BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL
INDEPENDENT HEARINGS COMMISSIONER McKAY

UNDER	the Resource Management Act 1991 ("**RMA**")
IN THE MATTER	of an application under section 88 of the Act by **BRYAN & KIM ROACH & SOUTH TARANAKI TRUSTEES LTD** to the **NEW PLYMOUTH DISTRICT COUNCIL** for a land use consent to construct a dwelling and asssociated retaining and fencing at 24/26 Woolcombe Terrace, New Plymouth. (LUC24/48512)

RIGHT OF REPLY FOR THE APPLICANT BRYAN & KIM ROACH & SOUTH TARANAKI TRUSTEES LIMITED (ROACH)

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MAY IT PLEASE THE INDEPENDENT HEARINGS COMMISSIONER

Right of Reply

1. These submissions in reply respond to matters arising at the hearing, as well as address further information and evidence provided in response to the Commissioners' Minutes of 28 March 2025, and 17 April 2025, and/ or by way of reply. The fact that not every aspect of Mr Cameron's submissions is addressed in reply should not be taken as accepting any part of Mr Cameron's submissions. Much of what Mr Cameron covered had been anticipated and addressed in the applicant's opening submissions and/ or in their expert evidence.

2. For example, the applicant sees no need to revisit the interpretive issue relating to the applicability (or not) of the alternative daylight angle standard MRZ-S4. The issues have been well ventilated, and the experts did not consider the applicability (or not) of MRZ-S4 to be determinative of their opinions.

"Minor" in the context of section 104(1) RMA

3. The Commissioner has asked Counsel for the applicant to address: how does the word "minor" come into the mix, or is considered, under the section 104(1) RMA assessment in the context of a discretionary activity?

4. The meaning of the term "minor" (as well as less than minor) was addressed in opening submissions.

5. Section 104(1)(a) requires "any actual and potential effects on the environment of allowing the activity" to be considered. It does not set a standard or threshold (unlike the effects limb of the s104D test, which requires the consent authority to be satisfied that the adverse effects of the activity on the environment will be "minor").

6. That does not mean that a touchstone of "minor" adverse effects cannot be used when considering effects under s104(1)(a). It is usually helpful for a decision-maker to have a sense of scale of effect, rather than having (say) expert opinions offered

that state the activity is "acceptable" (or not). Of course, an expert may find that an effect is both minor (or less than minor) and, therefore, acceptable.

7. Whether an effect is "minor" (or falls within some other standard) can also be relevant when considering objectives and policies, and the weight to be given to them. Some objectives and policies, for example, use the term minor or provide for some other standard to be met – or avoided. Such terms do not appear to be embedded in the relevant objectives and policies of the PDP in this instance. They push to a more rounded evaluation against the sorts of outcomes anticipated by (in this case) the Medium Density Residential Zone. That said the Supreme Court has said in *NZ King Salmon ([2014] 1 NZLR 953*) that:

> … It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding.

8. This was in the context of avoid policies and an argument, which the Supreme Court did *not* accept, that:

> … because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

9. So, to the extent that there are directive "avoid" policies in play (which the applicant does not consider to be the case), then undertaking an enquiry into whether or not the effects are minor (only) may be of assistance. The applicant considers that the objectives and policies in this case are more descriptive of outcomes, eg MRZ-O7:

> Adverse effects of activities are managed to provide residential amenity consistent with the planned character of the Medium Density Residential Zone

10. Later policies refer to "minimising" certain effects, eg MRZ-P9, which requires, in ensuring development provides well designed on site amenity, regard to be had to "the provision of separation distances between buildings to *minimise* adverse

enclosure and dominance effects". Understanding whether an effect is minor – if not capable of being minimised further, eg through mitigation – is helpful in that context. The pergola and/ or planter boxes is an example of this.

11. Finally, consideration of whether effects on the environment are "more than minor" can be relevant if s104(3)(d), which prohibits a consent authority from granting resource consent if the application should have been notified and was not. It is not understood that this is at issue here, since the Whytes were limited notified, and there has been no suggestion that public notification was required on the basis that the effects on the wider environment (ie in terms of section 95A(8)(b)) were more than minor.

