

**BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL**  
**INDEPENDENT HEARINGS COMMISSIONER**

**IN THE MATTER**

of the Resource  
Management Act  
1991

**AND**

**IN THE MATTER**

of an application  
under section 88  
of the Act by K.D.  
Holdings Limited  
for land use  
consent to  
construct a six-  
storey mixed use  
building and  
remove a notable  
tree at 45, 49, 51  
Brougham Street,  
33 Devon Street  
West and 24  
Powderham  
Street, New  
Plymouth

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**OUTLINE OF SUBMISSIONS OF COUNSEL**  
**FOR THE APPLICANT K.D. HOLDINGS LIMITED**

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## **MAY IT PLEASE THE INDEPENDENT HEARINGS COMMISSIONER**

### **Introduction**

1. The central business area/district (CBD) of New Plymouth is part of the physical environment which serves the people and community of the New Plymouth District. The positive effects of the proposal on the CBD area will, it is submitted, be significantly enhancing and will provide for people's social, cultural and economic wellbeing and health and safety - while potential adverse effects will be relatively outweighed, and minimal.
  
2. Being minimalist and contemporary in style – the proposed modern, sustainable mixed-use urban design aims to transform the rundown brownfield site carpark into a high quality architectural showpiece in the New Plymouth CBD – which will provide numerous benefits to the wider community – and positively contribute to New Plymouth's evolving urban fabric<sup>1</sup>.

### **Issues and Effects**

3. The critical issues requiring determination in this case are:
  - (i) Whether or not the proposal passes through one (or more) of the threshold tests in s. 104D Resource Management Act 1991 ("RMA"); and, if so:

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<sup>1</sup> Boon Team Architects Limited, Design Statement Letter to NPDC Planning Department, 27 August 2020 (included in Appendix N of the application, Cultural Impact Assessment, Ngati Te Whiti Hapu, 2 September 2020, Appendix 3).

- (ii) Whether or not the proposal promotes the sustainable management of natural and physical resources, applying the usual overall broad judgement.
4. Provided the proposal passes through one (or more) of the s. 104D thresholds (gateways) the application must be determined on its merits in accordance with the provisions of s. 104 RMA.
  5. Pursuant to s 104B, you may grant or refuse the application and, if granting it, may impose conditions under s108.
  6. It is respectfully submitted that the result of this case should be one that the Commissioner believes best achieves the purpose of the RMA: the sustainable management of natural and physical resources as defined in s. 5(2) RMA.
  7. In my submission the proposal can pass through both of the s. 104D "gateways" (for reasons expanded on later in these submissions); and will promote the sustainable management of natural and physical resources in a way (or at a rate) which will enable the social, economic, and cultural wellbeing and health and safety of people and communities of New Plymouth, Taranaki region and New Zealand generally to be provided for.
  8. The proposal will also appropriately avoid, remedy or mitigate any adverse effects of activities on the environment (and achieve all the relevant caveats in s. 5(2)(a)-(c)).

#### **Mitigation Measures Proposed**

9. To address the issues and effects in this case the applicant has proposed a range of mitigation measures throughout the

application, s. 92 and hearing process. Experts from relevant disciplines have assisted the applicant with the design of the proposed development and site landscaping etc – and mitigation measures have been proposed in a careful and thorough manner to address concerns raised by the submitters, and the Council, as far as practicable.

10. The Court whenever it considers adverse effects, does so having regard to their mitigated version: KPF Investments Limited v Marlborough District Council<sup>2</sup>.
11. As a general summary, the mitigation measures proposed include<sup>3</sup>:
  - complete glazed façade providing direct connectivity to the adjoining streets and Huatoki Awa (stimulating vibrant activity in the CBD by creating direct visual connections between people working in the building and people walking past on the street etc); and
  - complete glazed façade providing lightness in feel – and mitigating height perceptions by creating a seamless façade face;
  - non-tinted glass and transparent building providing lightness (and that seeks to look outwards, connect and blend with its surroundings);
  - upper-level apartment timber cladding directly linking it to the timber structural elements below, and pronounced vertical elements in the apartment façade - further reducing potential visual impact (by drawing the eye line

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<sup>2</sup> [2014] NZEnvC 152, at [18]

<sup>3</sup> See predominantly: Evidence Murali Bhaskar, paras 4.5, 8.1-8.9, 10.3-10.17, 11.2, 11.3

up and out over the building, as opposed to a capping that stops the eye);

- setback upper-level apartment to, for example, mitigate potential height and shading effects;
- connections through the buildings core (creating active edges to both facades of the building, and creating a direct link to the awa and the proposed Huatoki public space developments);
- design features guided by tangata whenua and underpinned by cultural context - responding to surrounding significant cultural sites within the Ngāti Te Whiti rohe - to extend the presence of mana whenua and activate a connection to the neighbouring awa;
- design features and techniques to explore a cultural narrative within the building fabric - such as glazing fritting, timber and cultural patterning/narrative, patterning on the ground floor shared space extending to the outside of the building (connecting it to the land and representing Hīnaki), representation of Mauri stone and a water feature from the awa;
- environmental sustainability frameworks/energy efficiency and low carbon initiatives – to, for example, reduce energy and emissions and promote water efficiency and conservation;
- Specific landscaping to reduce scale and soften the appearance of the building (and more generally enhance the quality of the environment);
- Upgraded site and holistic integration with the surrounding environment generally.

12. Many of the proposed mitigation measures above will improve the existing environment; as will the development generally (in my submission).
13. It is submitted that this combination of measures will appropriately avoid, remedy or mitigate any adverse effects of the activities on the environment; and will lead to better environmental outcomes than presently exist - or that could otherwise be achieved under the relevant permitted activity thresholds of the Operative District Plan (and Proposed District Plan); ultimately promoting sustainable management.
14. The finer detail of those mitigation measures is discussed in evidence presented for the Applicant.

