

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

AND an application pursuant to section 88 of the RMA, to the New Plymouth District Council by Regina Properties Ltd for land use consent for a residential apartment addition (one additional storey) to the top of an existing commercial building on the Business B Environment Area located at 1-3 Dawson Street New Plymouth in respect of land described as Lots 1 & 2DP 19418, and Lot 1 DP 10510.

1. INTRODUCTION

1.1 APPLICATION

The applicant has sought land-use consent to undertake substantial additions and extensions to the existing commercial building known as the GQ building and adjacent land, for residential purposes. It is proposed to construct a single residential apartment which would add a fourth story to the existing three- story GQ building and the remaining bulk of the proposed building will adjoin the GQ building to the south. The main elements of the proposal as summarised in the s42A report¹ are as follows:

- *Additions to the existing building resulting in a three storied annex addition to the GQ building as an extension*
- *In addition to the three- story annex extension the third story of this extension will extend over the existing three- story GQ building resulting in a fourth story to that structure, this is due to the terrace down from Lot 1 DP 10510 to Lot 1 DP 19148*
- *The fourth/third storey respectively provides for a rooftop apartment including both indoor and outdoor areas and an outdoor pool*
- *The existing commercial tenancy will be retained ground, first and second floors*
- *Car parking for the existing commercial facility would be reduced from 13 to 11 car parks including one accessible park, an e charging park and bike parking area.*
- *A separate two car garage will be provided for the house*

¹ S42A Report- para 20

- Existing vegetation will be retained where possible including all of the landscaping within Lot 2 DP 10510 and the large palm tree located at the north-eastern corner of the site
- 6 landscaping trees are shown
- Building finishes have not been confirmed but neutral colours are indicated

I was advised that proposal proposes a maximum building height of 15.4 metres above existing ground level within Lot 1 DP 19148 and therefore a maximum infringement of 5.4 metres above the permitted 10 metre height limit for the zone. However, and as the site is not uniform, differing height infringements occur at various parts of the site. The existing consented GQ building is approximately 1.7 metres higher than the 10-metre height limit set for the zone.

1.2 SITE & SURROUNDING ENVIRONMENT

- Background

The s42A report² outlined the consent background to the existing commercial building and that a consent had been granted in 1996 which allowed for an increased height to 11.7 metres noting that 10 metres was permitted by the relevant zone provisions at that time.

- Site

The s42A report described the site, which is comprised of three titles, as follows:

“The sum of the three allotments account for approximately 1553m² of land. Lots 1 DP 19148 and Lot 1 DP10510 consists of the majority of the site area and all of the area subject to the proposal. Lot 2 DP 19148 is a narrow strip of land owned by the New Plymouth District Council (NPDC) which the existing commercial building (Govett Quilliam or GQ building) extends into. The narrow strip of land owned by NPDC currently accommodates landscape planting, the existing building encroaches over this. Each lot is held under a separate certificate of title.

Historical natural topography in the area is reflective of Dawson Street which slopes gently towards the coast. The site itself is generally flat but has historically been terraced in to two levels. The lower level accommodates the GQ building which was been cut into what would have once been the sites natural sloping contour. The lower terrace has an RL of approximately 8.5 metres while the upper approximately 13 to 13.5 metres RL. Ground levels to determine maximum height limits under the ODP are to be taken from the last deposited survey plan of which was 1997. As specified by the applicant’s agents BTW, Council records show building inspections for the GQ building occurring in 1996 so the present terraced

² S42A Report- para 9

ground levels are reflective of the ground levels when the survey plan was deposited, this forming the ground levels used by the applicant to determine height exceedances and develop plans.

The site is separated from the Coastal Marine Area (as defined in the Act) by the Coastal Walkway and Marton Railway line and therefore the site is not subject to Statutory Acknowledgment for Te Ātiawa Iwi.”

- Surrounding Environment

Both the application and s42A report³ describe the surrounding area as follows:

“...the land use in this area is mixed. Commercial buildings and residential apartments are located to the south and east of the site. The Hine Street area to the west is generally in low to medium density residential use. A strip of Business D Environment Area is located along the western side of Dawson Street, developed as residential sites. St Aubyn Street supports a mixture again of residential and commercial sites.”

I did observe though that a significant part of the block bounded by the coastal walkway, Dawson Street, St Aubyn Street and Regina Place is of a residential nature.

The subject site adjoins Dawson Street to the west, to the north it adjoins the coastal walkway (Regina Place) and to the east the “Oceanview Apartments.” It is noted that the remaining adjoining properties to the south are owned by the applicant and accommodate vacant commercial buildings. Medium density residential properties (generally 2 storey) are located on the western side of Dawson Street, and to the south across St Aubyn Street, are the Devonport Apartments (4 storey). To the east of the Oceanview Apartments, is the Richmond Estate comprising a mix of 1 to 3 storey terraced residential apartments and an 8- storey residential tower block.

There are some commercial activities such as a dentist located at 124 St Aubyn Street, vacant commercial properties owned by the applicant and a corner dairy. However, residential activities are the predominant land use activity.

The buildings in the area are of a varying scale and character including the high- rise Richmond Tower and the mid-rise Devonport Apartments, both of which provide high density residential living. All other surrounding residential land uses are of a medium density and generally low rise (one to three levels), including the terraced housing within the Richmond Estate, Oceanview Apartments and the residential dwellings along Dawson and Hine Streets.

³ s42A Report-para 12

Overall, the area is predominantly characterised by residential activities of varying height and density and with some commercial/business activities, although mostly vacant. The subject site, Oceanview Apartments, Richmond Estate and Devonport Apartments are all located in the Business B Zone.

The s42A report noted that “the site is located outside of the Coastal Policy Area under the operative district planning maps, but the Coastal Policy Area does adjoin the sites northern boundary. Under the Proposed District Planning Maps the site is within the “Coastal Environment.” The area carries recreational and natural amenity values given the proximity to the Coastal Walkway. A further notable feature includes the “Honey field Fountain” a heritage item in both the ODP and PDP as a heritage item.

The adjoining road network includes Dawson Street which turns to Hine Street as it rounds the corner near the Coastal Walkway. Both Dawson Street and Hine Street are classified as Local Roads under the Operative District Plan and have a 50 kph speed limit. Further to the south, but not adjoining the site, is State Highway 44.

From a cultural context, the site is not subject to statutory acknowledgment nor identified to contain any mapped sites of significance to Maori (SASMs) under either the ODP or PDP.

Overall, the immediately surrounding area is consistent with its underlying business zoning which supports both medium to high density residential living and business activities. Residential activities do however dominate over commercial/business activities.”

1.3 PRE-HEARING MEETING

I was advised that no pre-hearing meeting had been held as it was not considered that matters could be resolved through such a meeting.

1.4 APPOINTMENT

I was appointed by the Council as an Independent Commissioner in terms of section 34A of the Resource Management Act 1991 (“the RMA”) to hear the applicant, expert witnesses, submitters, and the Council’s reporting officer and to determine the application. The information available to me prior to the hearing included the application documentation, assessment of environmental effects (AEE) report and other information; the submissions and a report prepared by Council’s reporting officer, being the section 42A report, and pre-circulated expert technical evidence.

1.5 NOTIFICATION

The application was subject to limited notification on 14 April 2021. The s42A report⁴ outlined all parties who were served limited notification and the reasons for an extended submission period which closed on 12 May 2021.

1.6 DEFINITIONS

In this Decision I use the following terms:

AEE	-	Assessment of Effects on the Environment report
Applicant	-	Regina Properties Ltd
District Plan	-	Operative District Plan
PDP	-	Proposed District Plan
RMA	-	Resource Management Act 1991 and its amendments
s42A	-	Section 42A report

2. HEARING

The hearing was conducted on 23 and 24 September 2021 in the Council Chambers, New Plymouth District Council.

Appearances were from:

2.1 APPLICANT

- Mr Stephen Quinn- Counsel
- Mr Keith Preston- Licensed Cadastral Surveyor
- Mr Murali Bhaskar- Registered Architect
- Mr Kyle Arnold- Architectural Technologist
- Mr Richard Bain- Landscape Architect
- Ms Darelle Martin- Consultant Planner

2.2 SUBMITTERS & WITNESSES

- Ms Sarah Ongley- Counsel (for following 10 submitters)

⁴ S42A Report-Paras 59 & 60

- Mr Bill & Mrs Diane MacArthur
- Mr Colin and Mrs Margaret Comber
- Mr Larry and Mrs Kaylene Stewart
- Mr Bill Williams (Statement read by Mrs Stewart)
- Mr Trevor and Mrs Kay Clegg
- Mr Bill and Mrs Judy Hurlstone
- Mr Morris and Mrs Ria Hey
- Mrs Lyn White
- Mrs Liz Pease (Statement read by Mrs Stewart)
- Ms Leonce Sharrock (Statement read by Ms Ongley)
- Mr Bill Jackson- Registered Architect (Witness for above submitters)
- Ms Barbara Holt- Via Zoom

2.3 COUNCIL

- Mr Luke Balchin- Planner & s42A reporting officer
- Ms Erin Griffith- Landscape Architect & Peer Reviewer

Ms Julie Straka was in attendance as Committee Advisor.

2.4 SITE VISIT

I conducted a site visit on 23 September 2021 prior to commencement of the hearing. I viewed the site and surrounding locality from the public roads and adjacent coastal walkway. I did not go on-site in respect of any property.

After adjournment of the hearing, I conducted a site visit on Saturday 25 September. The site visit involved visiting the GQ building and viewing the locality from the roof; entering a number of apartments in both the Oceanview Apartments and Richmond Estate complexes; and viewing the subject site and submitter properties from the coastal walkway and adjacent streets.

I was accompanied by representatives of the applicant and submitters being Ms Martin and Mr Comber. The Council advised that it did not need to participate in the site visit.

I was appreciative of the ability to go inside both the GQ building and several submitter apartments.

2.5 CLOSURE OF HEARING

I formally closed the hearing on Friday 22 October 2021.

3. SUBMISSIONS & MAIN ISSUES RAISED

At the conclusion of the limited notification period, 15 submissions had been received with 14 in opposition and one neutral. The following table outlines the submissions received and the matters raised by submitters

#	Name	Key Submission Points Raised
1	Lynette Elizabeth White –	<ul style="list-style-type: none"> • Some loss of sea views • Development should stay within ODP height limits.

	Devonport Apartments	
2	Diane & Bill MacArthur – 122 St Aubyn Street	<ul style="list-style-type: none"> • Oppose an already over height building being extended higher. • Will cast additional shading over winter + loss of sun. • Reduced sky space. • Questioning accuracy of shading plans provided by applicant. • Effects on privacy. • Impacts on outlook and accuracy of LVIA assumptions. Precedent set by past applications being rejected in the area for over height buildings.
3	Morris Hey Unit 1A/120 (Richmond)	<ul style="list-style-type: none"> • Seeks height reduction to comply with district planning requirements. • Outlooks effected. • Adverse shading effects.
4	Elizabeth Anne Pease – 3/120 St Aubyn Street (Richmond Estate)	<ul style="list-style-type: none"> • Oppose building that exceeds height limits. • Loss of views and privacy. • Noise pollution. • Additional shading over Richmond Estate and shading plans provided by applicant are inaccurate.
5	Kenneth James Gardener – G/120 St Aubyn Street (Richmond)	<ul style="list-style-type: none"> • Opposes height exceedance. • Assessment of shading effects is inadequate. Diminishment of amenity and quality of living in the area.
6	Bill Williams – Richmond Estate (Unit SGA)	<ul style="list-style-type: none"> • The development will result in sever shading of ground floor apartment in the Richmond Estate. • Shading will create dampness. • Diminish quality of life. • A modified design to reduce shading would partly address concerns.