Hinsen

12. Counsel for the Whytes has taken issue with the applicant's reliance on *Hinsen*, *[2004] NZRMA 115*, particularly its reference at [29] to the situation where a building has been erected, then the freedom to avoid, remedy or mitigate "is constrained by consideration of the proportionality of the adjustments that might otherwise have been appropriate".

13. There can be no mistake that *Hinsen* means what it says, including at [39]. The words are not ambiguous or open to interpretation. They form part of a considered passage of the decision. The element of "proportionality" in any "adjustments" that might be made will also not necessarily be determinative. The Court in *Hinsen* explicitly said, at [30] (emphasis added):

> **Whether that will be significant in this case will only appear after we have considered our findings on the evidence by reference to the relevant criteria**. But we do not accept the principal submissions for the Lyneses, and hold that **our judgment can be influenced by the Lyneses' past conduct**, particularly in proceeding with the erection of the building without resource consent, despite having been notified that it was needed. **We accept that the weight to be given to those matters is for the statutory purpose, not as a punitive measure, and not to override any of the explicit criteria**.

14. The later passages relied on by Mr Cameron at [33] and [34] was the Court's application of the analytical approach to the circumstances before it. Those are very different to what has occurred here. The Roach's were not given notice that resource consent was required. They did not proceed deliberately, or recklessly. They sought to comply with the permitted rules in all respects. That is the entire opposite approach to how the Lyneses approached matters in *Hinsen*.

15. In any event, the Environment Court later took into account proportionality in deciding to grant retrospective consent in *Hinsen*, stating at [130] (emphasis added):

> Without belittling the dominance effect on the Hinsen property, it is our judgement that **refusing consent, so that alterations of that scale are required to make the building comply, would be quite out of proportion to the benefit to be gained for the environment**. Although it might be observed that the Lyneses brought the cost of those alterations on themselves by building without having obtained consent, and failing to respect the effect on their neighbours, **the cost would be so disproportionate to the benefit that it would override the prescribed criteria and be perceived as a penalty**.

16. Aside from the deliberateness of the Lyneses in *Hinsen*, the issues facing the Court are the same as those currently before the Commissioner in these proceedings. It is respectfully submitted that in such circumstances that the Commissioner is bound to follow the approach set out by the Environment Court in *Hinsen* and take into account the extent to which the cost of complying would be disproportionate to the benefit of doing so, and so would become a penalty.

17. The Court in *Hinsen* also noted in that case (at [129]) that it did not have any evidence before it as to the costs of the alterations that would be required, but took notice that they would be extensive.

18. So that the Commissioner has no doubt as to the ability to enable compliance in the current circumstances, and the very significant costs of having to do so, the applicant has produced a reply brief of evidence from Mr Christopher Bell dated 28 April 2025 (included with this Right of Reply). He concludes the following at [3.7]-[3.8]:

> In my professional view the moving of the house in any direction is not feasible and to be simply honest it's not possible. The only option to move the property would be a full demolition and rebuild which in today's market would be in excess of $3 million dollars.
>
> The cutting down and moving of the East side wall approximately 1.000m in towards the West is also not possible - as the load bearing walls holding up the 1st floor sit on the current exterior walls, and the weight is transferred down into the foundations and piles. There are also water proofing issues to consider and it is simply not feasible.

19. This would be an entirely inefficient use of resources, which is a matter that must be considered under s7(b), and factors in to any wider consideration of s5 and Part 2 RMA matters.

20. If there is any issue with the Commissioner receiving Mr Bell's evidence (not that there should be), then it is submitted that the Commissioner can still take "judicial notice" that the costs of complying would be significant (as the Court did in *Hinsen*). There is also existing evidence of some relevance, for example in the primary Statement of Evidence of Mr Roach – see paragraph 39 in the context of moving steel frames at a cost of $85,000.00 for the frames alone. While that evidence might not have been given expressly in respect of Ms McRae's purported "mitigation" measures as noted above – it is very obvious that if the costs of taking down structural steel and then revising and re-erecting at approximately $85,000.00 in 2023 (being Spark's metal fabrications costs only) – that the costs of "Redesign of building's eastern façade further away from boundary so it does not exceed HIRB envelope"[1] and "Reduction in height/angle of roof plane so it does not exceed HIRB envelope"[2] – would be significant, as well as entirely impractical.