### **Evidence**

15. The Applicant will call evidence from the following witnesses:

#### ***Lay Witnesses***

- (a) *Kevin Doody – director of the Applicant.*

Mr. Doody (and his family) are driving the development – ultimately to enhance and revitalise the site and part of New Plymouth – for the benefit of New Plymouth (and beyond).

His aim is that the proposed building will achieve history in its own right for the city – a city and heritage which he is

passionate about – and in respect of which he has already taken steps to restore and enhance<sup>4</sup>.

Having been a leading businessman and landlord in New Plymouth for over 45 years – Mr Doody is aware of, and excited about, the benefits that the new building will bring to the CBD and the people and community of the New Plymouth District<sup>5</sup> - and hopes to progress the development as soon as possible.

### ***Expert Witnesses***

- (b) *Clive Cullen – Architect, member of Heritage Taranaki, Heritage and Conservation Project Specialist.*

Mr Cullen has assessed the potential adverse effects of the proposal on the Heritage Character Area (HCA) of the New Plymouth CBD – and the adjacent heritage listed buildings. He also assessed the proposal against the relevant parts of the City and Town Centre Design Guide, New Plymouth District Council, July 2019.

As noted, the building has been designed to interface with the Huatoki Awa and the future development of the adjoining Metro Plaza site.<sup>6</sup>

Noting that the site currently adds little to the HCA (and possibly detracts from it), Mr Cullen notes the potential enhancement of the connections between the street and the Huatoki Awa – and the use of a modern interpretation of Maori

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<sup>4</sup> Evidence Kevin Doody, paras 4-7

<sup>5</sup> Evidence Kevin Doody, paras 8-20, 22

design motifs on the exterior glazing - building a relationship between mana whenua with the CBD area<sup>7</sup>.

Due to the proposed building design – Mr Cullen is of the view that it is not intimidating or extending any of the heritage topologies of the adjacent heritage buildings; and will present a contrast to the existing buildings - which will emphasise and enhance their style. It will not be competing with them – while also reflecting the heritage aesthetic on to its own glass facade<sup>8</sup>.

The proposal will provide a better contrast and add to the urban mix and amenity values in that regard. For the reasons he provides, the proposal will complement nearby heritage buildings - and potentially provide more opportunity for people to experience those heritage buildings<sup>9</sup>.

Mr Cullen concludes that the proposal will not adversely affect the heritage values associated with the HCA or the nearby heritage buildings; conversely, it will add to the amenity of the area – particularly in terms of adding connection to Maori cultural values related to the area<sup>10</sup>.

(c) *Ivan Bruce – Archaeologist.*

Mr Bruce prepared the archaeological assessment of the project included in the application.

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<sup>6</sup> Evidence Clive Cullen, para 6.6

<sup>7</sup> Evidence Clive Cullen, paras 6.7-6.10

<sup>8</sup> Evidence Clive Cullen, paras 9.1-9.2

<sup>9</sup> Evidence Clive Cullen, paras 10.1-10.5

<sup>10</sup> Evidence Clive Cullen, paras 13.2-13.3



In his view the heritage values of the potentially affected remnant section of railway embankment are low-medium - and representative samples of the same assemblage are listed elsewhere in the District Plan<sup>11</sup>.

Further discovery of archaeological evidence relating to pre-European Maori occupation on the site is considered to be very low for the reasons he provides; but, in the event that archaeological evidence of Maori occupation is encountered during project works – condition 6 of the archaeological authority to modify the site (2021/174) provides an appropriate mechanism to consider (and protect if necessary) unexpected archaeological finds<sup>12</sup>.

He and Mr McCurdy agree that the removal of the protected tree in a controlled manner as part of the development is optimal in the context of the short section of stone railway embankment. They also agree that that the proposed works proceeding under an HNZPT authority are appropriate for the entire site, and removal of the protected tree – a tree which will inevitably impact the structure and integrity of the remnant section of railway embankment at some stage in the future (regardless of the proposed development)<sup>13</sup>.

The proposed consent conditions are adequate and appropriate in Mr Bruce's view. He concludes that the applicant has fully recognised and provided for the protection of historic heritage from inappropriate subdivision, use and development and is consistent with s 6(f) of the RMA<sup>14</sup>.

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<sup>11</sup> Evidence Ivan Bruce, para 5.2(A)

<sup>12</sup> Evidence Ivan Bruce, paras 2.1, 5.2(B)-(C)

<sup>13</sup> Evidence Ivan Bruce, paras 7.4-7.8

<sup>14</sup> Evidence Ivan Bruce, paras 8.1-9.1

(d) *Bruce MacDonald – Arboricultural Specialist.*

Mr MacDonald is a highly experienced and well-regarded arboricultural specialist who prepared the arborist reports included in the application and further information request response<sup>15</sup>.

In his experience and expert opinion, the proposed development will adversely affect the health of the notable tree – due to impacts on its root systems.

However, he also considers that the tree has now entered the life cycle stage of decline – and that if it was reassessed for current notable status, it would not meet the required score when assessed against the criteria<sup>16</sup>.

Mr MacDonald is generally in agreement with Mr Paice, although he disagrees that the tree was originally planted for the reasons provided<sup>17</sup>.

While the evidence of both experts is that building on the land will likely affect the tree roots and subsequently its health – in my submission it is also a substantial and unreasonable interference with my clients use and enjoyment of the land if such land cannot be further developed due to the encroaching tree roots; being land that is zoned for such building development as that proposed.