7	Larry & Kaylene Stewart – 11/120 St Aubyn Street (Unit GC - Richmond Estate)	<ul style="list-style-type: none"> • Development should stay within ODP rules. • Will cast additional shading + loss of sunlight. • Loss of amenity and quality of life. • Questioning accuracy of shading plans provided by applicant. • Reduction of views of the sky. • Proposed building is closer than stated in application. • Loss of views/outlook to the west. • Precedent set by past applications being rejected in the area for over height buildings.
8	Lynette Elizabeth White - 2/120 St Aubyn Street (Richmond Estate)	<ul style="list-style-type: none"> • Opposes because area is predominantly residential. • Building will intrude and block views from apartment. • Adverse shading effects on Richmond Estate. • Shading studies provided have errors. • Parking is congested in the area. • Would endorse any development within the height thresholds of the ODP.
9	Susanne Anne Patten / Richmond	<ul style="list-style-type: none"> • Bulk and height of the development will be out of character with what is now a predominantly residential neighbourhood.
	Estate Body Corporate.	<ul style="list-style-type: none"> • Shading plans inaccurate. • AEE is inadequate regarding shading. • Adversely effects views to the west from the Richmond Estate.
10	Leonce Sharrock - 4/120 St Aubyn Street (Richmond Estate)	<ul style="list-style-type: none"> • Adverse shading effects • Lose most of western outlook. • Reduction in afternoon sunlight admission. • Shading plans inaccurate. • Shadows would create darkness and lack of warmth. Proposal should keep in line with district planning requirements.
11	Trevor & Kay Clegg - 10/120 (Richmond Estate)	<ul style="list-style-type: none"> • Proposal will result in excessive shading onto outdoor deck and living areas. • Negative effects on quality of life. • Shading assessments are an underestimate. • Proposal is out of character and will visually dominate
12	Colin Michael & Margaret Josephine Comber -	<ul style="list-style-type: none"> • Out of character with the neighbourhood Does not meet ODP requirements. • Shading diagrams are inaccurate and no information regarding methodology. • Accuracy of elevation plans (general) Application fails to acknowledge that the neighbourhood is primarily residential. • Uncertainty around mechanical services and noise effects. • Would prefer to see a redesign.
13	Barbara Colleen Holt - Devonport Apartment	<ul style="list-style-type: none"> • Effects on views from my apartment • Building will be uncharacteristic with the surrounding area. • Impact values of property. • Seeks application is declined
14	William & Judith Hurlstone – 1B/120 St Aubyn Street (Richmond Estate)	<ul style="list-style-type: none"> • Would cast shadows into their light filled rooms. • Loss of daylight and sunlight admission. • Adversely effects views • Shading plans are not accurate and does not illustrate effects on living areas • Adverse effect on ability to enjoy home. • Adverse effects on value of property.

		<ul style="list-style-type: none"> • Building is not in character with the area and will have adverse amenity effects.
15	Rosalie Bennett	<ul style="list-style-type: none"> • Basically, supports the project. • Has concerns over winter shadows which might have an impact on lichen and moss growth.

4. PLAN PROVISIONS AND ACTIVITY STATUS

- Operative District Plan

The District Plan became operative on the 15 August 2005. The site is within the Business B Environment Area and is subject to map overlays including:

- Section 3 Cameron Street Viewshaft
- Section 3 Marsland Hill Viewshaft
- Coastal Hazard Area - Lot 2 DP 19148 only.

It was common ground that the proposal did not comply with a number of District Plan rules outlined as follows:

- Rule Bus 13 – specifies a 10m maximum height limit for the location. The proposal cannot meet the permitted conditions of this rule because the building height is a maximum of 15.4m. This is a restricted discretionary activity.
- Rule Bus 19 – specifies that seven landscaping trees would be required along the Regina Place boundary. Of the 7 trees required 2 are proposed. This is a restricted discretionary activity.
- Rule Bus 87 – specifies the quantity and design standards for car parks to be provided. The proposal would require 16 parks to meet the standards set under Bus 87, 13 are proposed. This is a restricted discretionary activity.
- Rule Bus 88 – specifies the loading and standing space requirements. No designated loading or standing space has been proposed by the applicant. This is a restricted discretionary activity.
- Rule Bus 91 – specifies the queuing space requirements. Queuing space of 6m is not provided between the front boundary and the first carpark. This is a restricted discretionary activity.
- Rule OL 63 – Maximum height of a building within the Cameron Street viewshaft specifies a 10m maximum height. The proposal cannot meet the permitted

conditions of this rule because the building height is a maximum of 15.4m. This is a restricted discretionary activity.

- Rule OL 71 – Maximum height of a building within the Cameron Street viewshaft specifies a 10m maximum height. The proposal cannot meet the permitted conditions of this rule because the building height is a maximum of 15.4m. This is a restricted discretionary activity.

Given that where there is non-compliance, and as noted for all of the above rules, consent is required as a restricted discretionary activity in respect of the District Plan Provisions.

- Proposed District Plan

I was advised that the Proposed New Plymouth District Plan (PDP) had been publicly notified on 23 September 2019 and the further submissions process closed on 12 August 2021.

The s42A report outlined that the subject site was within the ‘Mixed Use Zone’ and subject to PDP map overlays including:

- Section 2 Cameron Street Viewshaft
- Section 4 Pūkākā / Marsland Hill Viewshaft
- Coastal Environment
- Coastal Hazard Area - Lot 2 DP 19148 only
- Notable Tree Group Site ID 357 - Lot 2 DP 19148 only

Mr Balchin advised that there were no rules in the PDP relevant to the application with immediate legal effect. The consideration of objectives and policies is outlined in section 10 of this decision.

5. MATTERS OF DISCRETION

The matters of discretion that the Council has restricted itself to relate to Rule Bus 13, Rule Bus 19, Rule Bus 87, Rule Bus 88, Rule Bus 91, Rule OL63, and Rule OL71.

The relevant District Plan restricted assessment criteria are outlined in section 9, under each relevant section of the ‘Main Findings’.

6. PERMITTED BASELINE

Section 104(2) provides discretion to apply the permitted baseline. Section 104(2) of the RMA provides that when forming an opinion about whether there are any actual or potential effects on the environment of the allowing of the activity, the consent authority may disregard an adverse effect of an activity on the environment if the plan permits an activity with that effect.

The permitted baseline applies when considering any effects that may apply as a result of a permitted activity.

Both Ms Martin and Mr Balchin were of the opinion, that it was appropriate to apply the permitted baseline when assessing the proposal and therefore relevant to my consideration of the proposal.

Ms Martin outlined⁵ that she considered the permitted baseline was relevant and necessary to apply *“because the ODP sets a permitted height standard of 10 m for the site without any other restrictions on building bulk, design or location, nor are there any restrictions on these matters imposed on the site by other sites it is adjacent to, as it is effectively surrounded by the same Business B Environment Area applicable to the site.*

I consider that it would not be fanciful for a landowner to develop the application site as per the permitted baseline example used (demonstrated in Ms Batchelor’s evidence) because of the following contributors:

- a. *Because of the site’s values such as:*
 - i. *Location in close proximity to the central city area with services / facilities, large population of people, a short commute from outside suburbs, and near main transportation routes*
 - ii. *Size, at 1,478 m² (owned by the applicant, excluding the NPDC owned landscape strip); and*
 - iii. *Aesthetic, being near the coast with views of the sea and recreation opportunism nearby”*

She further outlined that there *“is a reasonable likelihood and expectation then that the site follows a similar development pattern and intensity to those surrounding it, noting that the Business B Environment Area provides for it.*

As such, site, elevation, and 3D plans (SK3.10-13) demonstrate a non-fanciful building addition surrounding the existing building to 10 m above ground level on the application site. The model of the building was then utilised to provide shading plans to demonstrate shading effects from a permitted baseline development.

I note that the assessment criteria for Bus13 is with regard to the effects of the “extra height” of the building, and most of that for OL63 and OL71 is with regard to effects of the “additional height” of the building. The ODP therefore directs

⁵ Martin Evidence in Chief- paras 21-26

assessment to effects of only the parts of the building which are not permitted and therefore supports consideration of the permitted baseline when determining applications for over-height buildings.”

Mr Balchin was of the opinion that the applicant had demonstrated that the permitted baseline was relevant. He noted⁶ that *“the site adjoins Business B to the east and south, and road reserve to the north and west, the ODP entails that the site is not subject to any site coverage, setback or daylighting restrictions. Further, and even if the applicant developed the site to half the extent show on the applicants plans effects on properties to the east would be similar to if the applicant developed the site to its fullest extent.”*

He also outlined that the Business B Zone permits and encourages larger scale, bulky buildings such as warehouses.

Mr Balchin further outlined that with respect to *“the interface of the site with the eastern boundary where effects are mostly directed, the applicant could rightfully construct a building on the boundary. The building may be 10 metres tall with no daylighting requirements and with no requirement for windows or any façade treatment. The applicant has illustrated on drawing SK3.13 the extent of a permitted building on the site taking into account all relevant zone and overlay provisions in the ODP and the PDP.”*

I have considered Mr Comber’s evidence in respect of application of the permitted baseline. He noted that non-habitable buildings such as warehousing and offices, would unlikely be future uses of the subject site. However, such uses are provided for by the zone provisions. Furthermore, he suggested that a 3- metre setback from the eastern boundary would be a more likely scenario, although as noted by both Ms Martin and Mr Balchin, there are no setback requirements.

Having considered the planning expert evidence of Mr Balchin and Ms Martin, and the evidence of Mr Comber, and legal submissions of both Mr Quinn and Ms Ongley, I have concluded that it is appropriate to apply the ‘permitted baseline.’

7. PRINCIPAL MATTERS IN CONTENTION

Having considered the application, submissions and evidence provided, and being guided by the assessment criteria of the District Plan, I consider that the principal issues of contention are in relation to the restricted criteria are:

- Character and visual amenity
 - Shading
 - Bulk, dominance, and privacy and outlook
 - Coastal walkway and amenity
-

⁶ S42A Report- paras 46-48

- Landscape and visual effects
 - Urban viewshafts
 - Outstanding and regionally significant landscapes
- Natural character and coastal environment
- Effects of reduced landscaping
- Traffic and transport

8. SUMMARY OF EVIDENCE

The following summary is not intended to be a full coverage of all matters raised at the hearing. Relevant parts of the evidence presented by the parties are referred to in the 'Main Findings' section of this decision, where it forms a component of the findings by me, in determining the application.

8.1 APPLICANT

- **Mr Quinn** presented his opening legal submissions. He noted that the applicant agreed with the conclusions and recommendations of the expert evidence presented and the Council's s42A report.

He further outlined that Ms Emily Batchelor who had provided architectural design and shading evidence could not attend the hearing because of health reasons and that her colleagues Mr Murali Bhaskar and Mr Kyle Arnold were in attendance to answer any questions in respect of architectural and shading matters, respectively.

Mr Quinn outlined the permitted activity rules the proposal did not comply with and the relevant matters of restricted discretion.

Mr Quinn outlined various matters that were raised in submissions, which were not within my scope of discretion. These included submission points that the area was predominantly residential and that exceeding the 10m height would not be possible in the residential zoned area. He noted that the subject site was in the Business B Environment Area and had different matters for discretion when assessing applications.

He outlined that in respect of precedent effect, this was not something to be considered as it was not specified in the matters of discretion, and while they may be relevant to non-complying and discretionary activities, were not relevant to the matter before me.

In regard to concerns raised about property values, he advised that this was not an effect recognised by the RMA, and not a matter for which discretion had been reserved.

