

NEW PLYMOUTH DISTRICT COUNCIL
DECISION OF INDEPENDENT COMMISSIONER

IN THE MATTER OF: The Resource Management Act 1991

AND An Application for Resource Consent By Dawson Developments Limited for land use consent to construct, at 122 St Aubyn Street (New Plymouth), a 7-storey apartment building that exceeds the maximum permitted activity height limit prescribed by the rules of the New Plymouth District Plan and to remove a Banksia tree to enable construction to proceed.

New Plymouth District Council Reference LUC08/44744

Applicant: Ian Pritchard Architects on behalf of Dawson Developments Limited

Application Site: Lots 1 and 2 DP 8836 extending between 122 St Aubyn Street and 13 Regina Place (New Plymouth) comprising a site of 1,273m² area.

Site Owner: Dawson Developments Ltd (R E Bristow and A J Wrataslav).

District Plan Zoning: Business 'B' Environment Area overlaid by the 'Cameron Street Viewshaft'.

Consent Status: **Restricted Discretionary Activity** pursuant to Rule OL63 (relating to the Cameron Street Viewshaft 10m height limit) and Rule Bus13 (relating to the permitted activity 10m height limit) and Rule Bus87 (relating to the layout of internal carparking); and **Controlled Activity** pursuant to Rule OL69 (for the removal of the Banksia tree).

Notification Details: The application was publicly notified on 5th September 2008 and 2nd October 2008; submissions closed on 3rd November 2009; and 89 submissions were received in opposition to the application.

Summary Of Decision:	Consent for construction of the apartment building is refused and consent to remove the Banksia tree is granted for the reasons set out in part 20 of this decision.
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Hearing Details: The application was heard by independent Commissioner Christine Foster on Tuesday 22nd June 2010. The Commissioner issued a memorandum to parties on 14th July 2010 setting out her preliminary findings and adjourned the hearing to allow the applicant an opportunity to address the potential adverse effects discussed in her memorandum. The applicant responded, by letter dated 6th September 2010, enclosing revised plans showing the proposed apartment in a different position on the site ('Scheme C'). There followed a series of correspondence between the applicant, the Commissioner and the Council's advisers about whether or not the amended 'Scheme C' fell within the scope of the application as originally lodged and publicly notified.

The Commissioner confirmed, by e-mail dated 19th November 2010, her view that 'Scheme C' did not fall within the scope of the proposal as originally lodged. The applicant advised, by letter dated 25th November 2010, its decision to continue with the version of the proposal considered at the hearing (rather than 'Scheme C').

Appearances At The Hearing:

For The Applicant:

- Mr Richard Brabant (Barrister)
- Mr Ian Pritchard (Registered Architect and Associate of the New Zealand Institute of Architects)
- Mr Richard Bain (Consultant Landscape Architect)
- Mr Robert Schofield (Consultant Environmental Planner – Director and Principal Planner – Boffa Miskell Limited)

Submitters:

- Mr Ron Sewell
- Mr Scott Grieve (Solicitor) on behalf of the RM Sarten Family Trust, the JEM Sharrock Family Trust and the Richmond Estate Body Corporate 17629
- Mr David Hermann (Registered Architect and Associate of the New Zealand Institute of Architects) in support of his own submission and on behalf of the Hermann 1 & 2 Trusts
- On behalf of Govett Quilliam, Regina Properties Limited and Devonport Apartments Body Corporate 13859:
 - Ms Lauren Wallace (Solicitor); and
 - Ms Melean Absolum (Consultant Landscape Architect and Fellow of the New Zealand Institute of Landscape Architects)
- Ms Lois Leonard (also known as Lois Scott) resident and Manager of Devonport Apartments
- Mr Bill Williams on behalf of the Flood Williams Family Trust
- Mr Colin Twigley

For New Plymouth District Council:

- Ms Rachael Megee (Environmental Planner – New Plymouth District Council)
- Ms Mary Buckland (Consultant Landscape Architect)
- Mr Colin Comber (Manager – Environmental Strategy & Policy – New Plymouth District Council)
- Mr Ralph Broad (Manger – Consents – New Plymouth District Council)

Written Statements Of Evidence Were Tabled At The Hearing From:

- Mr and Mrs Stuart and Marion Green (owners and occupants of Apartment 6 of the Richmond Estate Apartments); and
- Ms Pam Butler (Senior Resource Management Act Advisor for Kiwi Rail on behalf of OnTrack (New Zealand Railways Corporation))

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1 The Application Site

- 1.1 The site comprises two titles extending between 13 Regina Place and 122 St Aubyn Street, New Plymouth. It is 1,273 square metres in area and has a frontage of approximately 26 metres to Regina Place and 18 metres to St Aubyn Street. The site widens slightly from a point about midway between the two street frontages. The site slopes from the St Aubyn Street frontage to the Regina Place frontage and there is a difference of approximately 4.5 metres in height between the two frontages. There is also a 1.2-metre-high retaining wall separating the site from the formed Regina Place footpath.
- 1.2 There is an older-style dwelling on the part of the site fronting Regina Place that is used by one of the owners as a dental surgery. The perimeter of that part of the site is landscaped with grass and shrubs. There is a mature Banksia tree near the western boundary near Regina Place. That tree is an 'Amenity Tree' as defined in the District Plan by virtue of it being taller than 6 metres in height.
- 1.3 There is a three-storey commercial building occupying part of the site frontage to St Aubyn Street and an access driveway along the eastern side of that building through a paved car parking area at its rear. That driveway provides access to the dental surgery.

2 The Proposal

- 2.1 The applicant proposes to construct a 7-storey residential apartment building in approximately the position of the existing dwelling. The ground floor is to accommodate 12 car parking spaces, storage spaces, rubbish collection area and entrance lobby. The first to seventh floors are to be apartments of identical layout all accessed by a central lift and stairwell. The building is to be approximately 23 metres in height from its basement floor to the roof including the air conditioning unit. Additional carparking for 13 cars is proposed at ground level between the building and St Aubyn Street.
- 2.2 The applicant proposes to remove the Banksia amenity tree from near the western boundary. The landscaping plan submitted with supplementary information (dated 16th June 2010) shows the planting of specimen indigenous trees including pohutukawa and ground cover plants within the outdoor car parking area and around parts of the perimeter of the site.
- 2.3 A single vehicle access point is proposed onto St Aubyn Street.
- 2.4 The plans considered at the hearing differed from those submitted with the original application in the following respects:
 - (a) There is a 3-storey commercial building occupying the south-western corner of the site. The applicant originally proposed to retain and refurbish this building. That gave rise to requirements for on-site car parking that could not be achieved. The applicant no longer proposes to retain this building and proposes to remove it.
 - (b) The apartment building has been shifted southwards by approximately 3.5 metres. At its closest point, measured perpendicular to the Regina

Place boundary, the ground floor podium of the building will be 3.5 metres from that boundary and the closest part of the upper floor apartments will be 7 metres from that boundary. The closest part of the building will be approximately 700mm from the western side boundary and 1 metre from the eastern boundary. The closest part of the building will be approximately 30 metres from the St Aubyn Street boundary.

- (c) With the removal of the commercial building, the outdoor car parking has been re-configured and a revised landscaping plan prepared for that area (referred to above – dated 16th June 2010).
 - (d) The building has been lowered, by approximately 1.74 metres, by lowering the basement floor level. The overall height is to be just under 23 metres.
 - (e) The roof overhang on the northern face of the building has been removed.
 - (f) The balustrading on the balconies on each apartment floor is to be glass rather than solid concrete.
 - (g) A revised exterior colour scheme is proposed, using recessive tones, with a stipulation that surface reflectivity not exceed 35%.
- 2.5 There was no dispute from any party that the proposed amendments could be considered to be within the 'scope' of the original application. The amendments will not expand the scope of potential adverse effects and, in some respects, will provide enhanced mitigation of potential effects. Ms Megee, reporting planner for the Council, advised that there is no reason why the revised plans cannot replace the plans lodged. It was her evidence, and Mr Schofield's evidence for the applicant, that there is no need for the application to be re-notified. The revised proposal is what the applicant seeks consent for. The applicant referred to the revised proposal at the hearing as 'Scheme B'.
- 2.6 My 14th July 2010 memorandum to parties invited the applicant to submit amended plans of the proposed apartment building to address the potential adverse effects I discussed in that memorandum. For completeness, I note that the applicant prepared an alternative 'Scheme C' by which it sought to address some potential adverse effects. However, it is my assessment that this alternative 'Scheme C' cannot be considered to fall within the scope of the original application. It is my view that, if the applicant wished to pursue 'Scheme C' and in the absence of any written approvals from any parties potentially affected by 'Scheme C', a separate application for resource consent would be required. The reasons for my conclusion are explained in correspondence with the Council and the applicant and there is no need to detail those here. The upshot of the opportunity provided by my 14th July 2010 memorandum is that the applicant has elected to proceed with its 'Scheme B'. That is the proposal I refer to in this decision as 'the proposal' or 'the proposed building'.

3 Reasons Why Consent Is Required

3.1 The site is within the Business 'B' Environment Area of the District Plan and is identified as being within section 3 of the Cameron Street Urban Viewshaft. The proposed building requires consent as a **restricted discretionary activity** under the following rules:

Rule Bus13: Because the building's proposed height is greater than 10 metres;

Rule Bus87: Because the manoeuvring space behind the basement carparks (at between 6.3m and 7.0m) is less than the 7.7-metre minimum specified in Appendix 23; and

Rule OL63: For a building higher than 10 metres within the Cameron Street Urban Viewshaft.

3.2 Removal of an amenity tree is provided for as a **controlled activity** under Rule Bus69.

3.3 Both the applicant and Ms Megee considered the proposal to be, overall, a restricted discretionary activity but agreed that the discretion to grant or refuse consent does not extend to removal of the amenity tree. That activity cannot be refused consent, as it is explicitly a controlled activity, although conditions may be imposed to address any adverse effects.

4 Submissions

4.1 Public notification of the application drew 89¹ submissions all opposed to the proposal. Submitters included residents and representatives of residents living in the nearby residential area as well as people living elsewhere in New Plymouth concerned about the potential adverse effects of the seven-storey building. I record that I have read all of those submissions and would summarise the concerns expressed in them as:

(a) The height of the building, the extent of excess height above 10 metres and the potential visibility and visual dominance of this proposed building height;

(b) Potential adverse effects on the amenity values and character of neighbouring properties and the surrounding area generally (including effects of shading, loss of privacy and blocked views);

(c) Potential adverse effects on the natural character of the coastal environment and of the coastal walkway;

(d) Potential adverse effects on the experience of walking along the coastal walkway;

(e) Cumulative effects;

¹ Ms Megee stated in her section 42A report that submissions had been received from 101 people. I counted 89 individual submissions. There is no way of knowing how many people those submissions represent because some of them are from Bodies Corporate, some from family trusts and at least one is from a business.

- (f) Potential precedent that could be created for other similar proposals if consent is granted;
 - (g) Related to this last issue, a concern that the proposal could itself or in combination with other future similar development result in a lack of connection between the City and coast similar to development patterns in places like Surfer's Paradise Australia.
- 4.2 I also note that some submissions raised concerns about the insufficiency of on-site car parking and landscaping along the St Aubyn Street frontage. Both of these aspects of non-compliance have been overcome by the amendments to the plans for the proposal ('Scheme B') and the submissions on these points do not need to be further considered.
- 4.3 A submission from OnTrack (New Zealand Railways Corporation) raised particular issues about the potential for reverse sensitivity to arise in the future given the close proximity of the railway line to the proposed residential apartments. OnTrack's concern was that people who live in the proposed apartments might in future complain about noise or vibration caused by train movements and/or seek to constrain the activity on the railway line because of these effects. OnTrack requested that, if consent is granted, conditions be imposed to ensure the structural details of the proposed building address the potential for both noise and vibration effects.
- 4.4 A submission was received from Ngati Te Whiti Ahi Kaa relating to the proximity of the site to two waahi tapu sites. Ms Megee was unable to identify any such sites from Council's records and no-one appeared representing the submitter at the hearing to identify them or clarify the scope of the concerns.