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<sup>15</sup> Evidence Bruce MacDonald, para 2.1

<sup>16</sup> Evidence Bruce MacDonald, para 5.2

<sup>17</sup> Evidence Bruce MacDonald, paras 7.1- 7.2

In that context, Mr Balchin's view - that it is appropriate to remove the tree because it is hindering the reasonable development of the site – is correct<sup>18</sup>.

(e) *Andrew Fraser – Civil Structural Engineer.*

Mr Fraser prepared an engineering report in respect of the notable tree (included in the application), and also advised the applicant on the effects on the eastern downslope to the stream, and the proposed pile foundations effect on the existing notable tree roots<sup>19</sup>.

The effects of those potential issues are capable of being adequately and appropriately mitigated as discussed in Mr Fraser's evidence<sup>20</sup>. Further, dewatering is unlikely to be needed – but if it is, then can be adequately and appropriately managed/mitigated so that adverse effects on the environment will be less or no more than minor<sup>21</sup>.

Because of the intensive nature of the tree root system (as confirmed in Mr MacDonald's evidence) – Mr Fraser is of the view that it would be very difficult, and unlikely, to complete building foundations on the site without missing and/or damaging the tree roots. If damaged, the tree would potentially fall beyond the slip plane (because of its height) and damage neighbouring buildings<sup>22</sup>.

Noting that the protected tree has a limited life span, in Mr Fraser's opinion it is not practicable to keep the tree from an

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<sup>18</sup> Officer's Report, paras 148, 233 (see also discussion generally in paras 123-148)

<sup>19</sup> Evidence Andy Fraser, para 2.2.

<sup>20</sup> Evidence Andy Fraser, para 5.2.

<sup>21</sup> Ibid

engineering perspective – because the extensive (and intensive) root system will be damaged by the proposed piles and foundation beams – it is located above the existing potential slip plane that extends down to the Huatoki Awa – and removing the tree would mitigate potential damage to neighbouring buildings<sup>23</sup>.

(f) *Shaun Murphy – Architect.*

Mr Murphy undertook the proposed development shadow study to determine the potential adverse shadow effect of the proposed development on adjacent properties (including Sir Victor Davis Park). As he notes, measures were undertaken during design to mitigate any shadow effects where possible – such as the building materiality, and the set back design of the penthouse level to limit the shade<sup>24</sup>.

Mr Murphy's permitted baseline development shadow study was also undertaken as a tool to compare the potential shading effects of a compliant permitted activity development with the potential shading effects of the proposed development<sup>25</sup>.

Overlaying the baseline development and proposed development shading provided a clear visual representation of the potential adverse effects – which showed those to be less than minor<sup>26</sup>.

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<sup>22</sup> Evidence Andy Fraser, paras 5.12-5.17.

<sup>23</sup> Evidence Andy Fraser, paras 5.20-5.22.

<sup>24</sup> Evidence Shaun Murphy, para 6.1

<sup>25</sup> Evidence Shaun Murphy, para 5.1

<sup>26</sup> Evidence Shaun Murphy, paras 6.3, 7.4, 8.2, [9.1] and [9.2]

Accordingly, Mr Murphy agrees with the Officer's conclusion that any potential shading effects will be less than minor<sup>27</sup>.

(g) *Daniel McEwan, Landscape Architect.*

Mr. McEwan prepared the Landscape & Visual Impact Assessment Report, 1 September 2020 (LVIA) included in the application – and provides independent expert evidence about site context, landscape and urban character – potential impacts on that character (and the quality of the environment) – including potential impacts on cultural heritage/heritage character – and mitigation (including responses to issues raised by submitters and Mr Bain).

Viewing the proposal holistically, it will not generate significant adverse landscape, urban character, cultural heritage/heritage character or amenity effects on the environment – but will generate many positive effects in Mr. McEwan's expert opinion<sup>28</sup>.

While acknowledging that the building will result in change – the existing urban built form of the CBD can comfortably absorb that change – which change, Mr McEwan observes, is in alignment with key Council objectives and policies to ensure successful growth of New Plymouth's CBD<sup>29</sup>. Mr McEwan does not think the change will be as adverse as Mr Bain thinks it might<sup>30</sup> for the reasons he sets out on a holistic basis, looking over the entire application and a range of effects (in my submission).

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<sup>27</sup> Evidence Shaun Murphy, para 8.2

<sup>28</sup> Evidence Daniel McEwan, para 5.2

<sup>29</sup> Evidence Daniel McEwan, paras 5.2, 9.1

<sup>30</sup> Evidence Daniel McEwan, paras 14.2-14.5

Like Mr Cullen (and relying on his evidence where necessary), Mr McEwan is of the view that the proposal respects and celebrates the surrounding heritage building and Heritage Character Area environment<sup>31</sup>.

The significance and importance of the cultural heritage landscape should not be underestimated in this case – an important heritage that is sadly not currently well recognised at the site, or around much of the surrounding CBD. Positively, this proposal will remedy and help to restore some of that lost heritage – that will provide context and narrative to the existing heritage buildings nearby<sup>32</sup>.

On a holistic basis, looking over the entire application and a range of effects - Mr McEwan considers that the proposal fits well within the surrounding CBD environment – sits well, with the relevant statutory considerations – and has many positive attributes which outweigh any potential adverse effects, which he considers will be minimal (taking into account mitigation measures)<sup>33</sup>.

(h) *Murali Bhaskar – Project Architect, Boon Team Architects Limited.*

Mr. Bhaskar's evidence comprehensively describes the proposal, design philosophy and process, constraints and solutions, alternative developments and comments on the Officer's Report and consent conditions (discussed later in these submissions).