Mr Quinn outlined that while privacy and overlooking had been raised, privacy was not a matter discretion had been reserved. He further noted that this was a point of difference between the Business B Environment Area and the Residential Environment

Area and indicated a differentiation between the intended function and amenity of the two zones.

Mr Quinn noted that submissions had highlighted concerns in respect of effects on landscape character and outlined that other than effects on regionally significant and outstanding landscapes, and effects as a result of reduced road frontage landscaping, were not matters that discretion had been reserved.

He outlined concerns relating to impacts on views, including coastal and sky views, and loss of sunlight were also beyond the scope of matters of discretion, except where such effects on visual amenity and character would arise from the proposed additional height.

In addition, noise and character of the building were not matters of discretion.

Mr Quinn outlined that it was appropriate to apply the 'permitted baseline' and that the applicant had addressed this with a credible and non-fanciful assessment. He noted that the permitted baseline would 'arguably' impose greater effects on submitters than the proposal before me.

Mr Quinn discussed shading effects and outlined that shading generated by the proposal over that created by the permitted baseline was generally limited with a noticeable proportion on roofs with most shade disappearing from one hour to the next, and that visual amenity and character were not impacted. He further described various properties where shading would occur beyond the permitted baseline.

Mr Quinn commented on the assessment of the proposal against the District Plan policies and objectives, Part 2 of the RMA, the NPS-UD, expert evidence to be called by the applicant and submissions.

He concluded that consent should be granted to the proposal.

- **Mr Preston** outlined that he had been engaged by the applicant to prepare a survey dataset of the existing buildings at 122, 122A and 122 B St Aubyn Street and the Richmond Estate complex for shading analysis and to provide visualisation images of the proposed buildings from the submitter properties.

He outlined the process undertaken for the consent application and the visual simulations prepared by Mr Bain. Mr Preston also noted that the methodology he had used had been provided to the Council's peer reviewer being Mr Stefan Kiss of Taylor Patrick Ltd who was also a licensed cadastral surveyor and who confirmed that the approach of Preston in undertaking the survey capture was acceptable.

- **Mr Bhaskar** appeared at the hearing as Ms Emily Batchelor who had prepared the evidence in chief in respect of architectural design and shading matters was unable to attend the hearing due to ill-health.

Mr Bhaskar supported the evidence prepared by Ms Bachelor.

- **Ms Bachelor's** evidence covered architectural design of the proposal, and shading study evidence. In respect of the shading matters, Ms Bachelor outlined that her evidence did not pass judgment on the significance of shading effects and left that to others. She noted that the design concept focussed on a modern residence which is sympathetic to the existing GQ building, and that it had been carefully designed in consideration with the bulk and form of the existing building to mitigate visual dominance effects of the new extensions. Ms Bachelor outlined the design process and that it had developed over a period of time and discussed a range of design constraints and solutions.

She provided an outline of the modelling techniques and processes used in respect of shading evaluation. Also, she outlined that the permitted baseline development shadow study was undertaken using the same technology and survey data used for the shading evaluation.

Ms Bachelor discussed in some detail the shading effects in respect of 122, 122A and 122B St Aubyn Street, and the Richmond Estate. This part of her evidence is referred to in the 'Main Findings' section of this decision.

Her summary statement responded to submitter evidence and the evidence of Mr Jackson.

- **Mr Arnold** as with Mr Bhaskar appeared at the hearing as Ms Emily Batchelor who had prepared the evidence in chief in respect of architectural design and shading matters was unable to attend the hearing due to ill-health. Mr Arnold had assisted with developing the project brief and assisted Ms Bachelor with preliminary design options and supervised the 3D modelling process and shading considerations.
- **Mr Bain** provided a summary statement of his evidence in chief. He noted that the effects of the proposal on public viewpoints were very low which was due to the setback of the proposal's top level which would avoid dominance over users of the coastal walkway. He also noted that the Richmond Estate tower block reduces the scale of the proposal in the context of buildings in the area.

Mr Bain outlined that the effects on the District Plan urban viewshafts was very low for the Marsland Hill Viewshaft, due to the small scale of the proposal in its urban context, and he had proposed that there be conditions imposed regarding reflectivity of external cladding and the use of a neutral colour palette. Mr Bain noted that in assessing effect

on the viewshaft, it gives a sense of place to New Plymouth as a coastal city. While there would be a loss of view, it would be of a small impact. He further noted that the proposal would not be visible from the Cameron Street Viewshaft.

Mr Bain outlined that he had assessed the visual amenity from each submitter's property and had concluded that the loss of view elements (landscape elements screened by the proposal) does not reach a threshold in his opinion whereby the viewers sense of place is adversely affected.

Mr Bain noted that Mr Jackson in his evidence did not provide any methodology regarding the photographs he provided with a proposed building outline and accompanied by a very brief assessment. Mr Bain also took issue with several statements made by Mr Jackson and outlined reasons for his alternative opinion to Mr Jackson.

Mr Bain advised that in respect of 122 St Aubyn Street, that the view to Paritutu would be lost through a permitted baseline approach. He noted that the primary view was to the ocean and to the northwest and Paritutu was a distant focus, and that the loss of view was no more than minor.

He noted the proposed buildings potential dominance, but dominance did not relate to the restricted discretionary criteria. He stated that in terms of the character of the area, there is no dominance effect.

Mr Bain referred to the LVIA he had prepared and concluded that the proposal would have acceptable effects on character and visual amenity of the surrounding area.

- **Ms Martin** outlined that it was relevant to apply the permitted baseline in assessing the proposal and that it was feasible and not fanciful to develop the subject site as per the scenario outlined in the application.

She noted while shading is not specifically listed as a matter of discretion, it has a part in the consideration of effects on the character and visual amenity of the surrounding area. She noted that the Residential Environment Area has standards to manage shading on neighbouring properties, there are no such applicable rules in the Business B Environment Area.

Ms Martin highlighted that shading over and above that generated by a permitted baseline development, was generally limited to small patches and slivers in terms of area with most shade on any location disappearing from one hour to the next. She noted that shading was generally limited to certain time of the year. She concluded that in respect of shading effects, the character and amenity of the Business B Environment Area and submitter properties would be largely maintained.

Ms Martin considered that any dominance and bulk effects on the area and properties would be minor and that adverse effects from the proposal would be acceptable.

She noted that the proposal to be consistent with the objectives and policies of the District Plan. Ms Martin discussed the proposal in respect of the Proposed District Plan and that the proposal demonstrated consistency with a number of the strategic objectives, and that it was generally consistent with the relevant objectives and policies of that plan.

Ms Martin discussed matters raised by submitters and was of the view that the proposal was compatible with the character of the area, that adverse effects are acceptable and similar to those that would occur, from a permitted baseline development.

8.2 SUBMITTERS

- **Ms Ongley** outlined that she represented ten submitters who were all in opposition to the application. She observed that the area was essentially residential in character and was characterised by 2 & 3 storey residential buildings.

She outlined that I should have regard to as well as character, the submitters evidence on amenity which encompassed concerns relating to shading, blocking of access to the sky, compromised privacy, loss of access to sun and its health effects domination of the neighbourhood, and blocking of views.

Ms Ongley quoted the RMA definition of “amenity” and outlined that the concept of amenity is assessed in the context of a particular neighbourhood. She outlined a decision of the Environment Court (*Panuku Development Auckland Limited v Auckland Council* [2020] NZEnvC 24) that had concluded that residents’ evidence about what comprises amenity values is equally important to consider as is expert evidence.

She noted that residents’ level of amenity would be significantly affected, including privacy and dominance effects in addition to views and shading.

She further outlined that privacy and dominance were part of amenity considerations.

Ms Ongley outlined that the proposal will dominate the neighbourhood casting shadows and denying access to natural light. She further outlined⁷ that:

“It is accepted that to some extent, Rule Bus 13 of the Operative District Plan endorses the permitted baseline through its focus upon the ‘over height’ elements of the

⁷ Ongley Submissions- Para 32

building. You must consider whether the over height element of the building makes it particularly 'dominant' or introduce shading effects that are unacceptable. In relation to the duration of shading effects, in the Dawson Developments application, it was found that shading of a short duration during the day, may constitute a material adverse effect.

The Application documents establish that there will be additional shading, compared to a permitted building that filled the entire envelope. These shading effects are significant. Shading to the dwellings to the west will occur in the evening and in winter months where (Ms Martin also accepts) sunlight is most important. This includes effects of shading on balconies, as well as primary indoor living spaces.

Unfortunately, the shading analysis has again grouped the Richmond Estate Apartments - stating additional shading will occur during March-September and "typically" the proposed shading is similar to what would be created with a permitted baseline development. Ms Batchelor does note that the greatest impact will be on the Stewarts, but she fails to point out that the permitted baseline assessment does not hold true for the Stewarts. The relevant shading effect on the Stewarts living areas, would be due to the increase in height of the current GQ building, not a permitted building created over the current carpark area."

Ms Ongley outlined various matters related to use of the permitted baseline and was of the view that the applicant had produced little evidence that the baseline was realistic.

Ms Ongley discussed the NPS-UD and that the proposal did not fulfil its policies as it would not allow more people to live in areas that are near a centre zone nor supply more development capacity or improve amenity for some while reducing the amenity for other people.

In her supplementary submissions, Ms Ongley submitted that it is appropriate to consider relevant objectives and policies to help inform an understanding of the matters over which discretion is restricted and cited the Environment Court's conclusion reached in *Wellington Fish and Game Council v Horizons Regional Council* [2017] NZEnvC 37 that supported her contention.

Ms Ongley was of the view that the above case "*is authority that it is appropriate to consider relevant objectives and policies to inform its understanding of the matters over which discretion is restricted.*

She outlined the following policies as being of relevance to consideration of matters related restricted discretion:

Policy 1.2:

“Activities within an area should not have adverse effects that diminish the amenity of neighbouring areas, having regard to the character of the receiving environment and cumulative effects.”

Policy 7.1:

“Buildings, signs and other structures should be designed and/or located to avoid, remedy or mitigate adverse effects on the character and visual amenity of business areas.”

Ms Ongley noted that policies indicate that the amenity of each area is to be considered and that the objectives and policies require a detailed analysis of the factual character and visual amenity of the area in question.

- **Mr Jackson** in his statement considered that the most significant breaches of the rules related to the proposed maximum height of 15.4 metres noting the maximum height in the zone was 10m, and the same height breach in respect of the 10m maximum height permitted in the Marsland Hill Viewshaft.

He was of the view that the proposal should be assessed differently from if it were in the middle of the Business B area and should be assessed in relation to the character and visual amenity of the surrounding area in terms of its effects on people.

Mr Jackson questioned the applicant’s AEE and that the proposal would have negative effects on the already established residents who will lose privacy. He noted Ms Martin’s evidence that privacy was not specifically included as a matter of discretion, but believed it was a factor in considering peoples appreciation of an area’s pleasantness, aesthetic coherence, and recreational attributes.

He highlighted that the MacArthurs at 122 St Aubyn Street and Unit 11RE would be particularly affected, and the MacArthur’s living area and deck will be overlooked by a wall of glass. He also noted that while shading effects are not listed as a matter of discretion, such effects are given a lot of attention by the applicant.

Mr Jackson stated that the proposal had little regard for the loss of amenity to the surrounding environment which was predominantly residential in character and use.

He further outlined that shading effects have been understated as being minor and that some effects have not been addressed.

Mr Jackson that technical issues are not addressed such as effects on neighbouring residents’ amenity, quality of life, health, and safety.

He concluded that the effects of the proposal on character and amenity of the surrounding area are more than minor.