5 Principal Issues In Contention

- 5.1 The principal issues that were in contention in the submissions and in evidence to the hearing were:
- (a) The extent to which the proposed building would adversely affect the character and visual amenity of the surrounding area including neighbouring properties; and
 - (b) The extent to which the mitigation proposed by the applicant could address adverse effects.
- 5.2 I discuss the issues that were in contention in my assessment of the proposal in terms of the relevant restricted discretionary matters later in this decision.

6 Evidence

- 6.1 I summarise the relevant evidence presented to the hearing in discussing the merits of the proposal in terms of the restricted discretionary matters later in this decision.
- 6.2 Ms Melean Absolum, a Consultant Landscape Architect, appeared in support of submissions by Govett Quilliam, Regina Properties Limited and Devonport Apartments Body Corporate 13859. In spite of potential landscape and visual

impacts being the subject of those submissions and clearly 'live' for this hearing, Ms Absolum was not given instructions to prepare for the hearing until approximately 1 week prior to the hearing.

- 6.3 In the time available she was able to read the application documents and section 42A report, undertake a site visit, review the photographic simulations and draw some overall conclusions. Ms Absolum was quite candid that the time available had not allowed her an opportunity to undertake a full assessment of the visual impacts of the proposal as Mr Bain and Ms Buckland had been able to do.
- 6.4 My discussion of Ms Absolum's evidence is somewhat more brief than that of Mr Bain's and Ms Buckland's. That is accounted for by Ms Absolum's own explanation that, in several respects, she was unable to form an expert opinion based on the limited investigation she was able to do. Her evidence was nonetheless helpful to me and I draw on it where relevant.

7 Relevant Provisions Of The Resource Management Act

- 7.1 The application was lodged before the 1st October 2009 amendments to the RMA came into force. There was no disagreement that the application has to be considered in terms of the provisions of the RMA that existed prior to 1st October 2009.
- 7.2 My authority to grant or refuse consent to a restricted discretionary is set out in section 104C of the RMA:

'Particular restrictions for restricted discretionary activities

When considering an application for a resource consent for a restricted discretionary activity, a consent authority –

- (a) must consider only those matters specified in the plan or proposed plan to which it has restricted the exercise of its discretion; and*
- (b) may grant or refuse the application; and*
- (c) if it grants the application, may impose conditions under section 108 only for those matters specified in the plan or proposed plan over which it has restricted the exercise of its discretion.'*

- 7.3 Section 104A provides that, for controlled activities (the removal of the amenity Banksia tree):

'Determination of applications for controlled activities

After considering an application for a resource consent for a controlled activity, a consent authority –

- (a) must grant the application, unless it has insufficient information to determine whether or not the activity is a controlled activity; and*

(b) *may impose conditions on the consent under section 108 for matters over which it has reserved control in its plan or proposed plan.'*

7.4 Section 104 of the RMA sets out the matters I must have regard to in considering an application and any submissions received. The relevant matters are, in the present case:

s. 104(1) (a): *the actual and potential effects on the environment of allowing the activity;*

s. 104(1)(b)(ii): *the relevant provisions of the New Zealand Coastal Policy Statement*

s. 104(1)(b)(iii): *the relevant provisions of the Taranaki Regional Policy Statement*

s. 104(1) (b)(iv): *the relevant provisions of the New Plymouth District Plan and relevant provisions of the Taranaki Regional Coastal Plan;*

s. 104(2): *when forming an opinion for the purposes of subsection 1(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits and activity with that effect.*

7.5 I note that the consideration required under section 104 is subject to Part 2 of the RMA. I take that to mean that, whilst I must give the matters listed in section 104 due regard, I must also give appropriate weight to the relevant matters of national importance and to the sustainable management purpose of the RMA set out in Part 2. The Part 2 matters that were discussed in evidence as being relevant are:

Section 6 (a): which requires that I must recognise and provide for the preservation of the natural character of the coastal environment and the protection of it from inappropriate use and development (and, in this regard, I note that the concern under section 6 (a) is with *natural character*);

Section 7 (c): which requires me to have particular regard to the maintenance and enhancement of amenity values; and

Section 7 (f): which requires me to have particular regard to the maintenance and enhancement of the quality of the environment.

I discuss the relevant aspects of these matters in discussing the principal issues in contention later in this decision.

7.6 I also note that, under section 104 (1)(c), I must have regard to any other matter I consider relevant and reasonably necessary to determine the application. Two documents were referred to by submitters as being relevant to the proposal:

(a) The *New Plymouth District Coastal Strategy*; and

(b) The *Mountains To Sea Design Guide*.

- 7.7 The first is a non-statutory strategy setting out a number of goals together with implementation and consultation actions to be undertaken by various public agencies which have jurisdiction over parts of the coastal environment. The second is an urban design guideline intended to influence the design of public projects developed on streets within the CBD so as to strengthen the perceived connection between mountain, city and sea. I have reviewed both documents. Neither contains any policy that is directly relevant to the proposal.
- 7.8 Ms Megee and several submitters also made reference to a 2008 *North and South* magazine article in which New Plymouth was voted the 'most liveable city'. It seems that one of the reasons for this 'award' was the City's 'refreshingly low-rise CBD'. This is not a relevant matter for the purposes of section 104.

8 The Surrounding Environment

- 8.1 Before proceeding further, it is helpful to place the site and the proposal in the context of its surrounding environment.
- 8.2 New Plymouth is laid out in a grid pattern with the central business district (the *CBD*) occupying part of this grid near the curve of the coastline close to where the Huatoki Stream meets the sea. At the edges of the CBD, some of the grid shapes are truncated as triangles where the grid meets the curve of the sea. The site is part of a triangle of land bounded by St Aubyn Street, Regina Place and Dawson Street. To the immediate north of Regina Place is the Marton-to-New Plymouth railway line which runs along the coast between New Plymouth and the port. There are several train movements on that line each day and some also at night. The coastal edge is modified, through this part of New Plymouth, by the retaining structures and reinforcing blocks placed to protect the railway line from the sea.
- 8.3 St Aubyn Street is a state highway (SH44) and a main access road between the City and the port. Regina Place is a legal road but is formed only as a footpath with no formed vehicle access. The footpath provides a pedestrian connection, along the northern edge of the triangle of land, between Dawson Street and St Aubyn Street. The footpath forms part of the coastal walkway along the coastal edge of New Plymouth that extends from the port, some distance west of the site, to the Waiwhakaiho Stream to the north of the City.
- 8.4 Within the triangle of land there are four sites in addition to the applicant's site: Govett Quilliam solicitors occupy a modern building immediately west of the site. There is a large commercial building occupying most of the square-shaped site at the corner of Dawson Street and St Aubyn Street. That building was formerly occupied by a Fitness Centre but was unoccupied at the time of the hearing. The parcel of land between that building and the Govett Quilliam building (fronting Dawson Street) is an asphalted area of carparking used by Govett Quilliam.
- 8.5 To the immediate east of the site is the Richmond Estate residential apartment complex. The main building on the site was originally built as the Tasman Hotel in the 1960s. It was converted in the early 1990s to residential apartments. It features a nine-storey tower including an indoor heated swimming pool on the ground level with the upper floors divided into individual residential apartments. There also two wings of lower-level apartments: one

wing comprising three two-story apartments at the easternmost point of the triangular site and a 3-storey wing between the tower and the applicant's site. The ground floor of the main part of this wing is occupied by garages for residents' vehicles. The second and third levels are individual apartments. The second floor apartment is owned by Mr and Mrs Smith and the third floor apartment is owned by the Hermann 1 & 2 Trust. There are two apartments at the westernmost end of this wing: one occupying two floors (owned and occupied by Mr Tobeck) and a second at ground floor owned by the Flood Williams Family Trust.

- 8.6 The Richmond Estate Apartment complex is built largely hard against the St Aubyn Street frontage with security access gates and entry to the internal garages. The balance of the site, excluding access driveways and parking areas, is in lawn with some landscape planting. All of the apartments have outdoor decks or terraces oriented towards the sea to the north.
- 8.7 There are two mature pohutukawa trees along Regina Place east of the site both protected by identification in the District Plan as 'notable trees'. Mature pohutukawa trees are a feature of the wider landscape in this part of New Plymouth.
- 8.8 The land on the southern side of St Aubyn Street, opposite the site, is occupied by three apartment buildings (the Devonport, Clarendon and Quadrant on Queen Apartments) and a Chubb Security commercial premise.
- 8.9 Ms Lois Leonard, who lives in and is the Manager of the Devonport Apartments, stated in evidence that the Devonport Apartments were designed by F. Messenger, a leading Taranaki architect of the early twentieth century, and were completed in 1924. The Apartments comprise three blocks of three-storey apartments built to the St Aubyn and Dawson Street edge with rear car parking accessed from Young Street. Ms Leonard explained that there were once low walled gardens at the St Aubyn Street entrances into the building but that these were removed to make way for road widening in the 1940s. The Devonport Apartments have a Category II registration under the Historic Places Act 1993. They are not particularly identified in the District Plan which lists only Category I registered heritage items. The building has the style, features and façade treatment typical of large buildings of its era.
- 8.10 The Clarendon Apartments comprise three apartments on two levels also built to the St Aubyn Street edge with rear car parking accessed from Young Street.
- 8.11 Chubb Security occupies the two buildings between the Devonport and Clarendon Apartments.
- 8.12 To the immediate east of the Clarendon Apartments are the Quadrant-on-Queen Apartments in the recently-converted former New Plymouth Gentleman's Club.
- 8.13 The land to the south of the St Aubyn Street apartments, fronting Young Street and Queen Street, is a mix of warehouse-type and retail commercial at the fringe of the CBD. The land west of Dawson Street is predominantly residential.

- 8.14 Various witnesses described the site as being part of a 'transitional area' at the coastal edge of downtown New Plymouth. East of Queen Street, the land on the southern side of St Aubyn Street is occupied by motels, cafés and commercial land uses. A notable feature of this area is Puke Ariki which is the Council's library, museum and visitor information centre occupying land on the left bank of the Huatoki Stream close to where it discharges to the sea. I discuss later in this decision the District Plan zoning of the CBD, the areas at the fringe of the CBD and the residential areas surrounding the site.
- 8.15 The Todd Energy Aquatic Centre (a public swimming pool complex also referred to as the 'Kawaroa Pools') occupies a headland north of Weymouth Street some distance to the west of the site. Further west is Port Taranaki and the distinctive Sugar Loaf Islands and Paritutu.
- 8.16 There are a number of multi-storey buildings in the wider New Plymouth CBD. Mr Schofield identified the Shell Building, the Liardet Street Apartments, Genesis House and the Perry Dines, TSB, IRD and Department of Social Welfare buildings as all having 7 or more storeys height.