21. In addition, requiring compliance – as noted by the Commissioner at the hearing – is avoidance of effects, rather than mitigation. While the applicant's experts do not consider additional mitigation required, the Roach's have agreed to offer up the following additional mitigation measures:

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[1] Evidence Emma McRae, 19 March 2025, para 15.4

[2] Ibid

a. An additional set of external louvres on the eastern 'bay window'; as discussed in Mr Arnold's Supplementary Evidence dated 27 March 2025 and further discussed now in Mr Lawn's reply brief of evidence dated 9 May 2025 (included with this Right of Reply).

b. Screening/ softening planting to be achieved either through a pergola/climbing structure, or the use of planter boxes (as now also further discussed in Mr Lawn's abovementioned reply brief of evidence dated 9 May 2025 (included with this Right of Reply)).

22. This is not a recognition of adverse effects of such a scale that mitigation is required, but an attempt to further reduce (or *minimise*, to use some of the language in certain policies) effects - and ensure an enduring solution that (ideally) avoids any appeal by the Whytes (noting also that Ms McRae's evidence dated 19 March 2025 endorsed such mitigation, for the reasons she set out, at paragraph 15.4 of that evidence). The Roach's are not holding any mitigation "in reserve", although the mitigation planting can be achieved through either a pergola or planter boxes. The Roach's would prefer the pergola (due to the steel brackets already in place which they installed at relatively significant cost); but ultimately will implement either option if required – and it may be that is something the Commissioner has a view on, with the Commissioner's preferred option able to be imposed through the final conditions.

23. It should be noted, as discussed in Mr Lawn's abovementioned reply brief of evidence at paragraph 4.4 – that it is not efficient or practicable to move the pergola one metre back from the side boundary due to those steel brackets (which were installed some time ago under the ODP provisions). At a meeting on 22 April 2025 Counsel for the applicant discussed that with the applicants and those steel brackets are not easy to simply move. To do so would require removing the top deck in which they are situated – rearranging all the services underneath that deck which are already built/installed such as power – then shifting the steel brackets – and then re-instating the deck. Those steel brackets were fitted after services, such as power, had been installed underneath them – and the footings of the steel brackets are

concreted in one metre deep below the deck – so they are not something that can be easily or inexpensively moved.

Permitted baseline – further evidence and submissions

24. I referred to the very recent case of *Green Bay* at the hearing (*Green Bay East Residents Society Inc* v *AKL Council CIV-2024-404-2326 [2025] NZHC 644*), which said that the permitted baseline is concerned with what is possible, rather than what is most likely. It appeared as if Mr Cameron did not think that to be so different from the Court of Appeal's decision in Smith Chiltcott (*Smith Chilcott Ltd* v *Auckland City Council [2001] 3 NZLR 473*), at [26]-[27]. There the Court of Appeal stated as is most relevant (emphasis added):

> … "not fanciful" appears to us to set the standard appropriately. It follows that **any permissible use qualifies under the permitted baseline test unless in all the circumstances it is a fanciful use**. It accordingly follows that we agree with Salmon J that in this respect the Environment Court has erred in law.
>
> The answer to the second question is No. The Environment Court did not apply the permitted baseline test in conformity with law when it asked itself whether a permitted development was "likely" or "more likely" or "more credible".

25. The applicant has clearly demonstrated that a permitted residential dwelling can be designed to take full advantage of the permitted baseline and is "not fanciful" (*Smith Chiltott*), but is "possible" (*Green Bay*). It is not necessary for the permitted baseline comparison to be "likely", although it is the Roach's evidence that if they had to demolish and rebuild their home, they would necessarily then look to maximise the use of the permitted baseline to capture as much value from the property as possible.

26. In addition to the baseline model and assessment provided by Mr Arnold and Mr Lawn on 11 April 2025 in response to the Commissioners' directions of 28 March 2025, real world examples have been provided of the type of building form that is consistent with a building meeting the permitted baseline. It simply cannot be said in all the circumstances that a building meeting the permitted baseline would be

fanciful, or not credible. In those circumstances, and where the experts have all agreed that a baseline should be applied, it is appropriate (if not required) to apply the permitted baseline.