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<sup>31</sup> Evidence Daniel McEwan, paras 5.2, 14.3(c)

<sup>32</sup> Evidence Daniel McEwan, paras 5.2, 11.1, 14.3(c), 14.5(c)

The design is modern and contemporary in style and is intended to acknowledge its surroundings and future plans to open up the Huatoki Awa as part of the wider revitalisation of the CBD<sup>34</sup>; *"... the connection and acknowledgement to the Huatoki Awa in the design response/philosophy is extremely important, not just to this project but in the wider context of New Plymouth."*<sup>35</sup>

A range of design solutions have been employed by Mr Bhaskar (and his team) to mitigate site constraints (and potential adverse effects on the environment generally)<sup>36</sup>, as discussed earlier in these submissions.

Alternatives were also considered, but not pursued due to structural design complexities, construction costs and general constructability<sup>37</sup>; the proposed design efficiently optimizes a challenging, high profile site<sup>38</sup>.

Through a robust collaborative design process, Mr. Bhaskar has created a stimulating design that – *"... integrates well within its surrounding urban environment and is respectful to its neighbours, whilst making a positive statement about the city, district and region"*<sup>39</sup>; and also, *"... ensures that the voice of Ngāti Te Whiti as Mana Whenua and kaitiaki of the area is acknowledged and reflected in the design."*<sup>40</sup>

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<sup>33</sup> Evidence Daniel McEwan, paras 5.2, 9.1, 11.1, 12.2, 14.3, 14.5, 16.1

<sup>34</sup> Evidence Murali Bhaskar, paras 4.2-4.4

<sup>35</sup> Evidence Murali Bhaskar, para 4.2

<sup>36</sup> Evidence Murali Bhaskar, paras 4.5, 8.1-8.9, 10.3-10.17, 11.2-11.3

<sup>37</sup> Evidence Murali Bhaskar, paras 9.1-9.4

<sup>38</sup> Evidence Murali Bhaskar, para 12.1

<sup>39</sup> Evidence Murali Bhaskar, para 12.2

<sup>40</sup> Evidence Murali Bhaskar, para 12.3

- (i) *Cameron Twigley – Independent Planning Consultant, BTW Company Limited.*

Mr. Twigley peer reviewed the application (and prepared/peer reviewed the s. 92 responses); and provides expert evidence about the proposal, the site and receiving and surrounding environment; planning issues; relevant regulatory framework; effects and submissions; consent conditions, and sustainable management under Part 2 RMA.

He is generally in agreement with Mr Balchin's views in the Officer's Report; although he considers that some of the recommended consent conditions require amendments for reasons he sets out<sup>41</sup>.

Overall, both conclude that granting consent is not contrary to, and is generally consistent with, the relevant objectives and policies of the Operative and Proposed District Plans and other relevant statutory instruments in this case, and will promote the purpose of the RMA<sup>42</sup>.

### Law

16. The proposal has non-complying status and must therefore be first considered in terms of the threshold/gateway tests in s.104D RMA.

### ***Gateway test in Section 104D RMA***

17. Section 104D provides as follows:

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<sup>41</sup> Evidence Cam Twigley, paras 13, 135

<sup>42</sup> Evidence Cam Twigley, paras 10-14 136; Officer's Report, paras 220-234



**[104D Particular restrictions for non-complying activities**

- (1) Despite any decision made ~~[[for the purpose of notification]]~~ ~~[[in relation to adverse effects]]~~, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
- (a) the adverse effects of the activity on the environment (other than any effect to which ~~[[section 104(3)(a)(ii)]]~~ applies) will be minor; or
  - (b) the application is for an activity that will not be contrary to the objectives and policies of—
    - (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
    - (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
    - (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.
- (2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.]

18. Subsection 1(a) of s 104D requires you to be satisfied that the adverse effects of the activity on the environment ... will be minor. The other available gateway in subsection 1(b) is that the application should not be contrary to the objectives and policies of relevant plans and/or proposed plans.

19. In the Environment Court's recent decision in SKP Incorporated v Auckland Council<sup>43</sup> Principal Environment Judge Newhook provided a useful analysis on the correct legal approach to s 104D as follows;

"[47] Bearing in mind that the positions of the Applicant and the Council under s 104D(1)(a) are different (with Mr Wren giving his opinion that this limb of the gateway is not met because of some particular more-than-minor effects), it is worth noting a concession by the Council's counsel Mr Allen that the *Cookson Road* decision about an holistic approach is consistent with

earlier authority on a predecessor provision to s 104D (s 105(2A)), citing *Stokes v Christchurch City Council*.<sup>44</sup> We appreciate Mr Allan's candid submission that ultimately the assessment will involve conclusions by the Court as to facts and the degree of effect. We find that Mr Wren has been unduly conservative, and prefer the legal analysis offered by his counsel.

"[48] As to the "effects" gateway we may take into account aspects of mitigation and outcomes of imposing conditions of consent.

"[49] As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the law is that the evaluation under this provision is to be undertaken on a "holistic basis, looking over the entire application and a range of effects",<sup>45</sup> not individual effects.

"[50] The evaluation under subsection 1(b) is again, not an approach focussed on each relevant provision, but rather something more of a holistic approach. As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed.<sup>46</sup>"

20. Provided the proposal passes through one of the s. 104D gateway tests, the Application must be determined on its merits in accordance with the provisions of s. 104 RMA.

<sup>43</sup> [2018] NZEnvC 81

<sup>44</sup> *Stokes v Christchurch City Council* [1999] NZRMA 409 at p434.

<sup>45</sup> See for instance *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC 194 at [46] and subsequent paragraphs.

<sup>46</sup> See for instance *Cookson Road Preservation Society* decision; *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [73] – [74]; *Man O' War Station Limited v Auckland City Council* [2010] NZEnvC 248. Guiding this jurisprudence has been the seminal decision of the Court of Appeal, *Dye v [Auckland] Regional Council* [2002] 1 NZLR 337.