9 Relevant Provisions Of The District Plan

- 9.1 The relevant provisions include the objectives, policies, anticipated environmental results and rules for the Business 'B' Environment Area and the description of the Cameron Street Viewshaft.
- 9.2 The provisions of the Residential Environment Areas are also relevant in this case. As Mr Brabant explained in his legal submissions, there are deliberate distinctions between the Residential Environment Areas and the Business 'B' Environment Area in relation to policies for protecting residential privacy, sunlight access and other residential amenity values. It was his submission that these distinctions are important in understanding the character and visual amenity within the Business 'B' Environment Area that the District Plan seeks to protect. I examine those provisions – including the distinctions – in the following paragraphs:

(a) Business 'B' Environment Area Provisions

- 9.3 The site is part of the Business 'B' Environment which is one of four Business Environment Areas in New Plymouth District. The Business 'A' Environment Areas are located centrally within the New Plymouth, Waitara and Inglewood retail areas. In New Plymouth, Business 'A' is the zoning for the centre of the business and retail area bounded broadly by Queen Street, Robe Street, Powderham Street, King Street, Ariki Street and extending along Devon Street East.
- 9.4 The Business 'B' Environment Area is described on page 277 of the District Plan as being characterised by:

'larger scale, bulky buildings (such as warehouses), orientated towards the motorised customer, with parking usually provided on-site. Some of these buildings are set back from the road with car parking provided in front of the building while others are positioned up to the street with parking areas provided at the side or the rear of the building. Advertising is generally

through signs rather than window displays, and generally no weather protection is provided.'

9.5 Business 'C' Environment Areas are found in suburban (rather than central city) locations.

9.6 Business 'D' Environment Areas are described by the District Plan as being:

'areas that are in transition from residential to business uses or contain business uses which are located in buildings which are residential in scale and character. Generally businesses in these areas are providing a service and many of them are offices. Sites tend to be small in scale, well landscaped and provide on-site parking. They are generally found on the fringes of central retail areas.'

9.7 There are large areas zoned Business 'D' along St Aubyn Street and Young Street west of Dawson Street, along Dawson Street near the site and along Young Street as far east as Queen Street. There is some inter-mixing of Business 'B' and 'D' areas in the blocks immediately south of the site (between King Street and St Aubyn Street).

9.8 Mr Brabant emphasised the point, in his legal submissions, that although much of the Business 'B' zoned land in this vicinity is occupied by residential dwellings these are not protected by residential zone provisions. Rather, he says, this entire area is subject to the level of protection commensurate with its character as a Business 'B' area – recalling what the District Plan says (above) about the character of those areas.

9.9 Mr Colin Comber, the Council's Manager Environmental Strategy and Policy, attended the hearing and helpfully answered some questions I had about the rationale for the zoning in this part of central New Plymouth. Mr Comber stated that, prior to the preparation of the 1992 District Plan Review, the transitional District Plan contained no height controls for the central business district of New Plymouth. He explained that preparation of the District Plan Review in 1991/1992 included the publication of a series of technical papers and issues papers. These included a 1994 issues paper on amenities in urban design which was the subject of public consultation.

9.10 Mr Comber stated that the District Plan Review deliberately stepped away from zoning activities and sought to manage the effects of activities. For this reason, the various Environment Areas of the District Plan do not include prescriptive lists of permitted activities. Instead, the Council chose to provide generally for any activity in the Environment Area provided it meets specified standards. These standards, Mr Comber explained, are set at levels intended to manage potential adverse effects so as to protect local character. Mr Comber explained that the Council therefore carefully considered the character of the various areas within the District so that the thresholds for effects were set at levels that would ensure they could be managed so as to protect the character of different areas. He stated that the 10-metre permitted activity height standard for the Business 'B' area was chosen quite carefully by reference to the character of the area as it was understood at that time.

9.11 I asked Mr Comber where in the District Plan the character of the area surrounding this site is described. Mr Comber stated that there is no precise

definition of the character of this area. Rather, he said, the assessment of character needs to be undertaken in terms of what actually exists in the environment for each individual application.

- 9.12 Mr Comber stated that, at the time of preparing the District Plan Review, the Council did not contemplate tall buildings of the height proposed in this application. He recalled that there was an emphasis in submissions on the publicly notified District Plan Review on not wanting 'high rise' development. It was his opinion that the District Plan doesn't contemplate buildings significantly higher than the permitted activity height standard. As Mr Brabant pointed out in his legal submissions, however, there is no policy or rule or any other statement in the District Plan that suggests buildings higher than the permitted activity standard are not contemplated. It is inherent in the very nature of a restricted discretionary activity rule that they are indeed contemplated. Also, in the rule framework of the District Plan there is no upper height limit for restricted discretionary activities and no height limit that triggers non-complying activity status. Each proposal must be considered on its merits.
- 9.13 Mr Comber also explained that the District Plan generally provides for activities as permitted or controlled (if they meet the standards) or restricted discretionary activities (if they fail to comply with any standards). The District Plan then states the specific matters to which the Council has restricted its discretion in assessing restricted discretionary activity applications. Mr Comber stated that this was deliberately so that the assessment of a proposal would focus on the relevant matters and avoid being distracted by extraneous or irrelevant matters.
- 9.14 It was apparent, from the comments of some witnesses, that there is a belief that the 10-metre permitted activity height condition specified in Rules Bus13 and OL63 is an absolute height maximum. Ms Absolum put it this way²:

'Although redevelopment of the subject site, and indeed its neighbouring sites, might have been anticipated by the residents on the south side of St Aubyn Street, they would be justified in expecting any re-development to be confined to 10m in height'.

- 9.15 Ms Megee stated at paragraph 9.14 of her evidence in chief that:

'It is essential to retain the current low-rise nature of the CBD. To not do so would be contrary to Objectives 1 and 5 and Policy 1.1.'

- 9.16 I can find no basis, either in the District Plan or the evidence, for either of these assertions. There is no District Plan policy explicitly seeking to retain the current low-rise nature of the CBD. There is no basis in the District Plan for the belief that the 10-metre standard is an absolute maximum. In answer to my questions, Mr Comber and Ms Megee agreed it is not an absolute maximum and that proposals for buildings over 10 metres height are provided for (as restricted discretionary activities). To consider the 10-metre standard as an absolute maximum is therefore the incorrect starting point for an assessment of the effects of the proposal and of the merits of the proposal.

² At paragraph 4.3 of her statement of evidence

(b) Rule Bus13 Assessment Criteria For Proposals Over 10m Height

9.17 The restricted discretionary matters specified for non-compliance with the Business 'B' permitted activity height standard are³:

Assessment Criteria

Council has restricted the exercise of its discretion to these matters for land use consents

- 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;*
 - *adversely affect outstanding and regionally significant landscapes;*
 - *intrude into and/or block an urban viewshaft (see section 3 of the planning maps); and*
 - *adversely affect the natural character of the coastal environment or priority waterbodies;*
- 2) *The extent to which site layout, separation distances, topography, planting or set backs can mitigate the adverse effects of extra height.*
- 3) *Where the site is located in airport flight path surface 1 [and I note that this is not relevant to this application]*
- 4) *Any adverse visual effects on the New Plymouth entrance corridors [the roads adjoining and in the near vicinity of the site are not identified as entrance corridors].*
- 5) *Whether the building is necessary for the operation of an emergency service [and this is not relevant in this case].*

9.18 The evidence confirms that the proposed apartments will not adversely affect any outstanding or regionally significant landscapes. These are identified on the planning maps and there are none near the site. Neither are there any priority waterbodies near the site⁴.

9.19 The relevant discretionary matters in this case are therefore:

- (a) The extent to which the extra height of the proposed building will adversely affect the character and visual amenity of the surrounding area;

³ Rule Bus11 to Bus13 Restricted Discretionary Assessment Criteria on page 283 of the District Plan

⁴ The nearest is the Huatoki Stream which is approximately 400m east of the site and is unaffected by the proposal.

- (b) The extent to which the extra height of the proposed building will have an overbearing effect on sites within the Residential Environment Area;
- (c) The extent to which the extra height of the proposed building will intrude into and/or block an Urban Viewshaft (this is also addressed in Rule OL63);
- (d) The extent to which the extra height of the proposed building will adversely affect the natural character of the coastal environment;
- (e) The extent to which site layout, separation distances, topography, planting or set backs can mitigate the adverse effects of extra height.

9.20 I return to discuss each of these discretionary matters later in this decision. I turn now to consider the objectives and policies that are made relevant by these discretionary matters. I discuss the objectives and policies relevant to the Cameron Street Viewshaft and the coastal environment separately later in this decision.

(c) Objectives And Policies Relevant To Height

9.21 Issue 1, on page 13 of the District Plan, discusses the adverse effects of activities on the character of areas and on other activities. Paragraphs 2 to 4 of the discussion state that:

'The character of each area has been determined, to a large extent, by the nature of the activities taking place within it, their operational requirements, and the community's perception of an appropriate level of amenity. For example, traditionally, industrial areas generally have had higher noise levels, higher levels of traffic and lower levels of visual amenity than would be expected within a residential area. This is a result of the essentially production oriented nature of industrial areas compared with the social and family oriented nature of residential areas.'

The character of an area can be adversely affected by activities that generate effects that are incompatible with that character (for example, a noisy activity within a quiet area). Such effects can be from an activity located within that area, or from activities in a neighbouring area – where there is an interface between areas of different character (such as an industrial area located next to a residential area).

It is important to ensure that the amenity values that determine the character of an area are protected from activities that create effects that may degrade or detract from them....'

9.22 Objective 1 and Policy 1.1 respond to this issue and are:

'Objective 1 *To ensure activities do not adversely affect the environmental and amenity values of areas within the district or adversely affect existing activities.*

Policy 1.1 *Activities should be located in areas where their effects are compatible with the character of the area.'*

9.23 Mr Brabant's position was that the objectives and policies only become relevant to the extent that they relate to the Rule Bus13 restricted discretionary assessment criteria. In his view, they are only relevant in terms of the potential effect of *the extra height of the proposed building on the character and visual amenity of the surrounding area* because these are the words used in criterion (1) of Rule Bus13.

9.24 It was his submission that *character and visual amenity* are a subset of the broader realm of *amenity values*. In his view, Objective 1 cannot be relied upon to broaden the Rule Bus13 discretionary matters to encompass *amenity values* that were not intended to be part of the evaluation. That is because, even though the section 104 (1) consideration of an application is subject to Part 2 of the RMA, that cannot allow consideration of matters outside the scope of the specified restricted discretionary matters.

9.25 In support of this approach, Mr Brabant quoted from a High Court decision in the case of *Auckland City Council v The John Woolley Trust and SJ Christmas*⁵ (a case in which he had represented the *Woolley Trust* interests). Three points are of note from that decision:

[41] *...matters in s 104(1)(a), (b) and (c) must be read down so they are relevant only in relation to those matters over which the consent authority has restricted the exercise of its discretion. That was the position prior to 2003 under s 105(3A). Despite the repeal of that provision, there is nothing in the 2003 amendments or corresponding extrinsic materials to suggest that the position immediately before the amendment was intended to be changed. Section 105(3A) was simply a provision for the avoidance of doubt.....*⁶

[42] *...a distinction is to be drawn between the grant and the refusal of consent to a restricted discretionary activity. Section 77B(3)(c) and the observations of the Local Government and Environment Committee already noted, make it clear that Parliament did not intend by the amendments made in 2003, to undermine the statutory policy to restrict the consent authority's power to decline an application for a restricted discretionary activity and the power to impose conditions. In both cases, those powers were to be limited to the matters specified in the relevant plan.*

[43] *These considerations also have an important bearing on the application of Part 2. Consistent with the 2003 amendments and the views expressed by the Local Government and Environment Committee, any application for consent to a restricted discretionary activity is subject to Part 2 but with the important proviso, evident from s 77B(3)(c), that matters under Part 2 may not be relied upon to decline consent for a restricted discretionary activity. Similarly, Part 2 matters may not be relied upon to impose conditions on a grant*

⁵ CIV2004-404-387-3787

⁶ I note that it was Mr Brabant's submission in the present (Dawson Developments) case that nothing in post-2003 RMA amendments has altered that position either.

beyond those relevant to the matters upon which the consent authority has restricted its discretion in the plan.'

9.26 For the purposes of this present proposal, the relevant 'amenity values' to be considered are the *character and visual amenity of the surrounding area*. Some time was spent at the hearing, therefore, exploring what that means for the area surrounding this site. As earlier noted, the effects of interest are those associated with the *extra height* of the building – in other words the height above the permitted 10 metres – on the *character and visual amenity of the surrounding area*.