- **Mr Comber** presented two statements of evidence, the first being matters specific to he and his wife personally and their residence being 122A St Aubyn Street, and the second related to statutory planning matters.

In respect of the first statement, he was concerned that due to the 3.7 m of additional height coupled with a new build at 11.4 m, that natural daylight to all windows along the western wall of their dwelling would be significantly diminished. In addition, he noted that they will lose the benefit of direct afternoon light into their kitchen scullery.

The loss of privacy was another concern, but he did acknowledge a potential loss of privacy due to a complying building being erected on the subject site.

Mr Comber was of the view that when looking at the north elevation (Boon SK3.02.1 and the east elevation Boon SK3.03.1 shows how incompatible the proposal is with the character of the existing residences in the immediate vicinity.

He also highlighted concerns about the height exceedance and the effect of creating excessive shading. Mr Comber noted that their residence would suffer up to an additional 5 hours of additional shading in the summer months and additional; loss of sunlight and daylight to windows on the western elevation of their residence.

Mr Comber highlighted that the proposal was out of character with the existing built environment and that except for the Richmond Estate tower block, comprised of 1-3 story buildings.

He observed that the proposal had been designed with little regard to neighbouring residential properties and would dominate visually, neighbouring properties. In addition, it would create excessive adverse shading effects on a permanent basis although those may vary with the seasons.

In respect of statutory planning matters, Mr Comber highlighted a concern with the applicant's permitted baseline assessment, and that a more realistic use of the site would involve a building with a setback from the eastern boundary which would result in lesser adverse effects such as shading on adjacent residences. I further noted that a 100% site coverage scenario cannot be considered as non-fanciful.

Mr Comber discussed definitions of environments including what constituted the surrounding environment.

He noted that the immediate locality is residential in character.

Mr Comber discussed a range of other matters such as dominance of the proposal on the surrounding environment and its effects on character and visual amenity of the area. He

also outlined that the proposal was contrary to the NPS-UD as it does not increase residential densities.

In conclusion Mr Comber considered that the proposal had potential adverse effects that out-weighted any positive benefits and that residents in the area will experience a dominating effect of a bulky over height development coupled with shading, reduced daylight, and views of the sky and for some reduced views of the coastal environment which was an essential component of local amenity.

- **Mr & Mrs MacArthur** (122 St Aubyn Street) were opposed to the proposal. Mr MacArthur's statement outlined the background to the development of his residence and adjoining properties. It was considered that the proposal would have very high adverse effects on privacy and views and objected to the loss of sun and sky space also.

He was concerned that there would be extra shading and loss of sunlight to their north facing windows, ranch-slider, and balcony. Reference was made to Shading Effect Summary SK5.06 which showed that the extra shading in February to November is substantial and that a large portion of that time is the highest degree of additional shading. Mr Mac Arthur explained that they would have no direct sunlight from 3pm at least 8 months of the year.

He also referred to the BOON shading study which showed that there would be additional shading on their property commencing at 2.30pm.

- **Mrs Stewart** (Unit GC- Unit 11 120 St Aubyn Street) presented her statement outlining the application was opposed due to the excessive height of the proposal and the loss of sunlight and resultant shading. She considered that the loss of sunlight and the extent of shading would have a permanent detrimental effect of the quality of life they enjoy and the enjoyment of the indoor and outdoor living areas.

Concerns were highlighted that sunlight into the living room on the western side of the ground floor would be lost and that the view of the sky would be permanently lost.

Mrs Stewart was concerned that the sun would be lost earlier off the deck area. She did not think it reasonable that consent be granted when the building is already over-height and that it would have a detrimental effect on the lives of people in the area.

Mrs Stewart quoted from the s42A report that outlined that Unit GC is affected for more months of the year being March, June, and September, and that the shading plans showed that an additional 1.5 hours of shading in March and September when compared to the existing environment.

Mrs Stewart provided a range of comments in respect of the s42A report and the evidence of Ms Martin.

She concluded that the proposal if granted consent would be at the expense of neighbouring residents.

- **Mr Bill Williams** (Unit SGA) statement was read by Mrs Stewart. Mr Williams opposed the proposal. His apartment is below that of the Stewarts in Richmond Estate and he noted that it already has limited direct sunlight and subject to significant afternoon shading particularly in the winter months from the GQ building.

Mr Williams was concerned that additional shading effects and further reduction in direct sunlight created by the proposal will diminish the quality of life of the occupants of his apartment.

- **Mr & Mrs Hurlstone** (Apartment 1B 120 St Aubyn Street) opposed the proposal. Concerns were expressed that the proposal would result in significant adverse effects on neighbouring homes, the coastal walkway and impact on the amenity and landscape character of the area.

It was considered that the proposal would cut out reflected light and late afternoon sun, cause shading in our living areas and bedroom and affect their outdoor living enjoyment which is predominantly late afternoon and early evening.

It was outlined that their apartment was filled with sun from about 11am each day to within about 10 minutes of the setting sun. Little if any shading was experienced.

- **Mr & Mrs Clegg** (10, 120 St Aubyn Street) presented a statement where they opposed the proposal and building over the permitted height of 10m. Concern was expressed that the proposal would being 5 metres higher than the existing permitted height will take away afternoon sun from their deck and lounge area. The sun was considered to be most important to them as the deck and lounge was used to BBQ and entertain frequently late in the day.

Mr Clegg outlined that they have a view west toward the applicant's site and also have a viewshaft to the upper part of Paritutu and the top of the power station chimney.

Concern was also expressed that there will be a loss of privacy as there will be a direct line of sight from the applicant's residence to their deck and adjoining living areas.

- **Mr Hey** (Apartment 1A /120 St Aubyn Street) presented a statement on behalf of himself and his wife. Their major objection is that part of their lifestyle will be taken forever by the proposal. Mr Hey outlined that their apartment is at a lower level of the tower block and that by mid-afternoon, the loss of sun would have a major impact on their lifestyle as it descends behind the proposal.

Concern was also expressed that the proposal will intrude into the viewshaft directly west of their balcony and that views of the Sugar Loaf Islands and chimney will be lost.

- **Ms White** (Unit 2 /120 St Aubyn Street) provided a statement where she outlined that when purchasing her property, was influenced by the views and light. In particular, the land and sea view from Paritutu to the Kaweroa stand of pohutukawa and to Motuhora and Motumahanga.

She outlined that the port and Sugar Loaves were of significance to her, and the proposal will effectively remove her view of significant whanau history, particularly given her grandfather and great-grandfather had been hard hat divers for the Harbour Board.

She also expressed concern that the proposal would set a precedent for the area and that the flow on effect of granting consent with other buildings being built above the height restriction, would change the character of the neighbourhood.

Ms White was also concerned that that the reflected light enjoyed will be reduced with subsequent short negative effects on sleep, mood, performance, and alertness, as well as long term negative effects on physical health.

- **Mrs Pease's** (Unit 3 /120 St Aubyn Street) statement was read by Mrs Stewart. She was concerned that her apartment would suffer shading from the proposed development. She noted that the shading diagrams for September at 6pm show that shadow will reach her living area windows on the west side. It was noted that shading is not currently experienced, and it will be solely attributable to the proposal.

Mrs Pease was also concerned that her views to Dawson Street and beyond will be significantly interrupted due to the excessive height of the proposal. She also outlined that the proposal has no regard for privacy of the residential neighbours with extensive glazing and balconies looking out to neighbouring dwellings.

- **Ms Holt** (No 1 Devonport Apartments, 127 St Aubyn Street) attended the hearing via Zoom and presented her statement. Ms Holt highlighted five matters that were of concern.

She noted that her apartment is on the top floor and is most impacted in that it sits directly behind the proposal and would be right in the middle of her elevated and unobstructed

view of the ocean. Given the existing building was 1.7 metres above the current height limit of 10m, she believed that there should be a reasonable expectation that the rules would not be further waived.

She outlined that the evidence of Mr Bain downplayed the impact of the proposal on her property and disagreed with his conclusions and the proposed development is front and centre and would remove her unobstructed view of the horizon. She noted that there is only one view from her apartment and is her visual amenity. Ms Holt was of the view that the proposal would split her view in half and disagreed with Mr Bain's opinion that '*the broad seaward outlook is maintained.*' She further noted that her view is from her sunporch window which is 8 metres wide by 1.5 metres high. There are no side views from her apartment.

Ms Holt noted her concern that the proposal would significantly reduce the value of her property, and that advice from a local real estate agent, was that the proposal could reduce the value of her property by up to 10%.

Ms Holt outlined that the applicant had contacted her requesting approval to his proposal.

She also noted that if the application was successful, it could set a precedent for other proposals that reduced views for others.

Ms Holt commented that the proposal only benefitted one family and the adverse effects on the wider community would be severely detrimental.

- **Ms Leonce Sharrock's** (4/ 120 St Aubyn Street) statement was read by Ms Ongley. She was concerned that the proposal would seriously affect the light and sun enjoyed by properties in Richmond Estate. Concern was expressed that she would lose most of her western outlook to the Kawarua Pools, Paritutu, the stunning sunsets and ships using the port.

Ms Sharrock questioned the accuracy of the shadow diagrams.

She outlined that the proposal would not maintain amenity values, or the quality of the environment and it was inappropriate in terms of its scale. She also that the loss of western views would be substantial.

Ms Sharrock outlined the significance of the Sugar Loaf Islands and the marine protected area which her late husband, and son had spent many hours counting marine life, and the removal of this view would be of considerable concern.

8.3 COUNCIL

- Mr Balchin's s42A report was taken as read. He presented a prepared statement responding to various matters raised during the course of the hearing.

He noted that the primary topics in respect of the effects assessment related to visual amenity, character, privacy, shading and sunlight admission.

Mr Balchin outlined that *“visual amenity values are protected differently depending on zoning, overlays and the character of an area. This is reflected in the way objectives and policies in the district plan are worded and to ensure assessments are commensurate to the zoning and character of an application site. In relation to character, which has been a common topic of discussion, it is my opinion that there is a predominance of residential activities in the area. However, the proposal is residential in nature and in my view not out of character given the 4 storey Devonport apartments, 8 storey Richmond tower and proliferation of other 2 and 3 storey residential buildings.”*

He further noted that just because the character of an area is predominantly residential it does not change the matters of restricted discretion, relevance of the permitted baseline or ability for any person to propose a development as a permitted commercial activity. He stated that he agreed with the applicant legal submissions and planning evidence on these matters.

Mr Balchin outlined his views in respect of the Business B Environment area, and that it is a mixed- use zone where commercial and residential activities can co-exist. Residential activities are provided for, but commercial activities are also permitted, which is evident in the way that the matters of restricted discretion are worded and the permissive rules relating to setbacks and site coverage.

He also noted that the zone is a *“CBD ‘fringe’ area in transition from residential to business character. This is also evident in the way of which the site has been zoned mixed purpose in the PDP of which in my view is the twin zoning for the Business B Environment area.”*

Mr Balchin outlined his agreement with submitter's that there were adverse effects, but he concurred with the applicant that the permitted baseline is applicable and this along with the matters of restricted discretion, limit the ability to consider the extent of those effects.

He expressed his opinion that he did not believe the District Plan was *“designed to protect all day sun when living in a business zone and this would set an unreasonable expectation on land- owners considering the development of business zone sites, whether it would be for commercial or residential purposes.”* He was of the view that the imposition of suitable consent conditions would be the appropriate way to manage effects.

Mr Balchin believed private views were not protected through the District Plan provisions, but that they form part of visual amenity.

