Under	**THE RESOURCE MANAGEMENT ACT 1991**
In the matter of	**AN APPLICATION BY KĀINGA ORA–HOMES AND COMMUNITIES FOR RESOURCE CONSENT TO DEMOLISH EXISTING BUILDINGS, REDEVELOP THE SITE FOR MULTI-UNIT RESIDENTIAL DEVELOPMENT, AND UNDERTAKE ASSOCIATED EARTHWORKS AT 131 COROMANDEL STREET, NEWTOWN, WELLINGTON**

MEMORANDUM OF COUNSEL ASSISTING THE HEARING COMMISSIONER IN RESPONSE TO MINUTE #3

7 October 2021

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INTRODUCTION AND SUMMARY OF ADVICE

1. As recorded in Minute #3 of the Hearing Commissioner dated 1 October 2021, I have been asked to:

   (a) express a view on whether adverse environmental effects arising from a potential shortfall in carparks are relevant to consider in determining the present application by Kāinga Ora–Homes and Communities (**Kāinga Ora**) for resource consent;[1] and

   (b) if so, comment on a potential condition requiring the development to be used for social housing.

2. My view on these matters is set out below.

3. As an initial point, I note that these are difficult questions, in part occasioned by a lack of clarity in the National Policy Statement for Urban Development 2020 (**NPS-UD**). I acknowledge the helpful analysis already provided on these issues by counsel for Kāinga Ora and Mr Wood of Wellington City Council.

4. In summary, my views are that:

   (a) rule 5.3.7 does allow a consent authority to consider the effects of a proposed multi-unit development on *"provision of parking and site access"*, as well as traffic effects, in a broad sense;

   (b) the weight to be ascribed to any 'parking shortfall effects' is a matter for the consent authority, but the relevant provisions of the NPS-UD and the District Plan for Wellington City (**Plan**) clearly point to such effects having lesser influence on the outcome of consenting processes than they may have had previously; and

   (c) whether or not a condition should be imposed requiring the development to be used for social housing is ultimately a question for the consent authority, on the information before it. In my view, however, such a condition would risk being unlawful.

RELEVANCE OF EFFECTS ARISING FROM A SHORTFALL IN CARPARKS

5. The proposed activities trigger the need for resource consent under rule 5.3.7 of the Plan, which provides that the construction of a multi-unit development is a restricted discretionary activity.

[1] I understand the concern relates to potential effects experienced by persons **other than** occupiers of the site because, as landowner, Kāinga Ora can be understood to have given its approval to the effects of the proposal on future occupiers.

6. Section 104C of the Resource Management Act 1991 (**RMA**) relevantly provides that, when considering an application for resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which it has restricted the exercise of its discretion in its plan. If consent is granted, conditions may be imposed only for those same matters.

7. The matters of discretion relating to rule 5.3.7 include *"provision of parking and site access"*, and traffic effects. On their face, these words do not indicate any restriction on the consent authority's ability to consider parking-related effects of a proposed activity.

8. However, the words of a plan rule do not necessarily provide the complete picture, in terms of understanding its meaning. The leading judicial decision on interpreting plans is the Court of Appeal's judgment in *Powell*.[2] The Court held that the meaning of a provision in a plan turns on the plain and ordinary meaning of its words, but the interpretation exercise should not be undertaken *"in a vacuum"*. Rather, regard must be had to the immediate context in which the provision sits, including the objectives and policies, and the broader objectives and policies of the plan. The test is *"what would an ordinary, reasonable member of the public examining the plan, have taken from"* the planning document.

9. The question is therefore whether the broader Plan context within which rule 5.3.7 sits tempers or limits the seemingly broad ability to consider effects of multi-unit developments relating to *"provision of parking and site access"*.

10. In this case, the contextual information that is relevant to consider in interpreting rule 5.3.7 includes:

    (a) policy 4.2.12.4, regarding *"appropriate parking (…) in residential areas"*; and

    (b) the *"vehicle parking"* standards in 5.6.1.3.