9.27 I return to the actual nature of the character and visual amenity of this environment and to the Rule Bus13 restricted discretionary criteria later in this decision.

9.28 The discussion continues on page 14 of the District Plan to say:

'As communities we ascribe different values to resources in different areas, reflecting our perceptions about amenity, health and safety. Because the range of land use activities carried out in the district is extremely diverse, there is the potential for adverse effects to occur between activities that have different amenity requirements and expectations. The aggregation of activities with like effects can minimise and avoid conflict. The use of environment areas (formerly called zones) recognises the differing character of areas and aggregates activities of like effect. Environment Areas enable the development of controls to ensure the amenity and environmental values the community place on these areas are protected.

The character of any given area is determined by a perceived set of values; these form the basis for the formation of Environment Areas. Based on aggregation of land with similar environmental characteristics, five zones have been developed using boundaries of existing zones, and site inspections to determine the existing characters.'

9.29 The text then points the reader to the more detailed description of each Environment Area and I have referred to the relevant description for the Business 'B' Environment Area in paragraph 9.4 earlier.

(d) Important Distinctions Between Business And Residential Environment Areas

9.30 The District Plan says about the Residential Environment Areas that they are:

'located in urban areas and represent those areas where the majority of people choose to reside. They are characterised by a medium to high density built form, low to medium traffic movements, low levels of environmental nuisance (such as noise) and high levels of visual and aesthetic amenity.'

9.31 The discussion then describes⁷ how the District Plan intends to manage activities within Environment Areas (and confirms Mr Comber's summary of the intended approach):

⁷ Page 15 bottom left paragraph

'Within each Environment Area, it is the effects of the activity on the character of the area that is important rather than the activity itself. Standards are used to determine what is appropriate, based on the character and amenity values that the community seeks to protect; these standards are a baseline. Provided an activity can meet the required standards, there is no reason to preclude it from a particular Environment Area even though that particular activity is not generally associated with it (for example, a business use in a residential area). Where an activity does not meet these baseline standards, developers will be required to apply for a resource consent to demonstrate that any adverse effects of their activity can be avoided, remedied, or mitigated.'

The use of standards will ensure the subdivision, use or development of land in each of these Environment Areas will not adversely affect the character of the area.'

9.32 Policy 1.2 then follows and states 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 and cumulative effects.'

9.33 Mr Brabant's submission was that, for the purposes of Policy 1.2, 'amenity' does not mean 'amenity values' in its widest sense. Rather, it is confined, by Rule Bus 13, to the *visual amenity of the surrounding area* having regard to the character of the receiving environment and cumulative effects.

9.34 Under the Reasons for Policy 1.2, the District Plan states that:

'The residential area is recognised as being the most sensitive. For this reason the rules relating to effects between Environment Areas apply where there is an interface with, or the activity is in close proximity to, a Residential Environment Area. The residential requirements of rural areas have also been recognised.'

Differing operational requirements mean that visually, the Residential, Rural, Business, Open Space and Industrial Environment Areas are very different. Scale, height, bulk or appearance of buildings and structures, large areas used for parking of vehicles or outdoor storage, and the lack of amenity planting create marked differences between areas. Height and setback controls, daylighting requirements and the use of landscaping (including trees), fences and walls to screen or soften are all mechanisms that will be used to ensure the amenity of Residential Environment Areas is protected where such an interface occurs.'

9.35 Mr Brabant emphasised, in his submissions, that the residential properties adjoining and opposite the site are not part of the Residential Environment Area. They are, like the applicant's site, zoned Business 'B'. There are no issues of interface in the present case and the District Plan does not, in his submission, propose to protect the residential amenity of those Business 'B' zoned properties in the same way as for the Residential Environment Area.

9.36 The nearest zoned Residential Environment Area is located along Hine Street to the west of Dawson Street. Other than being able to see the proposed building from those sites, no witness suggested that there would be any

adverse effects on the amenity of those zoned Residential Environment Area properties.

- 9.37 Mr Brabant also referred to the Reasons for Policy 1.3 as further highlighting his point. There it states:

'In considering effects of activities on the environment it is important to recognise the differing levels of amenity between areas. For example, residential areas have much higher levels of amenity than industrial or business areas, and community expectations reflect this. Past planning practices have recognised that business, rural and industrial activities can generate effects incompatible with residential uses, and have provided for this by physically separating such activities. This has resulted in the aggregation of activities with like effect and areas with differing levels of amenity.

Activities intending to locate within a particular area need to recognise the level of amenity within it and should not have unrealistic expectations. Some activities may result in some degree of adverse effect, even if controlled to the best practicable levels, if the adjacent land use is sensitive to them.'

- 9.38 The explanation does not talk about sensitivities between Residential Environment Areas and Business Environment Areas. The language used is residential areas and industrial or business areas so the explanation may not be as supportive as suggested of Mr Brabant's point. Also, these reasons flow from a policy that concerns proposals to locate sensitive activities within areas having effects to which they might be sensitive. It does not deal with proposals, such as the present one, to establish a new building near existing potentially sensitive activities. The explanation of reasons flows from Methods of Implementation 1.3. These Methods are explicitly about separation distances between habitable buildings and intensive farming in the Rural Environment Area and sound attenuation in relation to the airport and the port. They do not specifically address sensitivities between Business and Residential Environment Areas.

- 9.39 Issue 6 of the District Plan addresses residential amenity. The discussion of the issue addresses residential areas in general (not exclusively Residential Environment Areas) but Policies 6.1, 6.2 and 6.3 and their Methods of Implementation apply explicitly and only in the Residential Environment Areas:

'Policy 6.1 *Subdivision in Residential Environment Areas should ensure sufficient space is available to enable residential living and to protect amenity values.*

Policy 6.2 *Buildings should be designed and/or located so that there is sufficient space for outdoor living requirements and reasonable access to sunlight and privacy.*

Policy 6.3 *Activities within the Residential Environment Area should be of a size, scale and visual character that do not adversely affect the amenity of the residential environment.'*

- 9.40 The Methods of Implementation for Policies 6.2 and 6.3 include rules specifying standards for daylight protection, maximum building height, length of buildings, maximum site coverage and side yard setback. As highlighted by Mr Brabant,

there is no equivalent policy protecting residential amenity values in the Business Environment Areas.

- 9.41 Issue 7 addresses the City's Business Environment Areas. Paragraph 3 (on page 44) includes the following statement:

'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 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.'

- 9.42 Mr Brabant emphasised the 'or' in this last sentence. In other words, the District Plan anticipates either similarity of bulk, height and location or mitigation of significant adverse effects.

- 9.43 Objective 7, for the Business Environment Areas is:

'To ensure the attractive, vibrant, safe, efficient and convenient character of the business environment is maintained.'

- 9.44 Mr Brabant contrasted this objective with Objective 6, for residential areas, which is concerned with ensuring sufficient space to protect residential amenity, protecting aural amenity and ensuring traffic generation is consistent with residential character. Interestingly, Objective 6 (unlike the policies that flow from it) is not explicitly only about *Residential* Environment Areas. It refers to 'residential areas' and 'residential amenity'.

- 9.45 Policy 7.1 addresses character and visual amenity:

'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.'

- 9.46 It was Mr Brabant's submission that I should read Objective 7 and Policy 7.1 together. In other words, the concern of Policy 7.1 about 'character' should be considered in terms of attractiveness, vibrancy, safety, efficiency and convenience. As Mr Brabant noted, the Methods that flow from Policy 7 do not refer to rules protecting daylight, privacy, coverage or side yard setbacks in the Business 'B' Environment Area. His point was, again, that there is no explicit protection for residential amenity values in the Business 'B' Environment Area.

- 9.47 Policy 7.2 does address access to daylight and sunlight but only for high pedestrian usage areas. The coastal walkway is one such high pedestrian usage area but the policy does not extend protection to residential areas.

- 9.48 The Anticipated Environmental Results for the Business Environment Areas are⁸:

(a) *Visually pleasing Business Environment Areas.*

⁸ Page 46 of the District Plan

(b) *Attractive and pleasant pedestrian areas.*

9.49 As I noted earlier, an important consideration deriving from all of the above-mentioned District Plan policy and the rule Bus13 assessment criteria is therefore the actual character and visual amenity that exists in a particular Business 'B' Environment Area. Mr Comber and Mr Brabant both agreed that this consideration should be in terms of what actually exists in the environment rather than being based solely on what the District Plan described for the generality of Business 'B' Environment Areas. It is apparent that, for this particular locality within the Business 'B' Environment, the actual land use pattern and associated character and visual amenity and attractiveness differ somewhat from what is described by the District Plan as 'typical' for the Business 'B' Environments in the City. I summarised what the District Plan says about this earlier in terms of being larger scale, bulky buildings such as warehouses orientated towards the motorised customer⁹ and I discuss the actual nature, character and amenity values of this part of the environment later in this decision.

(e) Objectives And Policies Relevant To Overall Urban Pleasantness And Coherence

9.50 Issue 5 of the District Plan addresses the pleasantness and coherence of the urban environment. Here it is noted that¹⁰:

'While each of the constituent areas has an individual character with associated amenity values (discussed under Issues 6-9), the urban areas as a whole also have a level of amenity associated with them. This urban amenity is characterised by elements that contribute to the coherence of the urban environment; that is, those elements that tie the different areas together (such as streetscape, vegetation and landscaping) or provide a focus (such as urban viewshafts and entrance corridors) or recreational or aesthetic opportunity....

Enjoyment of existing views from public places is also an important part of urban amenity. Views of the sea are mainly centred along roads but may be adversely affected by inappropriately located or designed buildings or other structures....

Within the New Plymouth central city area there are a number of large trees that contribute visually and aesthetically to the city environment. The contribution trees and other vegetation make to this central area should be recognised and, where possible, enhanced.

Vegetation can also contribute to urban coherence by providing attractive road corridors and streetscenes within New Plymouth District. Some of the road entrances to the urban areas, such as the northern entrance to New Plymouth, pass through areas that lack screening vegetation. These entrances can be visually cluttered or unsightly because of the lack of vegetation and do not enhance the arrival experience of visitors. As more than 90 per cent of visitors to the district arrive by road, the enhancement of this arrival experience through roadside planting is important.'

⁹ Reasons 7.1 paragraph 3 page 45 of the District Plan

¹⁰ Page 33 of the District Plan – Issue 5

9.51 Objective 5 and Policies 5.2 and 5.3 then follow and they are relevant to the landscaped appearance of the St Aubyn Street frontage, to the proposal to remove the *amenity* Banksia tree from near the western boundary, to the proposed planting of the site and to the visibility of the proposed building within the Cameron Street Urban Viewshaft:

'Objective 5 *To maintain and enhance the character and coherence of the urban areas of the New Plymouth District.*

Policy 5.2 *Buildings and structures should not detract from or reduce the visual amenity of the Urban Viewshafts.*

Policy 5.3 *The positive contribution vegetation makes to urban amenity should be recognised, maintained and, where possible, enhanced.'*

9.52 The Anticipated Environmental Results for overall urban coherence are:

- (a) *'Maintenance of the character and coherence of the district's urban areas.*
- (b) *Urban areas in which:*
 - (i) *public open space is interesting and retains a high standard of amenity;*
 - (ii) *levels of amenity planting enhance visual quality; and*
 - (iii) *Urban Viewshafts are protected from the adverse effects of development.'*

10 Examining The Relevant Rule Bus13 Discretionary Matters

10.1 I discuss in the following sections the matters to which my discretion is restricted. My findings on particular issues that were in contention are detailed at the conclusion of the discussion of each issue.