I note his opinion that the “properties in question maintain an acceptable level of visual amenity given the business zoning. This is consistent with the advice I have received from both the applicants, and Council’s landscape architects. I note my conclusion on this, particularly regarding 122 St Aubyn Street and Unit GC of the Richmond Estate, has been influenced by the application of the Permitted Baseline and Mr Quinn’s detailed analysis of the matters of restricted discretion. If it were not for the permitted baseline and activity status my 42A report conclusions would have likely differed.

Mr Balchin outlined that *“the site could be developed in a way which may have wider reaching effects. For example, a high density 3 storey residential apartment with considerable site coverage, multiple windows facing east effecting privacy or possibly worse bulky goods warehousing. A residential apartment complex of 3 storeys, basement parking and across a majority of all three sites owned by the applicant could occur as a permitted activity. Given the current demand for housing I suspect this would be a valuable and non-fanciful use of the land. I note in my thinking I have taken a slightly more cautious approach than the applicant regarding the permitted baseline and have considered it on the basis of the property being developed to say 75% GFA to allow for functional elements and road frontage landscaping, however the effects, and particularly on sites to the east would be comparable to what has been presented by the applicant. The more cautious approach is reflective of Ms Ongley’s comments at Para 36 and 39 of her legal submissions.*

Mr Balchin emphasised that the “permitted baseline had been stress tested” and in his view was plausible and credible.

He remained of the view that consent be granted to the application subject to conditions.

- **Ms Griffiths** advised she was comfortable with the proposal and noted that the use of neutral colours would assist in lessening the visual impact of the proposal.

8.4 APPLICANT’S RIGHT OF REPLY

- Mr Quinn provided a partial reply verbally as I had requested that the reply be in writing.

Mr Quinn highlighted a key issue in respect of Ms Ongley's submissions regarding amenity effects and values. He noted that the relevant matter of discretion is limited to character and amenity and stated that the word visual was of significance and that ‘visual amenity’ must be interpreted as narrower than amenity, otherwise the visual would be redundant.

Mr Quinn further outlined that:

“the lack of express inclusion in the matters of discretion to matters such as privacy and sunlight envelopes is of significance. The limitation of the restricted discretion to visual amenity and character effects arising from the over height component, and bulk and dominance to the effects on the Residential Environment Areas, cannot be ignored.”

He noted that the limits to the discretion were deliberate drafting choices in the District Plan and provided examples of residential rules that *“list both the character and visual amenity of the area, and the privacy and outlook of adjoining sites as assessment criteria”*.

Mr Quinn highlighted that:

“This is also the case for other rules that apply in business zones. For example, Bus15 (maximum site coverage in Business D) refers to visual amenity and character as well as privacy and outlook, and rules Bus16 and Bus 17 (which relate to setbacks) only refer to privacy and outlook not visual amenity and character. If visual amenity and character was intended to include impacts on privacy and outlook, the inclusion of both matters would be unnecessary. The focus must accordingly be on the words actually used in the discretion relevant to the zoning applicable to this application, and to interpret the Plan in a manner that is internally consistent. In essence, the submitters are inviting the Commissioner to interpret the Plan in a wider manner than what it is expressed, in a way that has been expressly written in other parts of the Plan but not applicable to this site. This review of how the Plan is structured must lead to a conclusion that the actual words used in each restricted discretionary list are deliberate and can and must be consistently interpreted.”

Mr Quinn stated that the interpretation of the limits to discretion that have been outlined are also consistent with the management strategy section of the Plan, where 'visual amenity' is clearly explained as the visual components without reference to privacy as outlined by Reason 6.3:

Visual amenity is made up of a number of components including the bulk and HEIGHT of BUILDINGS, the density of development, access to outdoor living space and daylight, the amount of landscaping and the impact of ‘non-residential’ objects such as ADVERTISING SIGNS

He was of the view that the matters listed by Ms Ongley in her at paragraph 16 go well beyond what can be lawfully considered in this case and that privacy, overlooking, dominance and health effects are not relevant given the express provisions of the Plan.

Mr Quinn discussed the permitted baseline assessment and noted that the applicant has put forward a credible and non-fanciful development and that for comparative purposes,

was an appropriate permitted baseline to use. He outlined that Ms Martin had undertaken an additional assessment against the provisions of the District Plan and this confirmed a credible and non-fanciful example.

Mr Quinn discussed matters related to mitigation, Part 2 of the RMA, the NPS-UD, and draft conditions which were attached to the 'reply' submissions.

9. MAIN FINDINGS

The main findings that have led to this decision are as follows.

9.1 DISTRICT PLAN

The New Plymouth District Plan is an operative document, and it was common ground that the proposal be considered as a restricted discretionary activity.

Particular matters relating to the District Plan, are discussed elsewhere in this decision.

9.2 EFFECTS: CHARACTER & VISUAL AMENITY

The following matters of the District Plan restricted discretion, are relevant to consideration of character and visual amenity effects, as follows:

"Bus 13 – Max Height

- 1) The extent to which the extra HEIGHT of the proposed BUILDING will:
 - adversely affect the character and visual amenity of the surrounding area;
 - have an overbearing effect on SITES within the RESIDENTIAL ENVIRONMENT AREA;

The character of the area is one of a residential nature including higher density apartment living, although there are some business activities located within the area bounded by Dawson Street, St Aubyn Street, Regina Place, and the coastal walkway. Mr Balchin noted that the area was predominantly residential in character.⁸

In respect of the additional height of the proposal, it is up to 5.4 metres above the permitted 10 metre height but acknowledging that the existing GQ building is 1.7 metres higher than the permitted height limit.

This is a significant increase in height and adds to the overall bulk of the existing building. Putting aside the Richmond Estate tower which was constructed in the 1960's, the area has

⁸ S42A Report- para 69.

seen the development of buildings generally within the height set by the District Plan. The scale of development has been in accord with what has been sought by the District Plan.

While the maximum height of 10 metres is not a tablet of stone and applications can be made to go beyond that height, it has provided for a generally low to mid rise form of development comprising of two to three stories, and that contributes in my view, to the current character of the area.

I note that Issue 7 of the District Plan states that:

“Each of these business areas has developed a different character based on the predominant uses of the area, catchment size and the sensitivities of the surrounding areas. Buildings and structures that are out of scale, or create a visual distraction, can adversely affect this character. Hence it is important to ensure that the development is of a similar visual character in terms of bulk, height, and location of development to the area in which it is located, or that any significant adverse effects are mitigated.”

The importance of ensuring that development is of a similar visual character in terms of bulk, height and location is noted along with a desire that any significant adverse effects are mitigated. While this is not a defined policy or objective, a response to the issue, objective 1 of the District Plan is to ensure activities do not adversely affect the environmental and amenity values of areas or adversely affect existing activities. This objective is supported by Policies 1.1, 1.2 and 1.3. These all have a focus on effects activities being compatible with the character of an area and should not have adverse effects that diminish the amenity of neighbouring areas.

Due to the proposed height of the buildings, and the existing two-three storey residential character of the area, I find that the proposal because of its proposed height and such height adds to the scale of the proposal, is out of character with the area. It is not of a similar visual character in terms of bulk or height.

The proposal has significant over height components which is well beyond any permitted baseline assessment.

Having regard to amenity values, the RMA provides the following definition as follows:

“Amenity values means those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.”

Ms Ongley noted that the concept of amenity should be assessed in the context of the particular neighbourhood and stated that the Environment Court has accepted that the

evidence of those that live in the area is highly relevant. In *Panuku Development Auckland Limited v Auckland Council* [2020] NZEnvC 24:

“[90] In our view, given the definition of "amenity values" in the RMA, the residents evidence about what comprises the amenity values of the area they enjoy is equally important to consider as is the expert evidence about what the predicted effects might be that could affect those amenity values and how, if adverse (in the sense of comprising a change to the current values enjoyed) it is considered those adverse effects might be avoided, remedied or appropriately mitigated.

[91] We are also of the view that what might be appropriate mitigation of an adverse effect on amenity values is most likely to require not only a technical or expert suggested solution, but an understanding and appreciation of the amenity values that are currently enjoyed by those experiencing them, and an understanding in a practical sense of how that solution intersects with the way in which they are currently experienced. It is impossible to understand how a practical and suitable solution can be offered as mitigation to an adverse effect on amenity values without consulting those that enjoy that amenity value.”

The submitters expressed a range of concerns through submissions and presenting at the hearing. Many of the concerns related to amenity related matters and the s42A report (Page 23) provides a helpful summary of those matters particularly relating to visual amenity.

6.2.1 Shading

Shading is considered to be an element of amenity, and whilst not particularly defined as a matter of discretion, I have considered it as part of my consideration of amenity.

The applicant provided extensive shading diagrams and a graphic summary of shading effects on properties most likely to be affected by the proposal. The plans outlined shading analysis for 21 March, 21 June, 21 September, and 21 December and for effects at sunrise and sunset. The illustrations also identified the shading effects of the existing built form, and a permitted building.

The shading analysis had utilised a survey dataset prepared by Mr Preston and a peer review of the shading assessments had been commissioned by the Council and undertaken by Taylor Patrick Surveying, and Ardern Peters Architects. The peer review confirmed that both the survey and shading analysis work undertaken was accurate and a reliable representation of the effects anticipated.

In respect of properties to the west of Dawson Street, as noted elsewhere in this decision, written approvals to the proposal had been provided and I cannot consider any effects on those properties.

Mr Balchin considered that the:

“most affected property to the west is in my opinion 3A Hine Street. There is a 20-minute effect shown on 3A Hine Street during the winter solstice, as shown on the plans the effect is on the roof, surrounding ground is already in shade. The effects will be lesser either side of the solstice and therefore effects on 3A from shading

are considered to be minor. As shown on the series of sunrise plans there are no other significant effects on properties which have not provided written approvals and the effects on public receptors are also minor. Particularly in the context of the permitted baseline.”⁹

Properties to the east of the subject site have had a greater focus on them in respect of potential shading and the shading diagrams together with the evidence of Ms Bachelor assist with providing an understanding of potential shading impacts.

Mr Balchin had sought clarification on the definitions of ‘degree of shading impact’ Ms Bachelor offered the following definition being:

“The degree of shading is a subjective interpretation following a thorough review of the shading diagrams and shadows generated in the 3D model. It is intended as a relative way of communicating the difference in the amount of shading experienced. Primarily, this is based on the quantity of additional shading cast on the walls and windows of the buildings as witnessed in the model and is not necessarily related to the activities or room types within the affected areas – though these are understood to often correlate.”

I was provided by the applicant with drawing numbers SK5.01- SK5.04, being the shading diagrams with a descriptor of the effects of shading in respect of 122, 122A and 122B St Aubyn Street, and Richmond Apartments. These annotated diagrams dated 23 September 2021, have assisted me in interpreting the effects of shading from both a permitted baseline development and the proposal.

In respect of 122 St Aubyn Street, Ms Bachelor noted that this property receives shading from the existing GQ building and further outlined that the proposal would create the greatest amount of shading effect on this property. She was of the view that:

“shading will occur on the northern façade and rooftop during the months February-October. The northern façade is two stories high and contains large windows and a balcony area. Shading effects are most often extensions of existing shadowing, and the size of the extension varies according to the time of day and year. The extensions range from small areas of the lower level of the house (low degree), to occasionally full coverage of both walls (highest degree).