11. In my view the relevant context also includes the changes made to those Plan provisions in May 2021 to give effect to policy 11 of the NPS-UD. Policy 11 requires, in relation to car parking, that the Plan *"not set minimum car parking rate requirements, other than for accessible car parks"*, and adds that councils are *"strongly encouraged to manage effects associated with the supply and demand of car parking through comprehensive parking management plans"*.

[2] *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA).

12. The Commissioner sought comment on this interpretation issue through Minute #2, and responses were provided by counsel for Kāinga Ora and Mr Wood of the Council. In essence, their respective positions were:

    (a) for Kāinga Ora, that the changes made to the Plan in May 2021, including the removal of the specific requirement to obtain consent for a shortfall in parking (via rule 5.3.1 and the standards in 5.6.1.3), effectively removed any 'parking shortfall effects' from consideration; and

    (b) for the Council, that the NPS-UD requires councils to remove or change any objectives, policies, rules, or assessment criteria in plans that have the effect of requiring a minimum number of car parks to be provided for a particular activity, but does not preclude consideration of related effects in consent processes.

13. As noted above, I consider the position to be unclear and arguable, and I respectfully agree with some elements of the analysis provided for both Kāinga Ora and the Council.

14. For example, I concur with the view given for the Council that policy 11 of the NPS-UD does not expressly require district plans to be changed to remove an ability to consider the potential effects of a shortfall in parking. In my view the intent underpinning policy 11 is quite clear, namely to encourage residential land-use intensification in areas of high demand that are well-serviced by public transport (as per objective 3 in the NPS-UD) and, in that context, to remove the need for developers to provide any minimum number of on-site parking spaces. However, on my reading the words of the policy do not go so far as to 'take out of play' altogether, in consenting processes, potential effects arising from a shortfall in parking.[3]

15. That said, clearly implicit in policy 11, in my view, is an expectation that adverse effects arising from a failure to provide adequate on-site parking will carry less significance in consenting processes than previously.

16. I consider that the changes made to the Plan align with these features of the NPS-UD.

[3] Indeed, the policy envisages effects requiring ongoing management, albeit with councils *"strongly encouraged"* to take responsibility for doing so through comprehensive parking management plans. As an aside, I do not consider the Ministry for the Environment's 'car parking fact sheet' to be particularly illuminating in terms of the present issue, including because (at least in the context of this Plan) I do not consider the relaxation of parking space requirements to have created a 'permitted baseline' for developments (such as the present) that otherwise require consent.

17. For one, in my view, the changes have not explicitly removed a decision-maker's ability to consider parking-related effects. I acknowledge that there is an argument, as clearly set out by counsel for Kāinga Ora, that the matter of discretion in rule 5.3.7 relating to *"provision of parking"* can be interpreted as being limited to the relevant parking standards in 5.6.1.3. On balance, however, I consider that the more natural reading of rule 5.3.7 (in context) is that the matter of discretion is not so limited and a consent authority can consider parking-related effects more broadly, because:

    (a) policy 4.2.12.4 is still worded in a relatively general way, despite recent changes, allowing a range of parking-related effects to be considered; and

    (b) rule 5.3.7 has retained the matters of discretion relating to *"provision of parking and site access"* and traffic effects, and those matters of discretion are not expressly linked to the pared-back parking standards in 5.6.1.3.

18. Further, in line with the NPS-UD, I consider that the recent changes to the Plan clearly signal that a parking shortfall will be a less significant issue in consenting processes than previously. The Council has reflected this policy intent by removing:

    (a) the following words from policy 4.2.12.4:

        "To minimise or reduce street congestion, all new developments must be reasonably self-sufficient with regard to parking. Rules therefore require on-site parking appropriate to the use or activity"; and

    (b) the requirements for one on-site carpark per household unit and, for multi-unit developments, a minimum of one visitor park for every four household units, from the standards in 5.6.1.3 (and associated requirement to obtain consent under rule 5.3.1 in the event of a shortfall).

19. As such, in my view rule 5.3.7 allows (and indeed requires) a consent authority to consider the effects of a proposed multi-unit development on *"provision of parking and site access"*, as well as traffic effects, in a broad sense.