11 The First Discretionary Matter: The Effect Of Extra Height On The Character And Visual Amenity Of The Surrounding Area

(a) The Extent Of 'The Surrounding Area'

11.1 To begin, I examine the actual nature, character and amenity values of the environment surrounding the site.

11.2 Mr Bain's assessment differed from Ms Buckland's as to the geographical extent of the 'surrounding area'. For Mr Bain, this is focused on the immediate surrounding area of the 'triangle' formed by St Aubyn Street, Dawson Street and Regina Place. For Ms Buckland, it is a wider area including large parts of the Business 'A'-zoned CBD and the coastal walkway extending quite a distance to the east of the site.

- 11.3 The relevant point, in terms of the objectives and policies, is to consider the actual or potential effects of the proposed height above 10 metres. Some effects will be experienced in the near surrounding area and some in the further distant area. They will be of different nature, scale and intensity depending on the nearness to the site.
- 11.4 One of the issues in dispute at the hearing was whether the Richmond Estate tower is, or is not, a relevant consideration. It was Mr Brabant's submission and Mr Schofield's evidence that this existing building is relevant because it is part of the existing environment and therefore must be considered as part of the built context for this proposal. Other witnesses, opposed to the proposal, variously described the Richmond Estate tower as a 'mistake' and an 'icon'. How it came to be is not a relevant matter. It is, however, undeniably part of the existing environment and I must consider it as part of the landscape surrounding the site.

(b) The Character And Visual Amenity Of The Surrounding Area

- 11.5 Ms Buckland's evidence was clearly that *visual amenity* means the visual amenity as experienced from outside the surrounding area, looking into the site, as well as the visual experience from within the area looking outward. On Ms Buckland's interpretation, the impact of the building on the visual attributes within neighbouring properties surrounding the site (such as sunlight access and views) are as relevant as the effects associated with the visual impact of seeing the building from other places in the surrounding area.
- 11.6 Mr Bain, the applicant's Consultant Landscape Architect, described the *character and visual amenity of the surrounding area* in the following terms:

'The subject site sits within a 'triangle' of land bounded by St Aubyn Street, Dawson Street, and Regina Place. The northern Point of the 'triangle' has an open spacious character as the land adjoins an open area of council reserve. This affords open and elevated views along the coastline to the north and also into the heart of the CBD. The visual amenity of these elevated views are high. They are arguably the best coastal views in New Plymouth.

This 'triangle' of land has its own identity as, unlike the central city area, this land is located between a busy arterial road (St Aubyn Street) and the coastal edge. Therefore, properties within this triangle are afforded a rare, intimate relationship with the coast. Most of the city is separated from the sea by either busy roads or wide areas of reserve.

The strip of land between private properties and the sea is highly modified due to the presence of the railway line, seawall, and Regina Place (a legal road). This gives the seaward side of the properties an urban character, that is, built form dominates natural elements.

The character of the coastal walkway in this location is more urban than in any other location along the 6km stretch of walkway. The walkway is located inland of the railway line, its surface is chipseal not concrete, sights and sounds are more urban than natural. This section of walkway has the most limited views of the sea of any section of the coastal walkway.

The buildings within the 'triangle' are either residential¹¹ or commercial as are the buildings along the southern side of St Aubyn Street. The western edge of Dawson Street is residential in character. There are good open views of the sea down Dawson Street which has high visual amenity.

The character of the area is peripheral in terms of its CBD character. The core of the CBD lies to the east and sits in a basin centred on the Huatoki Stream. The site is located on the western edge of the CBD hence my statement that it feels peripheral – it's on the edge of the CBD.

Visual amenity values include expansive open views of the sea from buildings located within the 'triangle'. Visual amenity of St Aubyn Street is characterised by broadening sea views as one travels into the city.

The character of the area is transitional from commercial to residential. This project [the proposed Kawaroa Apartments] is a continuation of this trend. Clearly the area is becoming increasingly used for apartment living. The high visual amenity of the sea views (particularly to the north) and the close proximity to the walkway and CBD make it a highly desirable place to live.'

- 11.7 Ms Buckland also described this part of central New Plymouth as a 'transition area' from the core CBD of mixed land use pattern. This features mainly residential land use (predominantly large and medium-sized houses of up to 2 storeys as well as larger apartment buildings such as the Devonport and Clarendon Apartments) with some commercial buildings including motels, the Richmond shopping centre and a mail centre. Ms Buckland described the overall character as predominantly residential in the immediate area with some mixed business and cultural activities and open space in the wider surroundings.
- 11.8 Ms Absolum's evidence did not particularly canvas the question of what the *character and visual amenity of the surrounding area* is. She had left the hearing by the time participants were addressing this particular issue. However, her written evidence did discuss the 'amenity values' of neighbouring properties. Her evidence was that an important element of the 'amenity values' of neighbouring residential Devonport and Clarendon apartments is their north-facing view¹².
- 11.9 It was Mr Brabant's position that *visual amenity* relates to the overall visual impression of the surrounding area and does not include attributes of sunlight and private views within private properties within that surrounding area.
- 11.10 All three landscape witnesses agree that the area is either predominantly residential or becoming predominantly residential¹³.
- 11.11 Mr Bain, Ms Buckland and Ms Absolum were all agreed that open views to the sea are an attribute of the *visual amenity* of the area surrounding the site.

¹¹ Mr Bain had used the word 'urban' in his written statement but corrected that, orally, to 'residential'

¹² Melean Absolum written statement paragraph 4.3

¹³ Richard Bain written statement dated 22nd June 2010 – bottom paragraph page 1 (noting again his correction of the word 'urban' to 'residential' and oral comment that 'residential is starting to override'); Melean Absolum paragraph 4.2; Mary Buckland oral comments 'mainly residential but with some individual commercial buildings' including motels.

11.12 Mr David Hermann also agreed that this area has evolved into a residential area featuring, for example, the Clarendon, Devonport, Reef and Quadrant on Queen Apartments. He also stated that the character of living in this area is defined by the open north-facing outlook and sea views, the sun and warmth of the site, the generous open space within the Richmond Estate site and proximity to the coastal walkway.

11.13 In addition, the site is near the coastal edge and the coastal environment here has elements of natural character. That natural character is associated largely with the sight, sound and smell of the sea, the sea breeze and some limited coastal vegetation. The view inland from the coastal edge is of a highly modified urban environment with limited overall natural character.

(c) Effects On The Character And Visual Amenity Of The Surrounding Area

11.14 The 'amenity' concerns of most submitters were about the potential for:

- (a) visual impact of the proposed building and the degree to which it might dominate the landscape as seen from the near and far surrounding area;
- (b) loss of sunlight and shading within nearby properties;
- (c) loss of or blocked views to the sea;
- (d) loss of privacy in internal spaces and on outdoor decks and living areas;
- (e) change in overall built character from a predominantly 'low-height' residential neighbourhood to a more 'high-rise' pattern of building.

11.15 For these potential effects to be of any relevance in considering this proposal, they must relate to the effect of the height above 10 metres on the *character and visual amenity of the surrounding area*. Mr Brabant and the applicant's witnesses seemed to accept that items (a) and (e) are legitimately issues of *character and visual amenity*. There was, however, dispute as to whether sunlight access, shading, loss of private views and privacy were issues to do with either *character* or *visual amenity* of the surrounding area.

(d) Effects Permitted By The District Plan

11.16 To understand the potential effects of the building height that exceeds 10 metres, one must conceptualise the scope of effects of a permitted building of maximum 10 metres height. A certain amount of attention was given, in evidence, to the bulk and height impacts of a conceivable (non-fanciful) permitted building on this site. Section 104 (2) of the RMA states that it is optional as to whether I disregard the adverse effects of the proposed building that would otherwise be permitted by the District Plan. I consider that these potentially permitted effects are highly relevant in this case and all the more so because the Rule Bus13 discretionary matters are explicitly about the effects of the building above the 10-metre permitted activity height.

11.17 Ms Wallace referred me to the decision of the Environment Court in *Lyttelton Harbour Landscape Protection Association Inc v Christchurch City Council* which sets out what she suggests are relevant considerations in exercising my

section 104 (2) discretion. I am satisfied that the evidence has addressed each of those considerations. Ms Wallace disputed that the applicant's proposed 'permitted baseline' example could comply with the District Plan but Ms Megee accepted that it could. There is one important difference between the *Lyttelton* case and the present application. That is that Rule Bus13 is explicitly concerned with effects over and above the permitted 10-metre baseline.

11.18 Mr Pritchard presented plans showing the footprint and elevation of a building that would comply with the bulk and location controls of the Business 'B' Environment Area. It could, potentially, extend to and along the entire eastern boundary to the Regina Place boundary at a height of 10 metres (there are no yard setback requirements or maximum building coverage limits). That would have a physical presence, in relation to the adjoining Richmond Estate Apartments and to the coastal walkway, and would cast some shadow on neighbouring properties. It is not a fanciful proposition. By way of comparison, the Govett Quilliam building is built hard against the Regina Place boundary (indeed occupies air space over that land) and is three storeys high.

(e) Visual Prominence Of The Building And Its Potential Visual Dominance Of The Surrounding Area

11.19 The photographic simulations demonstrate that the building will be highly visible from many parts of New Plymouth. It will also be visible, from off-shore, seen in the context of the built urban backdrop to the site. Many submissions assert that the building will visibly dominate its surroundings.

11.20 Several different viewing distances need to be considered:

From The Coastal Walkway Over 1km Distant:

11.21 Viewed from the coastal walkway, at distances beyond 1 kilometre from the site (such as seen in Viewpoint 2 of Mr Pritchard's photographic simulations), the building will appear generally lower than the skyline. It will appear visually surrounded by other built development (some admittedly further away but nonetheless built) at approximately the same height. It will appear higher – but not notably higher – than some immediately-adjacent buildings. The highest buildings in view will be the Richmond Estate Apartment tower and the chimney of the electricity generation plant at the port. Mr Bain's assessment is that the visual effect, at this distance, will be no more than minor. Ms Buckland's assessment is that, at this distance, there would be a slight effect on coastal character.

11.22 I find that, viewed from this distance and further east along the coastal walkway, the proposed building will not have an adverse effect on the built urban character of the wider or nearby surrounding area. It will not either, at that distance, have any adverse effect on the quality or visual amenity of the environment. The exterior detailing, exterior materials and recessive colours proposed by Mr Pritchard will further assist to moderate the visibility of the building from these distances.

From Inland:

11.23 From distances beyond 700 metres from the site, viewed from inland New Plymouth looking out to sea, including from higher vantage points such as

illustrated in Viewpoints 1, 9, 10, 12 and 13 of Mr Pritchard's photographic simulations, the building will appear in the context of multiple other buildings of similar height. At these distances, I find the building will have no more than minor adverse effect on the character, quality or visual amenity of the surrounding area. Broad sweeping views out over the City to the sea and horizon will remain.

11.24 From closer distances within the CBD, I expect the building will be visible only in glimpses between and above other buildings including some buildings of similar height. I find that, from these closer distances, the proposed building will have no more than a minor adverse effect on the character, quality or visual amenity of the surrounding area.

From The Coastal Walkway Closer Than 1km:

11.25 From closer distances along the coastal walkway, such as from the Liardet Street Overbridge (approximately 600 metres from the site) illustrated in Viewpoint 8 of Mr Pritchard's photographic simulations, the building will be highly visible. Mr Bain assesses the potential effect at this distance as no more than minor. Ms Buckland considers the building would be visually dominant at this distance silhouetted against the skyline.

11.26 The most eye-catching building from this perspective is the Reef Apartments building with its highly reflective exterior finish. It is, though, just one of several large buildings along the immediate fringe of the coastal edge.