There will be no additional shading created on this property in the summer months (November- January). The majority of the additional shading created on this property would also occur under a permitted baseline development scenario and in

⁹ S42A Report- Para 72

many cases, shading effects from a permitted baseline development would be greater than that of the proposed.”¹⁰

I noted that Mr Balchin was of a similar opinion but outlined that when considering the permitted baseline, any shading effects were considered to be minor.¹¹

In considering the above-mentioned annotated shading diagrams, I noted that that there was some slight shading in respect of the balustrade and roof top. In respect of the June shading diagram, it was noted that there would be shading to the northern elevation and that there would be approximately 2 hours of the day would be affected by additional shading which includes walls and the roof. This shading according to drawing SK5.02 would be additional shading created beyond the shading that could occur through a permitted development. To be specific, in June and July between 4pm and 4.30pm the shading of a permitted development would be less than that of the proposal.

122A St Aubyn Street is located immediately to the east of the subject site and is subject to shading from the existing GQ building. Ms Bachelor outlined that:

“The western façade and rooftop will be affected year-round by additional shading, and the highest amount will be during the summer months (November-January) which will occur over the longest period of time (approximately 2.30pm -7.30pm across the wall).

The western façade is three stories high and contains few windows (it is noted that there are two windows and a door missing from the surveyed model provided by BTW. These are understood to be for an ensuite, laundry, and garage door. Since the lower portion of the wall falls into shadow earlier in the day with the existing situation, the majority of the shading effects on this façade will be noticed at the windows on the third-floor level, which are understood to contain a scullery, toilet and ensuite.

Since the western façade is so close to the existing building at 1 Dawson Street, all new shading will be an extension of the existing. The size and amount of shading varies according to the time of day and year.”¹²

Mr Balchin outlined that due to the close proximity of this dwelling to the subject site, shading effects will be greatest during the summer months. The majority of shading effects have been shown to be to the ‘lowest degree,’ and primarily onto the roof and western elevation of the dwelling. While there are no living areas with windows on the western side, there are windows for a scullery, laundry, toilet, and a bathroom.

¹⁰ Bachelor EIC-Section 11.3

¹¹ S42A Report- Para 73

¹² Bachelor EIC- Section 11.3

It was noted by Mr Balchin that the duration of any additional shading effects are comparable to those that would occur from a permitted building, and he therefore considered any shading effects to be minor¹³.

I concur with that opinion.

In respect of 122B St Aubyn Street, Ms Bachelor noted that the dwelling already receives shading effects in the afternoon throughout the year and that the proposal will create additional shading effects to the rooftop in autumn, spring and summer, and some slight shading to the northern façade in summer.

Ms Bachelor further noted that the dwelling:

“is three stories high and contains balconies or outdoor spaces at all levels on the northern façade. The shading created by the proposed development on the northern façade is contained to mostly occur on the structural posts, as the overhangs of the roof and floors of the property itself already create shading to the balcony spaces. There will be some minor shading to the upper portion of the western façade, which will extend the shadowing already in existence on the building. The majority of the shading on this property is considered relatively minor (lowest degree). The effects of the proposed development are mostly beyond what would be created with a permitted development. There will be no additional effects in the winter months to this property.”¹⁴

Given that the shading effects are primarily confined to the roof, I consider any effects are no more than minor.

In regard to the Richmond Estate, it is located approximately 50m to the south-east of the subject site and various units already receive shading effects from the GQ building. Such effects are shown on drawings SK5.01-04.

Ms Bachelor outlined that the:

“proposed development will have additional shading effects on the northern and western walls of these buildings during March-September. The apartments are understood to be a mixture of sizes and orientations, with balconies on the northern side of the majority of the estate.

Shading will have the greatest effect to this collection of dwellings in March, April, August, and September, to the northern façade. Of the estate, the greatest impact will be experienced by unit GC (owned by the Stewarts) which is closest to the applicant site. In the winter months, the shading effect is mostly cast on the western side of the estate – the western façade of the Stewart’s apartment.

¹³ S42A Report- Para 73

¹⁴ Bachelor EIC Section 11.3

Typically, the proposed shading effects of the proposed development are similar to what would be created with a permitted baseline development. There will be no additional effects in the summer months October-February.”¹⁵

Mr Balchin assessment noted that Units 1A, GA, 1B, GB, and GC were most likely to be affected by shading. He then concluded that all the abovementioned units while likely to experience shading effects, such effects would be no more than minor with the exception of Unit GC.

Mr Balchin outlined that:

“Unit GC is effected for more months of the year, March June and September. The plans provided show the most notable effects are an additional 1.5 hours of shading in March and September when compared to the existing environment. As illustrated on SK5.08, effects overall for Richmond estate are minor when compared to the permitted baseline as the duration and degree of shading effects are comparable”.¹⁶

In considering the shading diagrams dated September at 5.30pm, some apartments in the Richmond Estate as noted on drawing SK5.03, will experience shading effects from the proposal beyond any permitted development and such shading will be to the northern and western elevations, noting that the northern elevation being walls and windows and decks will experience shading effects for approximately an hour.

In respect of the later time of 6pm noting that sunset is at 6.19pm, shading will mostly occur and have greatest impact on Unit GC. Shading effects will occur on the western faced of the unit which is owned by the Stewarts and could occur for around 1 hour.

I further noted that in response to submitters evidence, Ms Bachelor clarified the extent of shading in respect of submitter properties in the Richmond Estate as follows:

She noted that in September:

“the Richmond Estate as a whole will receive additional shading (with a proposed and with a permitted development) for a total of 1.5 hours a day. For the Richmond Estate, September is one of the months of the year with the highest amount of additional shading.

During that time, the additional shading will begin at the lower levels of the building on the western side and move upwards and across.

At 4.30pm, there is no additional shading of the Richmond Estate.

At 5pm, the Stewarts property will receive additional shading on the Northern façade to the lower floor level, and outdoor deck area. At 5pm there will be no additional

¹⁵ Bachelor EIC Section 11.3

¹⁶ S42A Report-Para 74

shading to the Clegg or Hurlstone properties. The amount of shading is similar with the proposed and a permitted development.

At 5.30pm, the Stewarts property will receive additional shading on the Northern façade to the upper floor level. The Cleggs property will receive additional shading to their northern façade and balcony area. At 5.30pm there will be no additional shading to the Hurlstone's property. The amount of shading is similar with the proposed and permitted development.

At 6.30pm, all three properties mentioned will receive additional shading to the Northern façade. By 6.00pm, most of the outdoor areas for each of these properties are already in shade. The amount of shading is similar with the proposed and a permitted development.

The sun will set at 6.19pm on the 21st September. In summary the Stewarts will experience approximately 1.5 hours of additional shading. The Cleggs will experience 1.0 hours of additional shading. The Hurlstone's will experience approximately 0.5 hours of additional shading."¹⁷

The quantification of the shading effects and the time each property will experience additional shading beyond a permitted development, has been very helpful to my consideration of such effects. Drawing SK5.03 outlines in diagram form, the nature and location of such shading effects in respect of properties in the Richmond Estate.

I note that Mr Balchin, Ms Bachelor and Ms Martin consider from an overall perspective, such shading effects are minor given their duration.

After considering the information provided to me and in particular the shading diagrams including those that were the annotated, and Ms Bachelors assessment, I am of the opinion that such effects given their duration as outlined above, and also in respect of some of the St Aubyn Street properties, are more than minor.

I heard from a number of submitters, their concerns about losing sun and having to incur further shading over and above what already occurs, which they considered was unreasonable, and would affect their quality of life and general lifestyle.

The shading effects while not specifically referenced in the matters of discretion do relate to the amenity of the area and the qualities and characteristics of the area that contribute to peoples' appreciation of its pleasantness.

It is a judgment call in respect of what are considered to be shading effects that are more than minor, and I have made it based on the matters and concerns highlighted by submitters, and after considering the expert evidence I have received on this matter.

¹⁷ Bachelor- Summary Statement-Para 3.4

I am of the opinion that the additional shading in the case of the properties referenced above, experiencing additional shading of up to 1.5 hours particularly during the month of September, will have an adverse effect on the affected submitter's enjoyment and appreciation of the pleasantness of the area and amenity values.

In addition, the objective and policy framework that applies in the Business B Environment Area has also provided guidance in reaching the conclusion I have. This is particularly having regard to the direction that activities within an area, should not have adverse effects that diminish the amenity of neighbouring areas, and ensuring activities do not adversely affect the environmental and amenity values of an area, or adversely affect existing activities.

6.2.2 Bulk, Dominance, Privacy, and Outlook

I have considered the assessments of both Ms Martin and Mr Balchin, the permitted baseline and matters of discretion, in respect of the above-mentioned matters.

- Dawson Street Properties

I was advised that properties opposite the subject site on Dawson Street that have an eastern aspect toward the proposal, had provided written approval. Given that situation I am unable to consider any effects that the proposal may have on those properties.

It is noted that properties along Hine Street further away from the subject site, are separated by Dawson Street and have orientation to the north. Given these factors effects associated with bulk and dominance are considered to be less than minor in nature.

It is noted that the abovementioned properties are in the Residential Environment zone and therefore assessment of the proposal in respect of bulk and dominance is appropriate given the restricted discretionary criteria in relation to bulk and dominance is confined to effects on properties in a residential area.

Properties to the west of Dawson Street and the subject site, are located in the Business 2 Environment Area. Therefore, the bulk and dominance restricted discretionary considerations do not apply and I am unable to consider such effects.

- Oceanside Apartments

I concur with Mr Balchin that in respect of amenity, bulk and dominance perspective, effects on the MacArthur property at 122 St Aubyn Street would be significant. I cannot consider any overbearing effects as adjacent submitter properties are located within the Business B zone and the discretion only applies to sites within the Residential Environment Area.

In respect of privacy, the proposal would have windows and balconies overlooking submitter properties and in particular the MacArthur property. Mr Balchin notes that the windows and balconies would be below the 10m height. The MacArthur's highlighted their concerns how the proposal would impact on their privacy and potential outlook from the proposed residence into their apartment and decks.

Mr Bain outlined that the MacArthur's main outlook and amenity related to the outlook, is to the north-east.

Notwithstanding Mr Balchin's observation that the windows and balconies are located below the permitted height, no particular mitigation has been proposed by the applicant to address the privacy concerns of the submitters.

I further note that in respect of the definition of amenity values, which includes "the characteristics of an area that contribute to peoples' appreciation of its pleasantness," it is unlikely to be achieved through the outlook that the proposed residence will have toward the MacArthur property.

In respect of 122A and 122B St Aubyn Street, I note that these dwellings do not have outlooks to the west and have limited windows along the western walls. Mr Comber did outline that because of the proposal the outlook from their scullery window and natural daylight would be negatively affected.

The properties have outlooks and levels of amenity toward the northeast which are not impacted on by the proposal and I observed this during my site visit.

Having considered the permitted baseline and the matters of discretion, and the issues of privacy effects resulting from the additional height, and what can be established in respect of the permitted baseline, and effects of bulk and dominance, I conclude that any effects are no more than minor. I noted Mr Balchin's observation that the windows and balconies that would overlook the MacArthur's property were located below the 10m height limit, and therefore would be permitted.

- Devonport Apartments

The upper apartments look toward the ocean and the outlook was described by Ms Holt in her presentation at the hearing. She referenced the unobstructed views of the ocean, and her reliance on the 10m height restriction to maintain the ocean view.

I was advised that the apartments are in a business zone and therefore I am unable to consider bulk and dominance matters. However other amenity effects can be considered, and outlook forms part of amenity.

Mr Bain believed the overall effects on amenity values associated with the outlooks enjoyed by these properties would be minor as a high level of amenity would be maintained by these properties including expansive sea views.

There are no particular view protection mechanisms in place to protect views from properties such as the Devonport Apartments, out to the ocean.

Notwithstanding the concerns of submitters, I concur with the evidence of Mr Bain and any effects on amenity will be no more than minor.