20. In terms of the Court of Appeal's test in *Powell*, in my view an ordinary, reasonable member of the public examining the plan would understand that any adverse effects arising from a failure to provide adequate on-site parking

can still be considered by a consent authority, despite the previous specific requirements regarding the minimum number of on-site parking spaces having been removed to give effect to the NPS-UD.

21. Importantly, however, the task of a consent authority under section 104 is to assess the merits of an application against the relevant planning instruments[4] and, in doing so, ascribe such weight to relevant considerations as it considers appropriate in the circumstances, guided by policy.

22. While questions of weight are matters for the decision-maker, for the reasons summarised above my view is that the policy intent regarding 'parking shortfall effects' in both the NPS-UD and the Plan (both of which are instruments to which the Commissioner must have regard) is clearly to reduce the significance of effects associated with any shortfall in parking.

POTENTIAL CONDITION REQUIRING USE OF SITE FOR SOCIAL HOUSING

23. I have reviewed the responses of counsel for Kāinga Ora and Mr Wood for the Council to Minute #2 as they relate to the significance of whether or not this proposal is for social housing. I understand that Mr Wood has recommended that a condition be imposed requiring the development to be used for social housing, but that Kāinga Ora has argued against the imposition of such a condition, including because it would unreasonably and unnecessarily restrict its ability to use the site.

24. Mr Wood has raised a number of related concerns regarding:

    (a) the scope of the activity for which consent has been sought;

    (b) the basis on which its effects have been assessed; and

    (c) how the application was notified.

25. All of these concerns, I understand, turn on a potential difference in 'parking shortfall effects' between a scenario in which the units in the development are all used for social housing, and other scenarios whereby some or all of the units are sold into private ownership at some unknown point in the future.

26. I have summarised above my views about the direction given by policy 11 of the NPS-UD and the relevant provisions of the Plan, which include that 'parking shortfall effects' are less important considerations in consenting processes than previously. Depending on the weight the Hearing Commissioner decides to give to the evidence regarding any such effects,

[4] See for example *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at paragraph 73.

the concerns raised by Mr Wood may be found not to warrant imposition of a condition requiring the development to be used for social housing.

27. I also note that the specific concern regarding notification appears to be answered by rule 5.3.7 itself, as explained in the response by counsel for Kāinga Ora.

28. More generally, it is not clear to me that a condition requiring the development to be used for social housing would accord with relevant administrative law principles governing the validity of conditions, such as those set out in the case of *Newbury*[5] and others that require conditions to be certain, *intra vires*, and not have the potential to frustrate or nullify the grant of a consent.

29. Such a condition would potentially be problematic for a number of reasons, including because:

    (a) It is difficult to define with certainty what qualifies as 'social housing'.

    (b) The condition would bring matters that are ordinarily private within the realm of the Council's enforcement powers. That is, the condition would contemplate the Council taking an interest in the process by which Kāinga Ora contracts with tenants to let units, the process of choosing tenants, and the potential future sale by Kāinga Ora of units (including to whom, and on what terms). At first blush this risks being an overreach of the consent authority's power to impose conditions.

    (c) As a related point, the condition would be difficult, if not practically impossible, to enforce.

30. Even if these issues could be worked through and a lawful condition imposed, it is not clear to me (acknowledging that I was not present at the hearing) that there is a sound evidentiary basis for the proposition that the number of cars owned by occupiers of units would materially or significantly increase if some or all of the units were not used for social housing. Conditions must be for a proper resource management purpose, which in my view requires there to be a clear, direct linkage between a likely adverse effect and a condition imposed to mitigate it.

31. As is the case with the weight to give to information about 'parking shortfall effects', whether or not a condition should be imposed requiring the

[5] *Newbury DC v Secretary of State for the Environment; Newbury DC v International Synthetic Rubber Co Ltd* [1981] AC 578; [1980] 1 All ER 731 (HL). The *Newbury* principles go to matters such as conditions being reasonable, being for a proper purpose, and fairly relating to the development authorised by the consent.

development to be used for social housing is ultimately a question for the consent authority, on the information before it. In my view, however, there would be a real risk of such a condition being unlawful.

DATED this 7th day of October 2021

David Randal
Counsel assisting the Hearing Commissioner