**Section 104D(1)(a) RMA**

21. It is submitted that the proposal passes through the minor adverse effects gateway contained in s.104D(1)(a), "on a *holistic basis, looking over the entire application and a range of effects*", not individual effects."<sup>47</sup>
22. Particularly so, in my respectful submission, when that evaluation is undertaken considering the salient case law in respect of the legal interpretation of the word "minor".
23. While not defined under s. 2 RMA, well established (and accepted/followed) case law has determined that "minor" is a comparative word.
24. In Bethwaite and Church Property Trustees v Christchurch City Council<sup>48</sup> His Honour Judge Skelton held<sup>49</sup> (on pages 7 and 8):

"The word "minor" is not defined in the Act but dictionary meanings suggest that in its primary sense, which is the appropriate one here, it is a comparative word. Thus, the Concise Oxford Dictionary gives as the primary meaning "lesser or comparatively small in size or importance...".

The Collins Concise Dictionary gives as the primary meaning "lesser or secondary in amount, importance, ....". "

"It seems clear therefore, that ..... Parliament did not intend that there should be no adverse effects. Nor, so it seems to us, did it intend that any adverse effects should be minimal. That is to say, again having recourse to the dictionaries, "smaller or very minute or slight". Thus, in using the word "minor" Parliament intended that whatever adverse effects there might be

<sup>47</sup> SKP Incorporated, supra, at paragraph [49]

<sup>48</sup> C85/93.

<sup>49</sup> In the context of the then s. 105(2)(b)(i) RMA - now s.104D(1)(a) - but this wording has not changed significantly.

they had to be *less than major, but could be more than simply minute or slight.*"

"Then too, we think it is permissible to consider this question having regard to any mitigation of effects that might be achieved by the imposition of conditions. Put another way, it is permissible to have regard to the effects of the activity, controlled by conditions that would limit or proscribe that activity and its effects. This has been done before – see for example Shell Oil NZ Ltd v Rodney District Council Decision No: C19/93..... It would not be sensible to have to rule out a proposed activity on the grounds that it failed to comply with both the pre-conditions in section 105(2)(b) of the Act if it was clear that by the imposition of conditions on the granting of consent, such a result could be avoided. [Emphasis added].

25. Subsequently, in Stokes v Christchurch City Council<sup>50</sup> (recently referred to in SKP Incorporated<sup>51</sup> above) - His Honour Judge Jackson confirmed<sup>52</sup> his agreement with the Planning Tribunal's findings in Bethwaite (supra) that the word "minor" means "less than major, but could be more than simply minute or slight." Then, His Honour went on to hold that:

"The test is whether the adverse effects, as proposed to be remedied and/or mitigated, and taken as a whole, are more than minor"<sup>53</sup>.

26. It is submitted that the adverse effects of the proposal on the environment, as proposed to be remedied and/or mitigated, and taken as a whole, will be no more than 'minor' - as that term is legally understood following Bethwaite and Stokes – and undertaking the evaluation, "on a *holistic basis, looking over the entire application and a range of effects*", not individual effects."<sup>54</sup>

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<sup>50</sup> [1999] NZRMA 409

<sup>51</sup> Supra, at paragraph [47]

<sup>52</sup> At pages 432-434

<sup>53</sup> Ibid

<sup>54</sup> SKP Incorporated, supra, at paragraph [49]

27. The evidence called by the applicant also establishes that there will be potential beneficial/positive effects of the activity on the environment for reasons that are provided in that evidence (and which will be discussed further under s.104(1)(a) RMA, where their relevance is applicable).

***Section 104D(1)(b) RMA***

28. Mr Twigley and the Officer both conclude that the application is for an activity that will not be contrary to the objectives and policies of the Operative District Plan and Proposed District Plan for reasons which have been clearly set out<sup>55</sup>.
29. It is submitted that they are correct, and the relevant case law analysis below, combined with the holistic evaluation approach summarised in SKP Incorporated<sup>56</sup> above (which they have properly applied), reinforces their views.
30. In Arrigato Investments Ltd v Auckland Regional Council<sup>57</sup> the Court of Appeal observed<sup>58</sup> that a non-complying activity, by reason of its nature, is unlikely to find direct support from any specific provision of the plan. At paragraph [18] the Court held:

“The issue in this case was not whether the plan supported the activity but rather, given that it did not, whether it was nevertheless appropriate to allow it. Indeed gateway (b) recognises that a non-complying activity will not be permitted by the plan, yet it may be granted provided it will not be contrary to the objectives and policies of the plan.”

<sup>55</sup> Evidence Cam Twigley, paras 93, 112; Officer's Report, paras 225-226

<sup>56</sup> Supra, at paragraph [50]

<sup>57</sup> [2001] NZRMA 481 (CA).

31. As was succinctly stated by Justice Grieg in the High Court's decision in New Zealand Rail Limited v Marlborough District Council<sup>59</sup>:

"...the essential question was whether the consent to the proposed use and development was "contrary" or not to the relevant objectives and policies. The Tribunal correctly I think, with respect, accepted that that should not be restrictively defined and that it contemplated being opposed to in nature different or opposite. The Oxford English Dictionary in its definition of "contrary" refers also to repugnant and antagonistic. The consideration of this question starts from the point that the proposal is already a non-complying activity but cannot, for that reason alone, be said to be contrary. "Contrary" therefore means something more than just non-complying."

32. More recently in Wilson v Whangarei District Council<sup>60</sup> His Honour Judge Thompson put it this way:

"[35] It is self-evident that a non-complying activity will rarely, if ever, find direct support in the objectives and policies of a Plan, but an absence of support does not equate to the activity being *contrary* to those provisions. *Contrary* in this context means ...*repugnant to...* or ... *opposed to...*the objectives and policies considered as a whole: - see *Monowai Properties Ltd v Rodney DC (A215/03)*."