11.27 The recessive colour of the exterior materials proposed by Mr Pritchard will moderate the visual prominence of the building. In the wider view, not illustrated in the Viewpoint 8 photographic simulation, several tall CBD buildings puncture the skyline. The proposed building will not be out of character in this respect and will not adversely affect character or visual amenity. It will be at the outer end of a continuum from the CBD to the port and will not be seen in stark contrast to the surrounding built character. The existing vegetation along Regina Place adjacent to the site will block or obscure the view of the base of the building and make its 'net' height appear less.

11.28 Closer still, for example from the Len Lye platform illustrated in Viewpoint 3 of Mr Pritchard's photographic simulations (approximately 400 metres from the site), the building will be visually more prominent. Ms Buckland's assessment is that, from this distance the building would appear 'blocky' and would be dominant in the view. She suggested in evidence that the adverse visual effect would be reduced if the building were slimmer than proposed thereby separating it from the Richmond Estate tower. Mr Bain's assessment is that, although the building would be clearly visible, any effect would be minor. He also notes that there is a large protected pohutukawa tree that extends to a height of approximately the 6th floor of the proposed building which softens any visual effect.

11.29 I find that, at distances of 500 metres or less along the coastal walkway, the building is highly visible but is not dominant in the view. It would certainly consolidate the built urban character of this view. Set against the built urban context of the wider view, however, this does not profoundly alter the character or detract from the visual amenity of the surrounding area. As to Ms

Buckland's point about the 'blocky-ness' of the building, it rather depends exactly where one stands to view the building. At some positions close to the road, the Richmond Estate tower would partially block the view. From other points further seaward, the two buildings would have a narrow separation. Viewed from the other direction, for example from the vicinity of the walkway near the Kawaroa Pools (as illustrated in Viewpoint 14 of Mr Pritchard's photographic simulations), the building will be seen sandwiched between the Govett Quilliam Office building and the Richmond Estate tower. Its height is not at all out of character, in this context, or at odds with the visual amenity of the surrounding area. There are other tall buildings in the further distant view.

From The Coastal Walkway Very Close To The Site:

- 11.30 Of course, as one approaches the site along the coastal walkway from either direction, the building will become more prominent in the inland view. Mr Pritchard presented three photographic simulations of the potential view from the coastal walkway near the point where the walkway crosses the railway line. Here, the site is elevated above the walkway somewhat so any building will appear above the viewer.
- 11.31 Mr Pritchard presented a number of amended photographic simulations from these close distances. They each differed markedly and served only to demonstrate, really, the frailties of this technology. I accept the explanations given for the differences between the size of the building shown in each simulation. Accepting the potential for errors, the simulations were nonetheless helpful in conceptualising the visual effect of the building. Mr Bain's assessment is that the visual effect this close along the walkway to the building is potentially adverse. He would not be drawn on 'how' adverse.
- 11.32 Ms Buckland considered there would be adverse effects on the coastal walkway and local area amenity. Similarly, she would not be drawn on 'how' adverse.
- 11.33 Even the non-fanciful permitted building described by Mr Pritchard would potentially dominate the view of someone walking along the walkway. The landscape experts' assessments did not clearly distinguish those permitted effects in their assessments. They are potentially material. I expect that the additional dominating effect of the part of the building that is over 10 metres height will, at this point, be difficult to discern for viewers on the walkway. I do not expect they will particularly be peering up into the site in any event. The view to be appreciated is out to sea.
- 11.34 I accept that there is a short section of the walkway here where tall structures (and trees for that matter) on the landward side will inevitably tower over the viewer. I should note also that the footpath divides into two routes just north of the site (ie just north of the proposed building): one heading down across the railway line to join the recreational coastal walkway and the second continuing on at the slightly higher elevation of Regina Place. For people walking westward along the (lower) coastal walkway, there is greater vertical separation between the site and their viewing level with potentially greater upper height visible but also potentially more of the base of the building obscured from view.
- 11.35 Ms Buckland's original assessment of the proposed building in its as-notified position on the site was that it should be set back further from Regina Place.

When pressed to comment on the success of the amended proposal – which sets the podium of the building back further at approximately 3.5 metres from Regina Place – Ms Buckland stated that the amended setback was sufficient. Her answer left me with the impression that her reason for concluding the setback was sufficient was moderated by her fear that any greater setback would create new adverse effects for the Cameron Street Urban Viewshaft. However, she did not recommend any further setback and stated the proposed setback addressed her concern.

- 11.36 The adverse visual effect, such as it exists through this section of the walkway, will be brief. The proposed building would certainly alter the existing character of this part of the walkway. I am not satisfied, however, that the additional height of the building over 10m would exacerbate the (permitted) effect of a 10-metre-high building. Also important is the presence of an existing protected mature pohutukawa tree. That tree creates something of a canopy that will interrupt the view up to the building.
- 11.37 The applicant proposes to plant other pohutukawa trees within the yard adjoining Regina Place with the expectation that these will attain a similar height and therefore a similar canopy effect. That is a positive feature of the proposal. Both Ms Buckland and Mr Bain considered the proposed trees would serve an important visual purpose, at this close distance, in providing visual canopy. Their conclusions rely on these trees achieving mature height.
- 11.38 I find that, whilst the proposed building will have an adverse effect on the visual amenity of the coastal walkway in this vicinity by towering over the walkway, that adverse effect is not necessarily significantly greater than the effect associated with a permitted 10-metre-high building built closer to the Regina Place boundary.
- 11.39 The potential for residents of the Kawaroa Apartments to overlook pedestrians on the walkway was raised as a potential adverse effect. Yet, in many situations the proximity of people in residence near a walkway is seen as offering passive security. The proximity of inhabitants occupying outdoor decks or looking out over the walkway from indoor rooms of the apartments will not make the walkway any less public or any less accessible. I do not expect any adverse visual amenity or character effects to result from the interaction of the private apartments and the public walkway at the vertical and horizontal separation distances proposed.
- 11.40 Some submissions and some witnesses asserted that the proposed building would adversely affect the natural character of this part of the coastal walkway both close to the building and further away. I find that it will not adversely affect the natural character of the coastal environment along this strip. That is because the view – inland – of this part of the coastal strip is largely a highly modified built urban scene with little natural character. The building's presence will not, in this sense, alter the genuinely natural character of the coastal environment in any material way. For example, it will not alter the sound and smell of the sea or the view north from the walkway over the sea to the horizon.

From Nearby Private Properties:

- 11.41 Ms Buckland, Ms Absolum and Mr Hermann also discussed in evidence the potential for the building to have a particularly dominating or 'overbearing' visual effect in towering above its nearest neighbours.
- 11.42 Given the proposed horizontal separation between the building and the Clarendon and Devonport apartments, I do not see that it will have a particularly overbearing height in relation to those residential apartments.
- 11.43 Given the much closer horizontal separation between the proposed building and the Govett Quilliam and nearest Richmond Estate apartments, there is potential for the proposed building to tower above those in an overbearing way. It cannot be said that such an effect is entirely at odds with the existing character of this locale. After all the Richmond Estate tower building, itself two-plus floors higher than the proposed building, somewhat 'towers' above the lower Richmond Estate apartments.
- 11.44 As described by Mr Hermann, the adverse impact of the 'towering' by the proposed Kawaroa Apartments lies in how much closer to Regina Place the proposed building is than the existing Richmond Estate apartments. Most views from the Richmond Estate Apartments are to the north out over the sea or to the south over St Aubyn Street to the City. The outdoor deck areas are also north-facing although they also have clear views to the site. The living rooms of the lower apartments do not face the site (to the west). To the extent that the proposed building 'creeps' forward of the windows of the apartment that face north, it has the potential to tower in an overbearing way that differs from the effect that the Richmond Estate tower itself does. This effect would be particularly pronounced for the two apartments at the western-most end of the Richmond Estate closest to the site (the Tobeck and Flood/Williams apartments).
- 11.45 It is true that any permitted 10-metre-high building built hard against the site boundary would be physically larger than these lower apartments. However, the effect of the portion of the building that is higher than 10 metres would be to create a particularly imposing and domineering presence. That adverse effect is materially greater than the potential adverse effects associated with a permitted building (which would have similar height to those existing Richmond Estate apartments). This was illustrated in the two annotated photographs prepared jointly by Messrs Bain, Pritchard and Hermann depicting the physical extent of the proposed building compared to a possible permitted 10-metre-high building. Those annotated photographs illustrate that a permitted building is not markedly higher than, for example, the Govett Quilliam building so, in that respect, maintains the built character.
- 11.46 The potential towering effect is less for the Govett Quilliam building which is set closer to the Regina Place boundary and will, as a result retain much of its seaward view – especially from outdoor balconies – clear of the proposed building.
- 11.47 I find that the upper floors of the proposed building above 10 metres will have a materially adverse effect on the visual amenity, character and the quality of the nearest Richmond Estate apartments within this part of the Business 'B' Environment. I note that the visual amenity and quality of the environment are

matters given emphasis in section 7 of the RMA to which I must have particular regard.

(f) Potential Shading Of Neighbouring Properties

- 11.48 The relevant question is, in terms of Rule Bus13, what is the marginal difference of effect of the proposed 7-storey building compared with a non-fanciful permitted 10-metre-high building.
- 11.49 Mr Pritchard and Mr Hermann both presented shade diagrams illustrating the potential shading effect of the proposed building compared with a possible permitted 10-metre-high building built hard against the site boundary and the Regina Place boundary. Mr Pritchard and Mr Hermann agreed that there were essentially no differences in the software or assumptions that generated those estimated shade diagrams for key times of the solar year.
- 11.50 There was a slight difference between their assumptions in terms of the position of the Richmond Estate tower relative to the lower Richmond Estate Apartments and therefore the extent to which the tower casts an existing shadow over those apartments. The point is that, correctly drawn, the lower apartments currently experience less existing winter-time morning shadow than depicted in Mr Pritchard's shade diagrams. Mr Hermann's observation appears to be correct and I have accounted for that error in evaluating the potential shading impact of the proposed building compared with the existing situation.
- 11.51 Both sets of shade diagrams confirm that a building of 10 metres height built hard against the site boundary would cast a shadow over the roof and north-facing living room windows of the two two-storey Richmond Estate apartments (the Flood/Williams and Tobeck apartments) nearest the site from about 3.30 pm on the 21st June (the shortest day of winter).
- 11.52 The proposed building would cast a more extensive shadow but not have a significantly different shading effect on the nearest two-storey apartments. On the shortest day of the year, the portion of the proposed building that is higher than 10 metres would have slightly different shading effects on different parts of the 3-storey Richmond Estate apartments. The lowest floor is entirely occupied by garages and would be largely unaffected by the extra height.
- 11.53 For the second floor (Smith) apartment, the western end of the living room windows and outdoor deck would experience slightly more shadow after about 4.00pm on the shortest day.
- 11.54 For the third floor (Hermann 1 & 2 Trust) apartment, the western end of the living room windows, outdoor deck and roof would experience considerably more shadow after about 3.30 pm on the shortest day.
- 11.55 Mr Pritchard and Mr Schofield considered this additional shading effect to be no more than minor when compared with the extent of shading that residents of Residential Environment Areas might expect from a typical two-storey (9 metre-high) dwelling on an adjoining property.
- 11.56 Mr Pritchard presented two shade diagrams illustrating the extent of shading that is permitted by the Residential Environment Area rules in support of this opinion. Mr Brabant emphasised that his position remained that the Richmond

Estate, as part of the Business 'B' Environment Area, should not be extended the same daylight protections as the Residential Environment Area. The diagrams were simply for comparison to illustrate his point that some degree of shading of adjoining properties is considered to be reasonable even in a residential environment. Mr Schofield accepted, in answer to a question I put to him, that shading is a potentially adverse effect on the character of an area.

11.57 What Mr Pritchard's diagram does serve to illustrate is the comparatively adverse shading impact that any permitted 10-metre-high building would have on the two two-storey (Flood/Williams and Tobeck) apartments nearest the site. However, I acknowledge Mr Brabant's point that this shading effect is not an effect on visual amenity or character that is caused by the portion of the building over 10 metres height (which is the sole concern of the Rule Bus13 assessment criterion).