6.2.3 Coastal Walkway and Amenity

The potential effects on the coastal walkway from the bulk and dominance of the building and particularly the over height elements, had been raised by several submitters. I have considered the advice of Mr Bain and Ms Griffiths who are both of the view that any effects on the landscape values of the coastal walkway are characterised as less than minor.

While the GQ building is close to the coastal walkway and is prominent, the proposed extensions are setback from the seaward side of the building and therefore the walkway. The walkway is located in a highly modified area and the proposal is unlikely to affect the amenity values of the walkway.

Overall effects on the amenity values attributed to the coastal walkway will be less than minor, and a high level of amenity will remain.

9.3 EFFECTS: LANDSCAPE AND VISUAL

The relevant District Plan restricted discretionary criteria is as follows:

Bus 13 – Max Height ...

2) *The extent to which the extra HEIGHT of the proposed BUILDING will:*

...

- *adversely affect OUTSTANDING and REGIONALLY SIGNIFICANT LANDSCAPES;*
- *intrude into and/or block an URBAN VIEWSHAFT (see section 3 of the planning maps);*

- ...
- 3) *The extent to which SITE layout, separation distances, topography, planting or setbacks can mitigate the adverse effects of extra HEIGHT.*

OL63 and 71 – Viewshafts

- 1) *The extent of intrusion of the additional HEIGHT of the STRUCTURE into the viewshaft, and the elements of the view affected (see section 3 of the planning maps).*
- 2) *The extent to which the core of the view is impinged upon by the additional HEIGHT of the STRUCTURE (refer to “view details” in section 3 of the planning maps).*
- 3) *Whether the STRUCTURE results in the removal of existing intrusions or increases the quality of the view.*
- 4) *Whether the additional HEIGHT of the STRUCTURE will frame the view.*
- 5) *The proximity of the STRUCTURE to the inside edge of the viewshaft.*

6.3.1 Urban Viewshafts

The protection of public viewshafts is provided by the District Plan overlay chapter. The applicant’s AEE and a Landscape Visual Impact Assessment undertaken by Mr Bain of Bluemarble, provided an overall assessment of the various landscape and visual amenity matters including any potential impacts of the proposal, on viewshafts. Mr Bain also provided visual simulations to assist with the consideration of any impacts of the proposal on the two viewshafts, being Cameron Street and Marsland Hill/ Pūkākā Pa.

I was also provided with an independent peer review commissioned by the Council from Natural Capital

I also wish to note that after the hearing on day 1, I undertook independently, a visit to the top of Marsland Hill/ Pūkākā Pa to see for myself the viewshaft toward the north and the subject site and locality.

In respect of the Cameron Street Viewshaft, I note the evidence of Mr Bain that the proposed building will not be visible within the viewshaft and the Bluemarble visual simulations support this conclusion.

Mr Bain noted in his evidence¹⁸ that the proposal will be visible but that any effects on the Marsland Hill Viewshaft would be very low due to the small scale of the proposal in

¹⁸ Bain Summary Statement – Para 4

its urban context. He outlined that the viewshaft has a pedestrian audience as there is a short walk to the viewing areas from the carpark.

I observed on my visit that views from Marsland Hill/ Pūkākā Pa are interrupted by mature trees.

I noted that Mr and Mrs Comber outlined in their submission that there would be viewshaft intrusions, stating that the proposal would be out of character in respect of the viewshafts that it is proposed to be located in. I note that no alternative evidence on viewshafts was provided to me.

Mr Balchin's s42A report¹⁹ outlined that there are:

"locations which provide a clear view of the subject site. As shown in the visual simulation the proposed building would be visible and generally in line with the height of the Devonport Apartments. The proposed building is noticeable given the colours shown on the LVIA, this has been described in Natural Capitals most recent LVIA peer review. The applicant has specified that the cladding will be a neutral colour. Black is a neutral colour but given the other buildings in the area and coastal background a black colour would stand out. I believe the conditions of consent would be able to manage this effect so that it would be acceptable. "

Mr Bain in his supplementary statement outlined that materials and colours of the external cladding shall have a reflectance value of between 30 and 100% and be a colour that is a neutral palette restricted to light grey, cream, or blue tones. Ms Griffiths also supported the use of a neutral palette to reduce the visual impact of the proposal in the view shaft.

Given the proposed reflectivity range and colour palette proposed, it is considered the proposed building although visible, would not result in adverse effects greater than minor. In reaching this conclusion considerable weight was given to both the permitted baseline, the LVIA prepared by Marble, the visual simulations relating to the viewshafts, and Ms Griffiths peer review of the LVIA.

¹⁹ S42A Report- Paras 99-100

6.3.2 Outstanding and Regionally Significant Landscapes

The s42A report²⁰ outlined that the Sugar Loaf Islands and Paritutu were the nearest such landscape and were approximately 4 kilometres from the subject site. Given that distance and that no evidence was provided to the contrary, I consider that there would be no effects on such landscapes would be generated by the proposal.

9.4 EFFECTS: NATURAL CHARACTER OF THE COASTAL ENVIRONMENT

The relevant District Plan restricted discretionary criteria is as follows:

Bus 13 – Max Height

4) The extent to which the extra HEIGHT of the proposed BUILDING will: ...

- adversely affect the natural character of the coastal environment or PRIORITY WATERBODIES.*

The locality is characterised by urban development particularly those areas to the south, east, and west of the subject site. To the north of the site is the coastal walkway, railway line and the rock revetment wall which are all manmade structures, and then the CMA.

The built environment contains a range of structures of varying heights, from two to eight storeys providing for a range of medium to high density residential living environments with a small number of commercial activities located along Dawson and St Aubyn Streets.

These existing features limit the potential for the proposal to have significant adverse effects on the “natural character” of the Coastal Environment.

Overall, given the existing highly modified area, and the existing character of the Business B zone area, I am of the opinion that the height of the building does not detract from the level of natural character of the Coastal Environment of the area, and any effects are considered to be no more than minor.

²⁰ S42A Report- Para 94

9.5 EFFECTS: REDUCED LANDSCAPING

The relevant District Plan restricted discretionary criteria is as follows:

Bus 19 – Landscaping of Road Boundary

- 1) *The adverse effects of reduced, alternative or no planting on the streetscape of the area.*
- 2) *Any adverse visual effects on the New Plymouth entrance corridors.*
- 3) *Alternative methods used to soften the appearance of the BUILDING from the ROAD and enhance the streetscape.*
- 4) *The extent to which existing topography, planting and SITE design can mitigate the adverse visual effects resulting from reduced, alternative or no planting.*

Whilst the proposal involves a reduction in the level of landscaping required at the road boundary, I concur with the assessment of Mr Balchin that sufficient planting is proposed along the Dawson Street frontage with the establishment of 8 trees.

It is noted that the landscape strip along the northern boundary of the site would continue to be maintained in consultation with the Council which interfaces with the coastal walkway.

I consider that any effects will be less than minor in respect of the proposal to reduce landscaping.

9.6 EFFECTS: TRAFFIC & TRANSPORT

The relevant District Plan restricted discretionary criteria is as follows:

Bus 87, 88 and 91 – Traffic and Transport

...

- 7) *The types of VEHICLES serving the SITE, their intensity, the time of day the SITE is frequented and the likely anticipated VEHICLE generation.*
- 8) *Whether parking provided on a separate SITE is compatible with the surrounding land uses.*
- 9) *Whether it can be demonstrated that a less than normal incidence of traffic generation and associated parking, LOADING or STANDING SPACES will be required by the proposal. 10) Whether it is physically practicable to provide the required parking, LOADING, STANDING, QUEUING and/or MANOEUVRING SPACES in the SITE in terms of existing location of the BUILDINGS, DEFINED RETAIL FRONTAGE, and access to the ROAD, or topography.*
- 11) *Whether the parking, LOADING, STANDING, QUEUING and/or MANOEUVRING SPACES will be required for use outside of peak traffic, cyclist, or pedestrian flows.*

- 12) *Whether the design, grade, or formation of the alternative construction of parking, LOADING or STANDING SPACE, or DRIVEWAY will assist in managing any actual or potential adverse effects that arise.*
- 13) *The adverse effects of using parking, LOADING or STANDING SPACES for manoeuvring and/or QUEUING SPACE.*
- 14) *Whether a significant adverse visual or nuisance effect on the character and amenity of the surrounding area will occur as a result of not providing the required parking, LOADING, STANDING, QUEUING and/or MANOEUVRING SPACE or access in the required manner.*
- 15) *The adverse effects on the safety of people, both on and off the SITE, due to not providing the required parking, LOADING, STANDING, QUEUING or MANOEUVRING SPACE, VEHICLE ACCESS POINT or DRIVEWAY and/or inappropriate design or construction of these.*
- 16) *The extent to which the safety and efficiency of the ROAD TRANSPORTATION NETWORK would be adversely affected by parking, loading, manoeuvring and/or queuing VEHICLES due to inappropriate design or construction.*

The applicant in the opinion of the reporting officer, had provided sufficient detail regarding parking and functionality and based on advice from the Council's development engineering and roading team, it was considered that any effects associated with transport related matters including parking, queuing, and loading would be minor in nature.

The s42A report²¹ notes that the existing carpark adjacent to the GQ building had functioned appropriately when the building had been tenanted. In addition, loading is available within the parking area.

It is noted that access is from a local road with a low- speed environment. The parking layout is considered to be the most effective use of land and the provision of a two- car garage and stacking space in the driveway for visitor parking ensures effects associated with overspill from the residential component of the development will be minor.

One submitter who resided in the Richmond Estate highlighted in her written submission that parking was congested in the area. No further detail was provided.

I am satisfied that given the consideration and advice provided by the Council noted earlier in this section, that any effects of the proposal in respect of traffic and parking matters would be no more than minor.

²¹ S42A Report- Paras 114-116

9.7 EFFECTS: POSITIVE

The proposal will have positive effects in so far as the current building and site would be utilised for commercial and residential purposes that is generally in accord with the purpose of the zone. It would lead to a reinvigoration of the locality and utilisation of an existing physical resource.

10. DISTRICT PLAN: OBJECTIVES & POLICIES

A range of policies and objectives apply in respect of the proposal, and these are outlined in the section 42A report. I note that they primarily focus on the avoidance, remediation, or mitigation of any effects from activities in the Business B Environment Area.

Mr Balchin's 42A report contained an extensive assessment of the relevant objectives and policies in both the District Plan and Proposed District Plan. Ms Martin's evidence supported that assessment. I generally concur with those assessments in respect of a number of objectives and policies.

However, in respect of the District Plan, I differ on several key objectives and policies and take an alternative view.

Objective 1 and associated policies 1.1- 1.3, have a focus on ensuring activities do not adversely affect the environmental and amenity values of areas or adversely affect existing activities. The policies then outline those activities should be located in areas where effects are compatible with the character of the area, and that activities within an area, should not have adverse effects that diminish the amenity of neighbouring areas having regard to the character of the receiving environment. Furthermore, it is noted that new activities that are sensitive to the elements that define the character of the area in which they are to be located should be designed and located to avoid conflict.

The objective and policies are of particular relevance given the submissions raised a number of concerns, and potential effects on amenity values and character from the proposal. The proposal will result in adverse amenity effects on several of the surrounding properties to the west of the subject site.

The character of the area is primarily of a residential nature and is reflected by low to mid rise buildings being 1-3 storeys in height. The tower block is an exception to that having been erected many decades ago. The maximum permitted height is 10m and that height

restriction has been in place for many years, and development has been in accord with that.

The current GQ building was erected in the mid 1990's and is 1.7m over height. The applicant is proposing to increase the height infringement to 15.4 metres. This is a significant increase and has the potential to change the character of the area from its current low-mid rise residential nature. The proposal will adversely affect the character of the area being the Business B Environment Area, because of its increased height and such height increases the scale of the building, it would not be of a similar visual character in terms of its bulk or height.