33. It is submitted that the proposal is not repugnant to, opposed to or contrary to the thrust of the objectives and policies of the Operative District Plan or Proposed District Plan evaluated holistically.
34. The relevant objectives and policies contained in the those plans seek to retain and enhance the core CBD of New Plymouth; the proposal will assist to achieve those aspirations

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<sup>58</sup> At paragraph [17]

<sup>59</sup> [1994] NZRMA 70 (HC), at page 80.

in my respectful submission. Both those plans expressly contemplate buildings of this nature on the site, despite the bundling classifying this proposal as non-complying.

35. In my respectful submission, the proposal can pass both s104D gateways/thresholds, and stands to be considered under s. 104 and Part 2 RMA.

### **Section 104(1) and Part 2 RMA**

36. Section 104(1) identifies the matters to which the consent authority must have regard, subject to Part 2;

#### **[104 Consideration of applications**

- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to -
- (a) any actual and potential effects on the environment of allowing the activity; and....
- [(b) any relevant provisions of-
- (i) a national environmental standard:
  - (ii) other regulations:
  - (iii) a national policy statement:
  - (iv) a New Zealand coastal policy statement:
  - (v) a regional policy statement or proposed regional policy statement:
  - (vii) a plan or proposed plan; and]]
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

### **Part 2 RMA**

37. "Subject to Part 2" – has recently been considered by the Court of Appeal in RJ Davidson Family Trust v Marlborough District

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<sup>60</sup> W20/2007, at paragraph [35].

Council<sup>61</sup>. In short, the Court held that a consent authority may generally have regard to the provisions of Part 2 (depending on the circumstances of each case). In the present case - it is particularly appropriate to do so due to the Proposed District Plan (relevant in this case).

38. That is because the Proposed District Plan is still in the relatively early stages of its statutory process - it has been notified, submissions and further submissions received – no decisions have yet been made and hearings have not yet been held, nor any Environment Court appeals and/or determinations<sup>62</sup>. Therefore, the Proposed Plan has not necessarily, as yet, been finalised in a manner that appropriately reflects the provisions of Part 2 RMA – therefore the Consent Authority will be required to give emphasis to Part 2 in this case.

39. Section 5 RMA is paramount:

**5 Purpose**

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
  - (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
  - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

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<sup>61</sup> [2018] NZCA 316

<sup>62</sup> The weight to be given to a proposed plan depends on what stage the relevant provision has reached, the weight generally being greater as a proposed plan moves through the notification hearing process.



- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

40. The method of applying s. 5 still involves the well-known overall broad judgement set out in North Shore City Council v Auckland Regional Council<sup>63</sup> – as noted in: KPF Investments<sup>64</sup>.
41. Application of that method in this case requires an overall broad judgement of whether the development, upgrade and use of the site for the proposed building for people to use for business/commercial purposes and residential dwelling, and enhancement of the adjacent Huatoki Awa etc, will promote the sustainable management of natural and physical resources; recognising that the RMA has a single purpose.
42. Such a judgement allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome<sup>65</sup> – provided it is recognised that the weight to be given to the relevant considerations must be carefully allocated by reference to the strong directions in ss. 6 to 8, and to any particularisation of those in the statutory instruments from national policy statements down to district plans: KPF Investments<sup>66</sup>.
43. In my submission, the proposal will clearly contribute in a positive way to the social, cultural, and economic wellbeing of the community of New Plymouth in terms of section 5(2) of the RMA; and is suitable for consent on the conditions proposed. In particular, it is submitted that ss 5(2)(a) to (c) are met.

<sup>63</sup>[1997] NZRMA 59 (EnvC)

<sup>64</sup>Supra, at paragraph [202]

<sup>65</sup>North Shore City Council, supra, at page 94

44. The relevant ss. 6 - 8 considerations in this case are set out in the evidence of Mr Twigley<sup>67</sup>, Ms Mako<sup>68</sup> and the Officer's Report<sup>69</sup>.
45. It is submitted that the proposal recognises and provides for the nationally important matters in ss 6(e) and (f); and, has particular regard to ss 7(a), (b), (c), (f), (g) and (i).
46. In terms of ss 7(b), (c), (f) and (g) of the RMA the proposal will enhance amenities because it will improve the present unsightly nature of the applicant's site and will improve the quality of the surrounding environment and provide a sound use for a finite resource.
47. Amenity values can be assessed by the consent authority/Environment Court (in terms of assessing effects on the environment) - which must apply the law objectively in performing these functions: Gisborne District Council v Eldamos Investments Ltd<sup>70</sup>.
48. In terms of ss. 6(e), 7(a) and 8 - the applicant, from an early stage in the proposal, has placed appropriate emphasis on gaining an understanding of Maori cultural values, and being guided by them. The applicant has undertaken appropriate consultation with tangata whenua, whose participation in the proceeding has been properly enabled, and whose views have been (and will be) appropriately taken account of.

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<sup>66</sup>Supra, at paragraph [202]

<sup>67</sup> Evidence Cam Twigley, paras 117-122

<sup>68</sup> Evidence Sarah Mako, generally

<sup>69</sup> Officer's Report, paras 209-219

<sup>70</sup>HC GIS CIV-2005-485-001241 [26 October 2005], Harrison J, at paragraph [42]

49. Ms Mako's evidence is quite unequivocal as to the views of Ngati Te Whiti hapu and Te Ati Awa iwi on the project; that is, the hapu and iwi supports it subject to the conditions proposed by Ms Mako - which have been accepted by the applicant.

