

Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context and the Special Rapporteur on the rights of indigenous peoples

REFERENCE:
AL NZL 1/2019

22 March 2019

Excellency,

We have the honour to address you in our capacities as the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 34/9 and 33/12.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the proposed construction of 480 houses by Fletcher's Living Ltd on Puketapapa, a land plot of 32 hectares near Auckland, which has strong spiritual, cultural and archaeological meaning to the Te Wai o Hua o Ihumātao (Maori community). Concerns have been voiced to us about this housing project, including its alleged negative effects on the land, cultural heritage and community well-being. Concerns have furthermore been raised about the lack of adequate and inclusive consultation with the Te Wai o Hua o Ihumātao in relation to the project as well as in relation to the prior designation of the land as a special housing area for development of intensive urban housing (SHA62) in 2014 under New Zealand's Housing Accords and Special Housing Area Act 2013 (HASHAA).**

As your government is aware, overall concerns over contemporary and historical land claims in New Zealand and the settlement processes with Maori in this regard were raised as a remaining challenge during the country visits by the previous Special Rapporteur on the rights of indigenous peoples to New Zealand, respectively in 2005 (E/CN.4/2006/78/Add.3, paragraphs 22-42) and 2010 (A/HRC/18/35/Add.4). In addition, concerns related to land issues have been mentioned in a previous communication to your Government about the Waitangi Tribunal and the representation of Maori in historical claim processes (NZL 1/2012).

According to the information received:

Puketapapa is an undeveloped area of 32 hectares of land on Ihumātao Quarry Rd in Auckland. Puketapapa is an important natural, archaeological and historic area for the Te Wai o Hua o Ihumātao, containing ancestral burial caves, volcanic cones and pre-colonial stonewalls. It borders the 100 hectares area of the Otuataua Stonefields Historical Reserve, which was established to protect and preserve the archaeological remains of communities that have been living on this land for several hundred years. The reserve and surrounding areas, including Puketapapa, are reportedly regarded as a waahi tāpu (a sacred place) to Ihumatao residents and a key source of their identity, as well as cultural and spiritual grounding.

In 2016, Puketapapa was bought by the company Fletcher Living Ltd, which plans to construct 480 houses for commercial sale on the land. Representatives of the Te Wai o Hua o Ihumātao (Maori community), who live nearby Puketapapa in Ihumātao village, oppose this construction project due to its adverse impact on the landscape, heritage and culture.

The Te Wai o Hua o Ihumātao traditionally held authority over Puketapapa as well as a larger area of 900 acres land in total, until it was confiscated in 1863 under the New Zealand Settlements Act. Members of Te Wai o Hua of Ihumātao have contested the confiscation with letters dating from as early as July 1865. The Waitangi Tribunal has summarized the evidence relevant to the confiscation of Ihumātao, including Puketapapa, in its Manukau Report of 1985 (WAI 008), which states the following: ... *the inhabitants [were] attacked, their homes and property destroyed and their cattle and horses stolen, but then they were punished by confiscation of their lands for a rebellion that never took place (at 35).*¹

In April 1866, the 900 acres land of Ihumātao was partitioned between the Crown and Maori by a Compensation Court set up under the New Zealand Settlements Act 1863, at which point Puketapapa fell to the Crown. In July 1866, Puketapapa was then offered for sale in a public auction by the Waste Lands Office and purchased by a Scottish immigrant, Mr. Wallace. The land remained in the hands of the Wallace family and was cultivated as farm lands in the following 149 years, before selling it to Fletcher Living Ltd in 2016.

In July 2014, Puketapapa was designated as a Special Housing Area, namely Special Housing Area 62 (SHA62), under the Housing Accords and Special Housing Area Act 2013 (HASHAA). Under the HASHAA, Special Housing Areas are designated through a fast-track procedure, which does not require the same level of safeguards as otherwise provided for in the Resource Management Act (1991) related to consultation and notification of plans to interested parties, including the Maori. The HASHAA expressly allows the development of land to progress without notice to any parties except adjacent landowners. According to the information obtained, the HASHAA was developed and passed in urgency in 2013 without proper consultation with the Maori.

On 13th December 2016, Puketapapa was sold by its then private owner, Wallace Farms Ltd, to Fletcher Living Ltd for an estimated \$NZ20million. Fletcher Living Ltd plans to build 480 houses on the land for commercial sale.