27. As also acknowledged by Ms Hooper in questioning from the Commissioner at the hearing on 27 March 2025 – there are likely a number of permitted baseline iterations or scenarios that could be built on the site in this context (particularly bearing in mind that the site was once held in two titles and is now held in one relatively big title, with two dwellings built on it) – the version provided by Mr Arnold and Mr Lawn on 11 April 2025 being only one such example.

Landscape – assessment scale

28. Each landscape witness has referred to the Seven-point level of effect scale found in *Te tangi a te Manu*, Pg. 151, and how that compares to effects assessments under the RMA. The following table summarises how the authors of *Te tangi a te Manu* understood the comparison to be:

					SIGNIFICANT	
LESS THAN MINOR	MINOR	MORE THAN MINOR				
VERY LOW	LOW	LOW-MOD	MODERATE	MOD-HIGH	HIGH	VERY HIGH

29. There should be no dispute, that if a landscape architect, undertaking their assessment in accordance with *Te tangi a te Manu*, finds an effect to be low-moderate adverse, then has an only minor adverse effect in RMA terms. The table leaves no room for question (as Mr McEwan noted during questioning by the Commissioner at the hearing – and rightly so in my respectful submission). This differs from if a landscape architect found effects to be low adverse. In that case, the RMA equivalent could be less than minor, or minor still, and so some element of further judgment or expert opinion is required to understand what the RMA equivalent is (if that is important). But "Low-moderate adverse" simply cannot

equate to "more than minor" (or any higher effect) in RMA terms. As submitted in opening legal submissions, it is also impossibly hard to see how low-moderate adverse (ie minor) can equate to "not acceptable". Those submissions are not repeated here.

Submitter views on mitigation

30. It is accepted that submitters do not have to put forward options for mitigation. However, they will usually do so, to assist the consent authority, and to best ensure, if an activity proceeds then the mitigation is as effective as it can be for them, or at least does not result in unintended consequences for them.

31. As indicated above, the applicants are relatively neutral on whether offered mitigation planting is achieved through a pergola/climbing structure or planter boxes (although would like to use the existing steel brackets for the pergola if they had the opportunity to do so).

Kyle Arnold experience and qualifications

32. During the hearing the Commissioner asked Mr Arnold for his qualifications and experience (some of which were inadvertently missed from his primary brief of evidence).

33. Mr Arnold discussed that with the Commissioner at the time.

34. However, for the record and to confirm same in writing they are as follows:

    a. Advanced Diploma Architectural Draughting (Technology), Wellington Polytech & Massey University Wellington

    b. 3 years full time study with specialist area Architecture and Building » Architecture and Urban Environment »

    c. Additional study Advance 3D modelling at Victoria University, School of Architecture

d. 23 years' experience with design and development of complex buildings and structures

e. Project principal at BOON Ltd Architects for 15 Years

f. Studio manger 10 years

g. Current Associate Director, Boon Ltd.

35. The Commissioner will also recall that Mr Murdoch gave evidence at the hearing on 27 March 2025 – and that Mr Murdoch is a registered architect (as set out in his primary evidence) – and Mr Murdoch confirmed during questioning at that time by the Commissioner that he endorsed Mr Arnold's permitted baseline evidence provided at the hearing. Further, to provide further robustness in this context, the Commissioner will note that the permitted baseline model prepared by Mr Arnold, and provided in the response regarding additional information sought from the applicant filed by Mr Lawn with the Council on 11 April 2025 – was also peer reviewed by another of Boon's registered architects – Mr Shaun Murphy; as per Mr Murphy's letter dated 11 April 2025 included with that additional information filed by Mr Lawn on that date.