***Section 104(1)(a) RMA***

50. Section 104(1)(a) requires the consideration of any actual and potential effects on the environment of allowing the site to be developed and used as proposed.
51. Actual and potential beneficial positive effects must be considered, as well as actual and potential adverse effects.

***Adverse Effects***

52. These have already been comprehensively addressed in the application, s.92 responses, evidence for the applicant, Officer's Report and earlier in these submissions.
53. It is submitted that, on the totality of the evidence in this case, there is a basis for holding that there is not a potential adverse effect on the environment in this case that is more than minor when considered taking the approach of the Environment Court in SKP Incorporated<sup>71</sup> – and that potential adverse effects are not of such significance to warrant declining consent in this case (subject to the implementation of appropriate conditions).

**Positive Effects**

54. The proposal will offer a variety of positive effects for people and communities, in particular, for example, providing new state of the art high quality commercial/business premises and residential dwellings in the CBD (also contributing to the housing supply needs of the New Plymouth District, in an attractive environment for people to live in), improved access and connection to the Huatoki Awa for cultural and recreational purposes; and future employment for consultants, contractors, builders and the like.
55. The numerous positive effects of the proposal are predominantly canvassed in Messrs. Doody's and Twigley's evidence<sup>72</sup>, and the Officer's Report<sup>73</sup>.
56. These potential positive effects on the environment have been acknowledged in the evidence before you and have not been successfully challenged; and it is submitted that they are present, and you should have regard to them in reaching your decision.
57. In my submission, on the facts and circumstances of this case, there can be little doubt that the development will only be positive for the people and communities of New Plymouth (and beyond).

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<sup>71</sup> Supra

<sup>72</sup> Evidence Kevin Doody, paras 8-20; Evidence Cam Twigley, paras 26-27

**Section 104(1)(b) RMA**

58. All the relevant provisions applicable under s. 104(1)(b) have been (predominantly) thoroughly canvassed in this case by the Officer and Mr. Twigley. Overall, they are in agreement that the proposal is not contrary to, and is generally consistent with, those provisions in my submission<sup>74</sup>; as is Ms Mako in the context of Tai Whenua, Tai Tangata, Tai Ao<sup>75</sup>.
59. The proposal adequately serves the higher order and regional policy frameworks and specific District Plan objectives and policies; the proposal is, therefore, appropriate in this context.

**Section 104(2) RMA**

60. Under Section 104(2), when forming an opinion for the purposes of Section 104(1)(a), the consent authority may disregard an adverse effect of the activity on the environment if a plan permits an activity with that effect.
61. As noted, Mr Murphy undertook a permitted baseline development shadow study as a tool to compare the potential shadow effects of a compliant permitted activity development with the potential shadow effects of the proposed development.
62. As discussed by Mr Balchin, *"All assessments concur that the effects associated with shading, and particularly compared to*

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<sup>73</sup> Officer's Report, paras 164-172

<sup>74</sup> Officer's Report, paras 178-204; Evidence Cam Twigley, paras 72-112, 136.

<sup>75</sup> Evidence Sarah Mako, para 14

*the effects associated with a complying building height, would be less than minor in nature.*"<sup>76</sup>

63. In the context of building heights and potential adverse effects, Mr McEwan's evidence is that there is little difference when comparing a permitted (or proposed permitted) development to that under consideration in this case, with particular reference to public receptors such as the Victoria Road viewshaft<sup>77</sup>.
64. So, there are permitted activities which could produce relevant comparable effects in those respects - and it is respectfully submitted that there is no good reason not to exercise your discretion to disregard those effects under section 104(2).

### **Section 104(3) RMA**

65. Section 104(3)(a)(ii) does not apply in the facts and circumstances of this case.

### **Other Legal Issues**

66. **Precedent Effect.** It is trite law that precedent in the strict sense does not arise from the grant of a resource consent, following the Court of Appeal's decision in Dye v Auckland Regional Council<sup>78</sup>. A consent authority is not bound by a previous decision of the same or another authority; the facts and circumstances of each case are never likely to be the same (due to the many variables in each case).

<sup>76</sup> Officer's Report, para 89; see also Evidence Shaun Murphy generally; Evidence Daniel McEwan paras 5.2(e), 13.2; Evidence Cam Twigley, paras 38-40

<sup>77</sup> Evidence Daniel McEwan, paras 8.1, 14.3-14.5

<sup>78</sup> [2002] 1 NZLR 337 (CA), at paragraphs [32]-[36].

67. It is submitted that the facts and circumstances of this case are highly unlikely to be readily replicated elsewhere in New Plymouth. The uniqueness of the site and surrounding environment means that the integrity of the Operative District Plan (and Proposed District Plan) is not threatened. Mr Balchin and Mr Twigley concur<sup>79</sup>.

### ***Consent Conditions***

68. In the context of these submissions on this point, the applicant does not accept that consent condition 33 (previously 34) is reasonable or appropriate on the basis recommended; for the reasons canvassed in Messrs Bhaskar's and Twigley's evidence<sup>80</sup>.

69. The power to impose conditions on a planning consent is not unlimited. In Housing New Zealand Limited v Waitakere City Council<sup>81</sup> the Court of Appeal held<sup>82</sup> that the test applied in the House of Lords decision in Newbury District Council v Secretary of State for the Environment<sup>83</sup> should be applied by New Zealand Courts in relation to the provisions of the RMA.

70. That test, in relation to the validity of resource consent conditions at law, is as follows:

- The condition must be for a resource management purpose, and not for an ulterior one;

<sup>79</sup> Officer's Report, paras 184-188; Evidence Cam Twigley, paras 129-134

<sup>80</sup> Evidence Murali Bhaskar, paras 11.1-11.7, Evidence Cam Twigley, para 135 and Annexure G

<sup>81</sup> [2001] NZRMA 202 (CA).