The purpose of the HASHAA is to address the housing shortage as well as need for affordable housing in New Zealand. Fletcher Living has in this regard informed that 10 % of the 480 houses would be sold at controlled price caps, which were established to increase the supply of lower-priced housing. While contributing with 48 new social housing units, it is alleged that the development of Puketapapa would unlikely address the needs for affordable housing at the

¹ Manukau Harbour Report of the Waitangi Tribunal is available at: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68495207/The%20Manukau%20Report%201985.pdf

lower end of the market but rather lead to higher housing prices in the area. It is unclear how or if member of the Maori community would benefit from the housing project.

Some representatives of the Te Wai o Hua o Ihumātao still claim authority over Puketapapa and demand that the land be returned to them or converted into a public reserve, over which they may exercise their duties of guardianship.

In terms of legal actions, a case related to Puketapapa was filed with the Waitangi Tribunal on 7 December 2015. An application to have the case heard under an urgent hearing was declined by the Waitangi Tribunal (Wai 2547, #2.5.5) on 14 August 2017. However, in the decision, the Chief Judge noted that the claim may be suited for a future inquiry as it raises general concerns about the form, operation and potential effects of the special housing areas legislation, of which the claimants say their claim provides a specific example. The decision also noted that ‘there is a real possibility that the treaty rights of the traditional owners of Ihumātao may not be given sufficient weight and consideration in the new legislative framework established by the Crown. Such a limitation raises a risk of prejudice to the traditional owners of Ihumātao that is both significant in that it would affect large-scale development in an area of cultural significance to the claimants and irreversible in that it is unlikely that the taonga (sacred object) identified on the land, if disturbed or destroyed by the development, could be restored’ (para. 60).

Furthermore, an appeal was raised to the Environment Court by indigenous organisations and archaeologists over the decision by Heritage New Zealand, the national historic heritage agency, to grant Fletcher ‘archaeological authority’ over SHA62. In November 2018, the Environment Court rejected this appeal, thereby closing possible domestic avenues for legal redress.

Recent opposition to the proposed construction of 480 houses by Fletcher’s Living Ltd on Puketapapa land as well as the designation of the land as SHA62 has been voiced by several leaders and indigenous peoples’ organisations, including through a petition that has obtained more than 15,000 signatures and will be presented to Parliament, and the Auckland Council Governing Body in April 2019.

Noting the cultural, spiritual and archeological importance of Puketapapa to the Maori involved, we express our concern about the proposed construction of housing for commercial sale on their traditional land. We are furthermore concerned about the alleged lack of adequate participation of the Te Wai o Hua o Ihumātao in relation to the designation of Puketapapa as Special Housing Area 62 (SHA62) in 2014, under the Housing Accords and Special Housing Area Act 2013 (HASHAA). While we note that Fletcher Housing Ltd. has informed about consultations undertaken with certain Maori representatives about SHA62 and on the construction of the 480 houses, we would like to recall the importance of ensuring inclusive consultations and settlements.

The case of SHA62 also seems to reflect a broader challenge in terms of ensuring a human rights-based approach to national housing strategies. Of specific concern is the fast-track procedure of the Housing Accords and Special Housing Area Act 2013, which does not allow for adequate consultations with the Maori. In addition, the HASHSAA section 80 appears to limit avenues for judicial review.

Furthermore, the HASHSAA does not seem to adequately address the housing shortages faced by the Maori. In this regard, the case of Puketapapa was raised in March 2018 at the 63rd session of the Committee on ESCR, where the fourth periodic report of New Zealand was discussed. The concluding observations expressed a general concern that “disadvantaged groups and individuals, notably Māori and Pasifika families and persons with disabilities are more likely to experience severe housing deprivation, including overcrowded conditions. The Committee is also concerned that housing costs have significantly increased, leading to housing becoming unaffordable for many families and thereby increasing homelessness”. The Committee in this regard recommended that the State party adopt a human rights-based national housing strategy, taking into account the 2018 Housing stocktake report produced by the Government.

