s42A report (at [47]) were clear that the Application did not include sufficient consideration of the cultural effects of the Application on Whakarewarewa. The Applicant's evidence is that recommendations from the onsite Service Provider relevant to mitigating potential cultural effects of the proposal be incorporated into the SMP: Statement of evidence of Alice Blackwell (5 October 2022) at [9.111].

27 Statement of evidence of Alice Blackwell (5 October 2022) at [13.28].

4. CONCLUSION

- 4.1** While Noahs' submission seeks that the Application is declined on the basis that the Apollo site is not an appropriate location for contracted emergency housing, it acknowledges the significant and important policy imperative of ensuring vulnerable people are safely accommodated.
- 4.2** If the Council is minded to grant consent to the Application, Noahs seeks that amendments are made to the conditions of consent in order to manage the adverse effects of the Application that are outlined in its submission.

DATED at Auckland this 14th day of October 2022

A handwritten signature in blue ink, appearing to read 'W. Loutit' or similar, with a large circular flourish at the end.

Bill Loutit / Chris Ryan
Counsel for Noahs Hotels (NZ) Limited