<sup>82</sup> At paragraphs [14] and [18].

<sup>83</sup> [1980] 1 All ER 731.

- The condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached;
- The condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.

71. Applying the Newbury test in Cookie Munchers Charitable Trust v Christchurch City Council<sup>84</sup> the Environment Court expanded on that in terms of “appropriateness” under s. 108 RMA<sup>85</sup>; and recorded<sup>86</sup> that an appeal to the Environment Court against conditions of consent may frequently involve a two-stage process:

- Firstly, an inquiry as to whether or not the conditions in question satisfy the Newbury tests. If they do not, they are not valid conditions and simply cannot be imposed;
- If the Court considers that the conditions meet the Newbury tests it must still determine whether or not they are the most appropriate conditions to achieve the purpose of the RMA; and that the “appropriateness” test is a different test to those identified in Newbury.

72. The Court further observed<sup>87</sup> that whether or not a condition is “appropriate” must be determined (inter alia) having regard to Part 2 RMA; more particularly, whether or not imposition of the condition is appropriate in light of the purpose of the RMA, namely promotion of the sustainable management of natural and

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<sup>84</sup> NZEnvC W090/2008.

<sup>85</sup> At paragraphs [23]-[34].

<sup>86</sup> At paragraph [33].

<sup>87</sup> At paragraph [31].



physical resources. The conditions must be considered on their merits<sup>88</sup>.

73. Considered on its merits, it is submitted that recommended condition 33 is both unreasonable and inappropriate for the reasons particularly set out in Messrs Bhaskar's and Twigley's evidence<sup>89</sup>.
74. For those reasons, in my submission, that condition is unreasonable in that no reasonable planning authority duly appreciating its statutory duties could approve it; neither is it the most appropriate condition to achieve the purpose of the RMA.
75. That is because it potentially requires the applicant to take measures beyond what is reasonably required to mitigate effects caused by the activity; and, moreover, it is uncertain whether or not the suggested condition can even be achieved – and could lead to frustration of the consent (for the reasons set out in Messrs Bhaskar's and Twigley's evidence)<sup>90</sup>.
76. The evidence for the applicant, therefore, is that recommended condition 33 be deleted – which, it is submitted, is appropriate and will achieve certainty, fairness and reasonableness and, ultimately, sustainable management.

### **Submissions and Conclusions**

77. Each case must be considered and determined on its merits in light of the particular facts and circumstances.

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<sup>88</sup> At paragraph [34].

<sup>89</sup> Evidence Murali Bhaskar, paras 11.1-11.7, Evidence Cam Twigley, para 135 and Annexure G

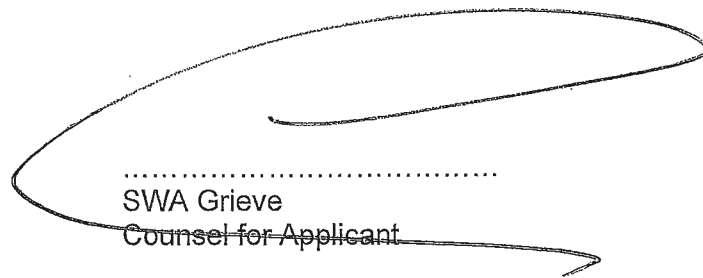
78. The applicant has put forward a firm proposal for developing and efficiently using, and enhancing, the natural and physical resources of the site (and surrounding environment) in a way which will enable people and communities to provide for their general, social, economic, and cultural wellbeing and for their health and safety - without significant adverse impact on the surrounding environment.
79. Furthermore, the proposal achieves a high degree of certainty about the appearance, location and intensity of the future use and development of the site; and provides future certainty to the community about the appearance of the site, and its integration with the surrounding environment. The proposal respects and enhances the surrounding environment in my submission.
80. Careful rigorous collaborative design has been undertaken to produce a high-quality aesthetic design and external appearance which fits within the context of the area. The design features incorporated to reduce the effect of scale, bulk, and shading - are all intended to produce a complementary visual outcome on the site and its surrounds.
81. Amenity values is a central issue which overlaps with the quality of the environment; and it is submitted that the applicant has sufficiently addressed the possible adverse effects, and ways to avoid, remedy or mitigate them, to the point where those effects are not an impediment to the granting of resource consent.

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<sup>90</sup> Ibid

82. It is submitted that overall – in terms of urban character, cultural heritage/heritage, landscape, and visual amenity values, in the round, the proposal is appropriate development in this particular location; will only have minor adverse effects on the landscape and urban character of the environment; and will have a range of effects, the great majority of them minor, on visual amenity values - and varying from positive to adverse depending on viewer attitude and visual perception.
83. It is submitted that analysed in that way, the proposed building will fit well into the landscape and provide a significant positive contribution to the experience and amenities of the New Plymouth CBD; and, will also help the functioning of the city of New Plymouth.
84. Clearly, in my respectful submission, the building development will enable people in the community by providing access to high quality commercial/business premises and residential accommodation - and associated social, cultural, and economic wellbeing.
85. The development will undoubtedly enhance and improve the existing environment. The significant positive effects that the proposal will bring far outweigh the limited (mitigated version) adverse effects in the circumstances of this case.
86. Based on the whole of the evidence, the proposal is clearly not contrary to, and is consistent with, the provisions of the relevant statutory instruments to be considered under s 104(1)(b); and any adverse effects that might occur can be adequately and appropriately mitigated.

87. It is respectfully submitted that the proposal meets the purpose of the RMA – it promotes the sustainable management of natural and physical resources; and the necessary consents should be granted.



.....  
SWA Grieve  
Counsel for Applicant