While we do not wish to prejudge the accuracy of these allegations, we would like to draw the attention of your Excellency’s Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide further information on how the Government seeks to ensure that the commercial housing project, with construction of 480 houses, by Fletcher Living on SHA62/Puketapapa will not undermine the cultural heritage and the rights of Maori.
3. Please provide information how the Governments plans to ensure that the planned housing construction on SHA62/Puketapapa contributes to the realization of the right to housing of the Maori people.
4. Kindly provide any additional information you have about the consultations undertaken with Te Wai o Hua o Ihumātao regarding the use and development of Puketapapa.
5. Please provide information on the background of designating Puketapapa as a Special Housing Area under HASHAA in 2014, as well as the

measures that your Excellency's Government has taken to ensure the participation as well as the free, prior and informed consent of the Te Wai o Hua o Ihumātao during this process.

6. Kindly explain in detail how the Government seeks to ensure that the HASHAA improves access to adequate, affordable and culturally appropriate housing for all residents, including Indigenous Peoples and will not undermine indigenous peoples' rights, under the UN Declaration on the rights of indigenous peoples and human rights law, as outlined above.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

Leilani Farha

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Victoria Lucia Tauli-Corpuz

Special Rapporteur on the rights of indigenous peoples

Annex
Reference to international human rights law

In connection with the above alleged facts and concerns, we wish to draw the attention of your Excellency's Government to its obligations under binding international human rights instruments.

Of particular relevance to the case of Puketapapa is Article 27 of the International Covenant on Civil and Political Rights (ICCPR), ratified by New Zealand in 1978, which states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". These cultural rights are furthermore guaranteed in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), also ratified by New Zealand in 1978.

We would also like to recall the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which New Zealand has been a party to since 1972. In particular, we would like to draw attention to the General Recommendation 23 of the UN Committee on Elimination of Racial Discrimination, which in its paragraph 5 calls on States "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories" (Doc A/52/18, annex V 1997).

In addition, we would like to refer your Excellency's Government to relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007 and endorsed by New Zealand in 2010. As affirmed in Article 26 of the Declaration: "indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Article 26 further provides that indigenous peoples have the right "to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired" and establishes a positive duty on States to "give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".

Relevant to the discussion of reparations for historical wrongs and the confiscation of Puketapapa in 1863, article 28 provides for indigenous peoples' "right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

We would furthermore like to recall article 27 of the UN Declaration on the Rights of Indigenous Peoples, which states that indigenous peoples shall have the right to participate in the process of recognizing and adjudicating "the rights of indigenous

peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used". In addition article 18 establishes the right of indigenous peoples to participate in decision-making in matters which would affect their rights and article 19 affirms that indigenous peoples shall be consulted "through their own representative institutions in order to obtain their free, prior and informed consent" before States adopt legislative or administrative measures that may affect them.

In addition, we would also like to draw your Excellency's attention to article 11 of the UN Declaration on the rights of indigenous peoples that stipulates that indigenous peoples have the 'right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites'. Article 31 states that indigenous peoples have the 'right to maintain, control, protect and develop their cultural heritage'. It adds that 'in conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of' this right'. These provisions recall article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which urges States to take steps to ensure the realization of the right to cultural life for everyone, including steps necessary for the conservation of culture. In this connection, we refer to General Comment 21 (2009) of the Committee on Economic, Social and Cultural Rights, which recalls that States have the obligation to respect and protect cultural heritage in all its forms. Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others (E/C.12/GC/21, para.50).

In relation to New Zealand's housing strategies, we would like to refer to the International Covenant on Economic, Social and Cultural Rights ratified by New Zealand in 1978, and more specifically article 11.1 recognizing the right of everyone to an adequate standard of living for himself and his family, including food and housing, and to the continuous improvement of living conditions. This article must be read in conjunction with article 2.2 of the Covenant which provides for the exercise of any right under the Covenant without discrimination of any kind. In addition, we would like to bring to the attention of your Excellency's Government general comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights which defines seven fundamental characteristics of the right to adequate housing that the Government must ensure. By focusing the priority on social groups living in adverse conditions, these features include the guarantee of: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) location; and (g) and cultural adequacy. We would also like to refer you to the Special Rapporteur's report on human rights based housing strategies (A/HRC/37/53).

Finally, we wish to bring to the attention of your Excellency's Government that in accordance with the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011, States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, and redress such abuse through effective policies, legislation, regulations and adjudication (Guiding

Principle 1). State should also exercise adequate oversight when they contract with business enterprises to provide service that may impact upon the enjoyment of human rights (Guiding Principle 5). Moreover, according to the Guiding Principle 25, the State must take appropriate steps to ensure that those affected have access to effective remedy.