11.58 The other point that Mr Pritchard's diagram serves to illustrate is that, where a neighbouring dwelling is built at two storeys (or higher) or is set further from the boundary, its upper storeys will be less affected by shading from such a 'typical' 9-metre-high building on the adjoining property. In other words, where a dwelling enjoys day-long sun at upper floor levels, this will typically be less adversely affected by shading. Mr Hermann made the point that the three-storey Richmond Estate apartments are further from the boundary and higher than the dwelling in Mr Pritchard's example and, therefore, enjoy sun for longer on winter days. As described by Mr Hermann, this sunlight access is an important attribute of the visual amenity and character of this part of the Richmond Estate. It was his opinion, supported by the shading diagrams, that the difference in shading caused by the portion of the proposed building higher than 10 metres is not reasonable and is materially adverse. I agree and find that the proposed building will have a materially adverse effect on the visual amenity values and the quality of this part of the Richmond Estate site. I note that this is also a matter given emphasis in section 7 of the RMA to which I must have particular regard.

11.59 Mr Brabant's submission was that the period of time for which a more extensive shadow will be cast by the upper floors of the proposed building is a small proportion of the day for only part of the year. The shading diagrams suggest that the extra shading will occur for a period of up to perhaps an hour at the end of the day during much of the year except the height of summer. I do not think that the fact the effect will occur at the end of the day is a reason to disregard it or diminish it. It will be materially adverse whilst it occurs. The effect will be most significant during winter when sunlight access is highly valued.

11.60 No other apartments within the Richmond Estate would be affected by shadow cast by the proposed building.

11.61 The shading diagrams also demonstrate that the proposed building will not cast significantly more shadow than a permitted 10-metre-high building over the Chubb property opposite the site. The upper floors of the proposed building will cast a more extensive shadow than a permitted building over the carpark to the south of the Govett Quilliam building in the early morning for much of the year. Given the use of that land, I do not consider that additional shading effect to be materially adverse.

11.62 The upper floors of the proposed building over 10 metres height will also cast a more extensive shadow over the western end of the Clarendon Apartments late in the afternoon in winter months. I did not have the benefit of a site visit to that building but note that there are north-facing windows along the part of the building affected in this way. That new shading effect is a material adverse effect of the height of the proposed building on the visual amenity and character of that property.

11.63 Neither a permitted 10-metre-high building nor the proposed higher building would have any material shading effect on the Devonport Apartments. The shading diagrams demonstrate that the former Fitness Centre building is the only source of shadow for those apartments.

(g) Potential Loss Of Views To The Sea

11.64 It is commonly accepted that the usual bulk and height controls of a district plan do not protect private views. In a situation such as this, where views to the north and north-west over the sea to the horizon are such a highly-valued attribute of the visual amenity and character of this locality, it is appropriate to consider the potential impacts of the parts of the building over 10 metres height. Mr Schofield agreed, in answer to a question from me, that views from private property can be considered to be an attribute of the character of a site or an area. As earlier noted, all three landscape experts agree that northerly views are an important attribute of the visual amenity and character of this area.

11.65 The proposed building will block parts of views to the sea from the lower Richmond Estate apartments and from the upper floors of one of the Chubb Buildings and from upper floors of the Devonport Apartments on the opposite side of St Aubyn Street.

11.66 A permitted 10-metre-high building set back by the margin of a planted strip from St Aubyn Street would also block views from these buildings. A permitted building occupying a larger footprint on the site would potentially block a greater extent of views – much as the former Fitness Centre building does on its site. Importantly, such a permitted building would block views from these buildings to the sea-sky horizon. The only remaining view would be of the sky above the building.

11.67 The difference in effect of the proposed building is that all of its floors will block only part of the view to the sea-sky horizon leaving substantial view shafts around its sides.

11.68 It was Ms Megee's evidence that the amendments to the proposed building ('Scheme B') do not materially alter the adverse impacts on neighbours' views to the sea and this contributed to her reasons for concluding that the adverse visual effects of the proposal are such that it cannot be supported. I note that Ms Megee did consider the potential difference between a permitted 10-metre-high building and the proposal when considering shading¹⁴. It is not clear that Ms Megee explicitly considered the difference in effect on views between a permitted 10-metre-high building and the proposal in terms of view interruption.

¹⁴ Page 3 of Ms Megee's supplementary statement of evidence dated 22nd June 2010

- 11.69 I find that the proposed building will potentially have a lesser effect in blocking views to the sea than a permitted building. In this respect, I distinguish this effect from the *visibility* of the proposed building from the existing buildings on the opposite side of St Aubyn Street. The proposed building will be highly visible but it will not block all views. Substantial sweeping views will remain to the sea and sky to the north.
- 11.70 The annotated photographs prepared jointly by Messrs Bain, Pritchard and Hermann confirm that a permitted 10-metre-high building would potentially block more of the view from the lower Richmond Estate apartments of the sea and reef in the northwest view than would the proposed building. Mr Hermann stated in evidence that, in respect of his family's apartment, the potential shading effect is of greater concern than loss of view. From all of the lower apartments, broad sweeping views to the north would remain unaffected by the proposed building.
- 11.71 The proposed building would block part of the view from parts of the Govett Quilliam building to the east. As for the Richmond Estate Apartments though, that effect is potentially less than would be caused by a permitted 10-metre-high building built hard against the Regina Place boundary in a similar manner to the Govett Quilliam building itself.
- 11.72 I find that the proposed building's potential effect in blocking views from properties in this locality is not a materially adverse effect – particularly when compared with potential permitted effects.
- 11.73 Mr Hermann was also concerned that the pohutukawa trees the applicant proposes to plant along the Regina Place frontage would, when mature, further block views from the lower Richmond Estate apartments. There is, however, no rule preventing the planting of such trees anywhere on the site. In any event, their planned location is to the west of the Richmond Estate apartments. Although they may block some view, there would remain an extensive sea view to the north.

(h) Potential Loss Of Privacy On Nearby Properties

- 11.74 Loss of privacy was raised as a potential adverse effect by residents of the Richmond Estate apartments and Govett Quilliam solicitors. The living rooms and outdoor balconies of the Richmond Estate apartments are oriented to the north. The Govett Quilliam boardroom is similarly oriented to the north.
- 11.75 The layout of the proposed apartments is similar with kitchen, living and dining rooms on the northern side of the building opening out onto an outdoor terrace the length of the northern side. There is also one bedroom in the northeast corner also opening out onto the terrace. A single window is proposed in each of the bedrooms along the eastern side. All other windows along that face are bathroom windows and will presumably be treated or opaque for privacy of users. One window is proposed in the south-western bedroom (facing south) and the central panel of the building facing south is proposed to be glazed allowing views from the entry and the fourth bedroom/study. This glazed area will, however, be obscured from view from the east by the south-eastern bedroom that extends south of that glazed wall. There is also a narrow window facing north at the corner of the south-western bedroom and a single west-facing window in the dining room near the Govett Quilliam boundary.

11.76 There is potential for people in neighbouring living areas and the boardroom to see and be aware of people in the living areas and on the terrace of the proposed building and vice versa. A permitted 10-metre-high building could, though, have a similar effect or greater effect.

11.77 The orientation of the proposed living area and terrace parallels that on the neighbouring properties. The proposed design does not create living spaces that particularly overlook neighbouring living or meeting spaces. I do not anticipate that the privacy of neighbours will be diminished to any greater extent than might currently occur between the apartments on the Richmond Estate or by the Govett Quilliam building itself. I accept that the privacy currently enjoyed on both adjoining sites is a notable attribute of the character of them but do not expect that the proposed building, as designed, would adversely affect that privacy to a material extent.

11.78 Given the distance separating the proposed building from the buildings opposite St Aubyn Street, I do not anticipate any potential for diminished privacy resulting from the presence of the proposed building.

(i) Potential Change In Built Character From A Predominantly 'Low-Height' Scale To a 'High-Rise' Pattern Of Building

11.79 The proposed building would create a second 'spike' in building height next to the Richmond Estate tower in this locality. It was Ms Buckland's and Ms Absolum's evidence that the height of the proposed building would alter the overall low built character of this area making it, overall, higher rise. I agree that the proposed building will change the character of the site and the immediate locality. I do not, however, expect that change will result in the re-definition of the overall low-rise character of this locality. The proposal does not, in this sense, represent a development that passes some 'tipping point' in a way that would lead one to describe the area as 'high rise'. I find that the potential effect of the proposal on this element of built character will be highly localised and not significantly adverse.

(j) Potential Cumulative Adverse Visual Effects

11.80 A number of submissions raised as a concern the potential for this proposal, in combination with other existing or future permitted built development, to create a wall of built development along this coastal edge. It seems to me that the District Plan's 10-metre permitted height without setback from the coastal edge permits that outcome to a degree along at least part of the coastal edge in this vicinity in any event. The relevant question is whether this proposal would achieve that result in any more profound or adverse way.

11.81 It was Ms Buckland's opinion that the proposal would contribute adversely to interrupting the visual connection between the coast and the urban hinterland. Mr Bain did not agree. His opinion was that the proposed height of the building will appear as a step down along a continuum from the Richmond Estate tower to the Govett Quilliam building and will not be out of character along that continuum.

11.82 I agree that the proposed building would create a second 'spike' in height along this coastal edge (the Richmond Estate tower being the other). However, having said that, this effect is very different in nature, intensity and scale from

the 'Surfer's Paradise' comparison several submitters sought to draw in their submissions. Their assertion was that this proposal represents a shift towards a 'Surfer's Paradise' style wall of buildings cutting the City off from the sea. That severely exaggerates the potential effect. I find that the proposed building will not create an adverse cumulative visual impression of there being a 'wall' of buildings at the coastal edge of the CBD. Importantly, the proposed building is not of the height or scale or intensity usually associated with Surfer's Paradise or other similar settlements along Australia's eastern coastline. The combined visual effect of the existing (Richmond Estate and Govett Quilliam) buildings together with the proposed apartment building will not constitute a continuous 'wall' or complete visual barrier.

(k) Potential Precedent

11.83 The issue of potential 'precedent' was raised in many submissions. Both Mr Ron Sewell and Mr Colin Twigley discussed this in their oral evidence. Mr Twigley wants me to decline consent precisely so as to send a 'strong signal' to developers that high rise buildings will not be accepted in New Plymouth.

11.84 There can be no issue of precedent where a District Plan provides for buildings that exceed the permitted activity standard as discretionary activities. Each proposal must be considered on its own circumstances and merits. This site has unique circumstances that contribute to its particular, and possibly unique, character and the proposal must be considered in terms of the potential for adverse effects in these particular circumstances.

11.85 This particular site is unusual in that it is part of a relatively small triangle of privately-owned land at the western periphery of the coastal edge of the CBD. The land along the coastal edge to the west is zoned Residential Environment Area or Open Space as far as the port. To the immediate east of the site, at the centre of the coastal edge adjoining the CBD, is a quite long strip of road and rail corridor and land held in public ownership that provides a substantial separating buffer between the coastal edge and the CBD. There are also other controls on development on CBD sites landward of that strip - associated with other Urban Viewshafts - which create different constraints on future development of that land compared with the applicant's site.

11.86 I do not accept the assertion that this proposal is the 'thin edge of the wedge' in terms of representing a change in the overall character of this coastal part of New Plymouth. The site must be seen for what it is: a site at the edge of the central CBD coastal strip with particular character associated with historic building patterns that are not replicated elsewhere at the coastal periphery of the CBD.