In respect of amenity and shading effects, I find that such effects would have adverse effects on several submitter residential units and apartments that would diminish the amenity of the area. Shading effects would occur particularly in the month of September and occur for periods of 30-90 minutes depending on the location of the affected submitter residential unit or apartment.

Submitters have a current level of amenity, including visual amenity, and access to sunlight. They have a reasonable expectation that they will be free of shading effects.

While many are subject to shading from the existing GQ building, they purchased property knowing that shading occurred. I acknowledge that a proposal in accord with the permitted baseline could result in further shading, but the proposal will result in shading effects beyond that baseline, and I do not believe that is appropriate given the intent of objective 1 and associated policies 1.1-1.3, that activities should not have adverse effects that diminish the amenity of neighbouring areas.

A number of concerns raised by submitters could be addressed through conditions if consent were granted, and for some effects, it is considered that they will be no more than minor, and the proposal would be in accord with many of the relevant objectives and policies for the Business B Environment Area.

However, matters related to the character of the area due to the erection of a significantly over height building of a scale that is beyond the current character of the area, and potential effects on amenity particularly in respect of shading effects, lead me to conclude that the proposal is not consistent with Objective 1 nor Policies 1.1-1.3.

In respect of the Proposed District Plan, consideration of it is required under s104(1)(b) of the RMA. However, any weight to be given to its objectives and policies is limited as Mr

Balchin advised that submissions had been received seeking changes to the provisions of that plan as they apply to the subject site, including rules, objectives, and policies. Those submissions are yet to be heard and determined.

In reviewing the objectives and policies, and the s42A report provides a useful assessment of such, I conclude that the proposal is not contrary to a number of them. It is noted however, that for the Mixed-Use Zone, proposed activities are a quite different character to the proposal, and current residential activity in the area. Therefore, the proposal would not be consistent with the proposed intent or objectives and policies of the Mixed- Use Zone.

Given that submissions hearings are yet to be held and decisions made on those submissions, I have afforded little weight to the Proposed District Plan objectives and policies in respect of the proposed Mixed-Use Zone.

11. SECTIONS 104: RESOURCE MANAGEMENT ACT 1991

A consent authority must have regard to a number of matters under s104 of the RMA when considering an application for resource consent. These considerations include:

- the actual and potential effects of an activity on the environment (s104(1)(a))
- the relevant provision of a National Environmental Standard (s104(1)(b)(i))
- the relevant provisions of a District Plan (s104(1)(b)(vi))
- the relevant provisions of a Regional Policy Statement (s104(1)(b)(v)) and
- any other matter the consent authority considers relevant and reasonably necessary to determine the application (s104(1)(c))

Under s104, any consideration of an application for resource consent is subject to Part 2 of the RMA.

I have given consideration to the relevant above-mentioned matters in my consideration of the application and the relevant matters are discussed in this decision.

12. OTHER MATTERS

12.1 NATIONAL POLICY STATEMENTS

- New Zealand Coastal Policy Statement 2010 (NZCPS)

The NZCPS establishes a set of objectives and policies to achieve the purpose of the Act in relation to New Zealand's coastal environment. It is noted that the NZCPS requires territorial authorities to define and map areas considered to be part of the coastal environment.

The s42A report outlines that under the ODP this is identified as the "Coastal Policy Area". The subject site is not within the ODP coastal policy area, but Mr Balchin was of the opinion given the sites proximity to the CMA and Coastal Policy Area, and the intent of the NZCPS, it is located in a coastal environment and an assessment of the NZCPS is relevant. He also noted that the site is in what is defined as the coastal environment in the PDP.

Mr Balchin outlined that the coastal environment may have differing degrees of natural character, and effects from development are likely to be relative to the surrounding natural character attributed to the coastal environment.

I have considered his assessment of the relevant NZCPS objectives and policies and that while there would be change in the built environment, it is not out of character with the existing built form in the locality, given the modification and changes that have occurred and the zoning of the area.

- National Policy Statement for Urban Development 2020

I have given consideration to the NPS-UD 2020. Both Ms Martin and Mr Balchin were of the opinion that the proposal was consistent with the NPS-UD, notwithstanding Mr Balchin outlined that the proposal would result in adverse amenity effects on the surrounding area but was not of a scale and significance that would make it inconsistent with Policy 6 of the NPS-UD related to the balancing of peoples' appreciation of amenity values.

Whilst some submitters noted that the NPS-UD did not support the proposal, no specific references or analysis was provided to support that contention.

Ms Ongley's legal submissions noted that the proposal for one residence does not fulfil the NPS-UD policies, whereas the building could accommodate additional residential accommodation. However, I note that the zoning provisions of the subject site and adjacent areas, provide for both business and residential activity and does not restrict the provision of a variety of housing typologies. In this case the applicant is proposing to establish a relatively large residential unit.

Having considered the provisions of the NPS-UD and the expert planning opinions, the proposal is not considered inconsistent with the NPS-UD.

- National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NES-CS.)

I was advised that there was no record of any activity included on the Hazardous Industries and Activities List (HAIL), having occurred on or more likely to have occurred on the subject site. The site is not included on the Taranaki Regional Council's register of selected land uses for contaminated sites.

Therefore, no further consideration of the NES-CS is required in my opinion.

12.2 TARANAKI REGIONAL POLICY STATEMENT/ REGIONAL PLANS

In accordance with s104 (1) (b) (v) any resource consent application must have regard to the relevant regional policy statement. The Taranaki Regional Policy Statement (RPS) considers regional wide issues on water, soil and land, air, freshwater, indigenous biodiversity, natural and historic features, waste management, minerals, energy, and the built environment.

I noted the relevant provisions contained in the RPS and both Ms Martin and Mr Balchin had provided an assessment of these. The objectives and policies of the Built Environment Chapter (15) recognise the need to provide for appropriate subdivision, use and development while avoiding remedying, or mitigating any adverse effects on the environment in order to maintain character and amenity values.

Ms Martin was of the view that the proposal achieved this and was consistent with the RPS.²²

Mr Balchin had concurred with that assessment but noted that Chapter 8 (Coastal Environment) and Chapter 10 (Natural Features and Landscapes, Historic Heritage and Amenity Values) also required consideration.

He had concluded that the proposal was not contrary to the relevant objectives of the RPS, and that the proposal was consistent with the concept of sustainable management.

²² AEE- Section 5.3

I considered that while the proposal was not contrary to objectives related to Chapters 8 and 10 of the RPS, it did not remedy, mitigate or avoid effects related to the character and amenity values (shading effects on submitter properties) of the area, as discussed in section 9 of this decision.

Accordingly, the proposal in respect of these matters, is not considered to be consistent with the RPS.

12.3 TAI WHENUA, TAI TANGATA, TAI AO- TE KOTAHITANGA O ATIAWA TARANAKI MANAGEMENT PLAN

The s42A report assesses the proposal in respect of this plan. It is noted that the subject site is not subject to any statutory acknowledgement, is not located within the coastal policy area and is not affected by any identified sites of significance to Maori in either the ODP or PDP.

Mr Balchin concluded that the proposal was not contrary to the management plan, and I concur with that opinion.

13. PART 2: RESOURCE MANAGEMENT ACT 1991

The Court of Appeal decision on *'RJ Davidson Family Trust v Marlborough District Council'* CA97/2017 (2018) influenced the way in which Part 2 should be applied and determined that:

"If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8."

I have considered Part 2 matters to round off my evaluation of the proposal notwithstanding that no party stated that the plan had not been competently prepared, although the plan was prepared several years ago.

The purpose of the RMA is to promote sustainable management by enabling people and communities to provide for their social, economic, and cultural wellbeing, while avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 5 allows for the balancing of conflicting considerations in relation to their particular significance to the overall outcome and requires an overall board judgement to be made.

While the proposal would promote sustainable management of physical resources through the utilisation of an unoccupied commercial building, it does not provide for avoiding or mitigating adverse effects particularly in respect of the character of the area through an over-height building, and imposition of shading effects on neighbouring properties.

In respect of section 6, no matters of national importance were highlighted to me.

Having regard to section 7, I consider that there are three matters of relevance being the efficient use and development of physical and natural resources, the maintenance and enhancement of amenity values, and the maintenance and enhancement of the quality of the environment.

The use of the existing GQ building would result in the use of an existing and under-utilised commercial building and an existing carpark area for a dwelling, and commercial use.

The proposal will not enhance amenity values for existing residents in neighbouring properties through the development of an over-height building that would be out of character to the low-mid rise nature of residential development in the area. In addition, increased shading effects would decrease amenity values and would diminish the quality of the environment for adjacent properties and residents.

No matters related to the principles of the Treaty of Waitangi were raised with me that required to be addressed.

14. CONCLUSION

I have considered all matters placed before me including all application documentation, evidence, submissions, and subsequent statements made by the various parties at the

hearing and the section 42A report and associated reports from Council staff, together with the relevant RMA and District Plan provisions.

I have considered the matters relating to the policy and objective framework of the District Plan and the associated rules applicable to the Business B Environment Area.

In considering the restricted discretion matters that I have considered, the proposal does address a number of such matters and I have found that any effects in respect of those discretionary matters, are no more than minor.

However, restricted discretionary matters related to character and amenity, have been key matters for consideration.

In respect of matters related to character, having regard to the proposed height of the proposal, and the existing two-three storey residential character of the area, I find that the proposal because of its height, and such height adds to the scale of the proposal, that it is out of character with the area. It is not of a similar visual character in terms of bulk or height.

The shading effects while not specifically referenced in the matters of discretion do relate to the amenity of the area and the qualities and characteristics of the area that contribute to peoples' appreciation of its pleasantness.

I have made a judgment call in respect of what are considered to be shading effects, which are more than minor, and have made it based on the matters and concerns highlighted by submitters, and after considering the expert evidence on this matter.

In addition, the objective and policy framework that applies in the Business B Environment Area has also provided guidance in reaching the conclusion I have, particularly having regard to the objective and policy direction that activities within an area should not have adverse effects that diminish the amenity of neighbouring areas, ensuring activities do not adversely affect the environmental and amenity values of an area, or adversely affect existing activities.

In considering all relevant matters including the matters raised by submitters, I conclude that consent be refused to the proposal.

15. DECISION

Pursuant to sections 104, and 104B, of the Resource Management Act 1991, the New Plymouth District Council refuses consent to the resource consent application of Regina Properties Ltd for a residential apartment addition to the top of an existing commercial building and associated extensions on land located at 1-3 Dawson Street, and described as Lots 1 & 2 DP 19418, and Lot 1 DP 10510.

Consent is refused for the reasons outlined in this decision, but are summarised as follows:

- a. *Having regard to section 104(1) of the Resource Management Act 1991, the actual and potential adverse effects on the environment in particular any effects on the character and amenity (shading effects) of the area and adjacent sites, are not avoided, remedied, or mitigated in respect of the proposal.*
- b. *The proposal does not meet the various statutory provisions to be given regard in terms of the Resource Management Act 1991, and is not in accord with key objectives and policies of the District Plan*
- c. *The proposal is not consistent with the purpose and principles of the Resource Management Act 1991 in respect of those matters for which discretion has been reserved and in particular, the proposal will not enhance amenity values for existing residents in neighbouring properties through the development of an over-height building that would be out of character to the low to mid rise nature of residential development in the area, and increased shading effects beyond the permitted baseline, would diminish amenity values and the quality of the environment for adjacent properties and residents.*



Bill Wasley
Hearing Commissioner

12 November 2021