Responses to Mr Whyte's evidence at hearing:

36. It is respectfully submitted that opinion evidence purportedly given by Mr Whyte as to the magnitude of effects be disregarded or given little weight. As the Court's practice note states at 8.1(a) and (b):

> The provisions of the Evidence Act 2006 apply to proceedings in the Environment Court. Attention is drawn to ss 6–9, 23–26 and 53 and 57 of the Evidence Act in particular.
>
> The provision in s 276(2) of the Act, that the Environment Court is not bound by the rules of law about evidence that apply to judicial proceedings, is an enabling provision for the Court and not an exemption for parties, counsel or witnesses

37. While not directly applicable to a Council-level hearing, there is no reason that a different approach should be taken. After all, all the experts have attested to the Code, as if it were applicable in these proceedings.

38. What the Commissioner can take from the evidence of Mr Whyte (and Mr Roach, for that matter), is the evidence of the background factual matters that have led to a breakdown in the relationship between the parties. To the extent it may be relevant, you will be able to judge how each of the parties have behaved and presented themselves before you at the hearing.

39. Only a few further comments or observations are necessary:

    a. Mr Whyte has confirmed that he and his wife would never consent to any infringements of the District Plan standards. This seems to be the case no matter how small the infringement might be, or how limited the effects of the infringement are. That is essentially why we are here in these proceedings. No compromise has been forthcoming from the Whytes. That is their right, and the RMA does not require neighbours to be reasonable to each other.

    b. Mr Whyte has taken great offence to the suggestion that he has been taking photographs of the Roachs. If that is to be taken further, that is a matter for a different forum, other than to note that privacy works two-ways. Yet, Mr Whyte has admitted to taking photographs (but not how many and how frequently), and it is entirely understandable that the Roachs do not appreciate that.

    c. Effects on property values are generally considered irrelevant in RMA proceedings. The Environment Court has generally held in a number of decisions now that land/property values are not an effect for the purposes of the assessment under s. 104 RMA; the physical effects on the environment are of more importance to the case – and the Court confines itself to considering the direct effects on the environment (rather than

speculative effects, such as property devaluation which can be caused by many different things locally and/or globally).

In *Tram Lease Limited v CJM Investments Limited [2015] NZEnvC 139,* at [56]-[60], the Environment Court noted that the principles are not complicated or controversial and summarised them as follows (citations omitted):

> The starting point is that effects on property values are generally not a relevant consideration, and that diminution of property values will generally simply be found to be a measure of adverse effects on amenity vales and the like: ***Foot v Wellington City Council***.
>
> Similarly in ***Bunnik v Waikato District Council***, the Court held that if property values are reduced as a result of activities on an adjoining property, then any devaluation experienced would no doubt reflect the effects of that activity on the environment. The Court held that it was preferable to consider those effects directly rather than the market's response, because the market can be an imperfect measure of environmental effects.
>
> In ***Hudson v New Plymouth District Council***, the Court held that people concerned about property values diminishing were inclined to approach the matter from a rather subjective viewpoint. The Court held that such people become used to a certain environment, and might consider that property values would drop after physical changes occurred, however a purchaser who had not seen what was there before, would take the situation as he/she/it found it at the time of purchase, and might not be greatly influenced by matters of moment to the present owner or occupier.
>
> We agree with those findings in those cases and the reasoning behind them.

Concluding Comments

40. It is respectfully submitted that all other issues raised in the hearing have been thoroughly canvassed in the application, the applicant's evidence and further evidence, legal submissions, and discussions during the course of the hearings.

41. As requested by the Commissioner at the hearing – the images from the 3D model provided by Mr Arnold at the hearing (as shown on the big screen by him at the hearing) are also included with this reply. As canvassed at the hearing – the 3D model images are provided in this regard in screenshots – as the raw data is difficult to share (which was also discussed at the hearing as the Commissioner will recall). And, the red areas (shown on the 3D model images) are the breaches under the ODP (as also discussed at the hearing).

42. Finally, the consent conditions in respect of the further mitigation offered by the applicant prepared by Mr Lawn are included with his reply brief of evidence at Appendix C as directed; providing future certainty for all parties, and achieving sustainable management, in my respectful submission.

43. Of course, it should be remembered, that adverse effects on the environment must be considered by the consent authority having regard to their mitigated version, also taking into account proposed conditions of consent: see, for example, *Guardians of Paku Bay Association Inc v Waikato Regional Council [2012] 1 NZLR 271 (HC)*, at [129].

SWA Grieve
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9 May 2025