12 The Second Discretionary Matter: Potential Overbearing Effect On Residential Environment Areas

- 12.1 The nearest Residential Environment Area is south of Dawson Street. No credible evidence was presented that the proposed building would have any overbearing effect on residential sites there.
- 12.2 I have commented earlier on the potential for the proposed building to have an overbearing effect on the adjoining Richmond Estate and Govett Quilliam. My conclusions there relate to the potential for the building's physically dominating presence to adversely affect the character and visual amenity of those sites as part of the Business 'B' Environment Area. I acknowledge that those sites are not part of the Residential Environment Area. The effect is no less valid but it is important to note that I have not relied on discretionary matter 1(b) in assessing that effect.

13 The Third Discretionary Matter And Rule OL63: Intrusion Into The Cameron Street Urban Viewshaft

- 13.1 Both Rules Bus13 and OL63 restrict the scope of matters I may consider in relation to buildings that exceed permitted activity height standards within the area defined by the Cameron Street Viewshaft. In Rule OL63¹⁵ those restricted matters are:

- 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.*

- 13.2 In addition, Rule Bus 13 requires consideration of *the extent to which the extra height of the proposed building will intrude into and/or block an Urban Viewshaft*. It then also refers to section 3 of the planning maps.

- 13.3 The relevant District Plan Policy is Policy 5.2:

'Buildings and structures should not detract from or reduce the visual amenity of the Urban Viewshafts.'

- 13.4 The explanation of Reasons for Policy 5.2 clarifies that:

¹⁵ Rule OL63 – set out on pages 197 – 198 of the District Plan

'Controlling the height of buildings and structures located within the first section of the Urban Viewshaft (that is, the section closest to the viewing point) should ensure that these public views are maintained. The height of buildings and structures is not controlled in other, more distant, sections of these urban viewshafts because the height restrictions for the underlying Environment Areas area already restrictive enough to ensure that buildings and structures do not detract from or reduce their visual amenity. Line drawings of these views and their full extent are mapped in section 3 of the planning maps. This will enable the effect of additional height of buildings or structures to be assessed when resource consents are applied for.'

- 13.5 The site is located in section 3 of the Cameron Street Urban Viewshaft where the permitted activity height standard is 10 metres. The photographic simulations presented with the application and in evidence confirm that the proposed building will be visible within the frame of view of the Cameron Street Urban Viewshaft.
- 13.6 The evidence of Mr Bain and Ms Buckland is in agreement that the impact of this on the amenity derived from public views along the Viewshaft will be no more than minor. The policy is clear that the only concern is with public views.
- 13.7 Ms Absolum did not offer an opinion on actual and potential effects on the Viewshaft but pointed out and criticised the fact that Mr Pritchard's photographic simulation of the view from the Cameron Street viewing point did not coincide with the viewing point shown in section 3 of the planning maps. Mr Bain addressed this criticism, presenting 3 photographic simulations taken from the District Plan viewing point and from two other viewing points down the street.
- 13.8 The District Plan nominated viewing point is the centre of Cameron Street at its intersection with Eliot Street (State Highway 3). There is no text in the District Plan detailing the values of the Viewshaft that are to be protected.
- 13.9 Mr Ralph Broad (the Council's Manager – Consents) has been employed by the Council since 1968. He assisted with aspects of the 1987 City of New Plymouth District Plan when the Urban Viewshafts were introduced and attended the hearing to answer my questions about the purpose and special values of this Urban Viewshaft.
- 13.10 Mr Broad clarified that some Viewshafts were a feature of the pre-Review transitional district plan and were carried forward into the current District Plan. He noted that the Cameron Street Viewshaft was not included in the transitional District Plan but was introduced into the District Plan Review. He also noted that the District Plan rules do not protect private views but public views from some identified viewing points, such as this one at the top of Cameron Street, are protected by the Urban Viewshafts. Mr Broad clarified that the viewing points represented in section 3 of the planning maps were drawn from photographs taken with a 50mm lens at a height representing an 'average person' standing at the centre of the public road in the apex of the view.
- 13.11 Mr Bain was critical of the selection of the viewing point – on the basis that few people would willingly place themselves in that position to enjoy the view. Mr Broad's explanation was helpful in understanding that the rationale was to

identify a clear point of reference consistently for similar Viewshafts. It was his opinion, based on his involvement with the District Plan Review and with planning in the City over many years, that the community places great value on the views obtained along the Viewshafts. Mr Comber added that the important values within the view along the Viewshaft are, in his opinion the iconic landscape, viewed across rooftops, to the skyline and horizon and the connection to the coast across the City with vegetation framing the view.

13.12 Ms Buckland and Mr Bain both agreed that the important elements of the view along the Cameron Street Viewshaft are the view across the City rooftops to the Sugar Loaf Islands and the sea framed by vegetation.

13.13 Mr Green, in his tabled statement, expressed concern that the proposed building would obstruct views from living areas within the Richmond Estate tower, from second floor upwards, along the Cameron Street Urban Viewshaft. The purpose of the Viewshaft is not, though, to protect private views.

13.14 From the nominated District Plan public viewing point, the view is fleeting because it would be experienced only as a glimpse gained either whilst walking across the road or driving through the intersection. The more open views to the sea along the view shaft are obtained walking downhill along the eastern footpath on Cameron Street but even these quickly disappear as one descends along that side of the street. Views to the sea from the western footpath along Cameron Street are blocked by existing vegetation, fences and buildings. From the viewing point, at the intersection of Cameron Street and Eliot Street, the proposed building will occupy a small part of the view of the sea – framed at left by existing mature trees and at right by the Richmond Estate tower building. The proposed building will not interrupt the sea-sky interface in this or any view from public vantage points in Cameron Street.

13.15 I find that the proposed building will have no more than a minor effect on the Cameron Street Viewshaft.

14 The Fourth Discretionary Matter: Effect On The Natural Character Of The Coastal Environment

14.1 The issues, objective and policies of Chapter 14 of the District Plan relating to the protection of the natural character of the coastal environment are relevant. The planning map identifies a *Coastal Policy Area* which follows the coastline immediately north of (but does not include) the site. This does not prescribe the *coastal environment* in the sense that expression is used in the RMA but delineates an area where the District Plan anticipates the impacts of inappropriate subdivision, use and development will be greatest¹⁶.

14.2 Objective 14 and Policy 14.1 address the wider coastal environment – seeking the preservation and enhancement of the natural character of the coastal environment. The coastal edge and the area landward of the coastal edge in the vicinity of and including the site is highly modified. It features the Marton-to-New Plymouth railway line, the formed coastal walkway and manicured landscaping, the boulders and concrete rip rap protecting the coastal edge of

¹⁶ Reasons 14.1 paragraph 4 page 83 of the District Plan

the railway line and the coastal walkway, and the built downtown area of New Plymouth. Whilst it is predominantly built urban in character, it has elements of natural character including the view, sounds and smell of the sea, sea breeze, sea birds and some coastal plants in the landscaping of the coastal walkway (even if they have been introduced). The landward backdrop, viewed from the coastal walkway looking inland, is entirely built urban in character. Objective 14 and Policy 14.1 are relevant to the extent that the character of the coastal environment is *natural* character. For the reasons noted, there is very limited genuinely natural character.

- 14.3 Ms Megee's evidence in this regard was entirely to do with potential impacts as perceived by users of the coastal walkway. As noted earlier, I find that the proposal will have little effect on the natural character of the walkway as experienced by its users. I reiterate that the proposal will not have any adverse effect on the elements of natural character that exist along this coastal edge: the sound and smell of the sea, the view out to sea, the sea breeze, the existing coastal vegetation or the bird life.
- 14.4 I found that some of the statements made in submissions and in evidence exaggerated both the natural character and the potential for adverse effect on the natural character of this built urban part of the coastal environment. One factor that did not seem to be acknowledged by some witnesses is that the District Plan's zoning of this site and indeed the whole urban area itself permits modification of and thereby affects the naturalness of this part of the coastal environment.
- 14.5 The planning map also identifies a *Coastal Hazard Area (H1)* along the coastal edge which is immediately north of, and clear of, the site. There are therefore no directly relevant objectives or policies associated with this notation.
- 14.6 Mr Schofield referred me to the relevant objectives of the Regional Policy Statement and the Regional Coastal Plan relating to the protection of the natural character of the coastal environment. I also note the objectives and policies of the New Zealand Coastal Policy Statement relating to preservation of the natural character of the coastal environment. These provisions do not alter the actuality of the *natural* character of this part of the coastal environment (they do not make it more natural than it is) and do not alter my conclusion about the very minor real impact on that natural character.

15 The Fifth Discretionary Matter: The Extent To Which Site Layout etc Can Mitigate Adverse Effects

- 15.1 Mr Brabant and Ms Wallace read this discretionary matter quite differently. Mr Brabant sees it as a matter to be considered only after having considered the previous discretionary matters and come to a conclusion that a proposal can be supported. At that point, he says, one should consider the extent to which site layout, separation distances, topography, planting or set backs can be used (for example as conditions of consent) to mitigate residual adverse effects.
- 15.2 Ms Wallace's interpretation is that this discretionary matter is entirely separate from the preceding matters that focus only on the effects of the building above 10 metres on certain (limited) matters. It was her submission that this separate

discretionary matter was concerned about all potential effects of the proposal – and not just those associated with the part of the building on character and visual amenity. She suggested that this then enables me to consider the much broader range of amenity values and policy matters than just those associated with *character and visual amenity*.

- 15.3 I cannot accept Ms Wallace’s interpretation because her approach seems to defeat the very purpose of assigning *restricted* discretionary status to proposals of this nature which Mr Comber explained was deliberately done.
- 15.4 It was Mr Schofield’s evidence that the amendments to the proposal, made prior to the hearing, appropriately mitigate all potential adverse effects. As I have noted, it was Ms Buckland’s evidence that the increased setback from Regina Place acceptably reduces visual dominance on the coastal walkway. Submitters did not agree that the increased setback, height reduction or planting would mitigate all adverse effects.
- 15.5 I find that those amendments mitigate some, but not all, potential adverse effects. Notably, the amendments do not fully remedy or mitigate the potential shading and visual dominance experienced on the nearest Richmond Estate apartments.

16 Rule Bus87 And District Plan Provisions Relating To Parking Non-Compliance

- 16.1 The proposal’s non-compliance with the standard requirements for aisle width between basement parking spaces has to be assessed in terms of the criteria set out in Rule Bus87. From that list, I consider the relevant criteria are numbered 7, 11, 12, 13, 14, 15 and 16. These all concern potential impacts on the safety, convenience or efficiency of the transportation network.
- 16.2 District Plan Objective 20 is relevant, in terms of these criteria, and is:
- ‘To ensure that the road transportation network will be able to operate safely and efficiently.’*
- 16.3 Policy 20.2 is also directly relevant and states:
- ‘The safe and efficient operation of the road transportation network should not be adversely affected by land use activities that have insufficient or sub standard parking or loading areas.’*
- 16.4 There was no dispute by any witness that the slightly lesser aisle width would affect only residents of the apartments and their visitors and that they would soon become accustomed to the layout. There was no evidence raising concerns about actual or potential adverse traffic safety or convenience effects for the road network beyond the site boundary. I find that the proposed layout of the internal car parking and manoeuvring aisles will satisfactorily provide for vehicle access and on-site parking without raising any adverse effects for other road users.

17 Rule Bus69 - Removal Of Amenity Tree

17.1 Rule Bus 69 specifies that the control is reserved over the following matters¹⁷ in considering the proposal to remove the amenity Banksia tree:

- 1) *The requirement for a replacement amenity tree(s) to be planted on the site and/or on an alternative site within the New Plymouth Amenity Tree Area.*
- 2) *If a replacement amenity tree(s) is required the following matters can be considered:*
 - a) *The species of the replacement amenity tree(s), including the species listed in Table 24.1 in Appendix 24, and*
 - b) *The size and grade of the replacement amenity tree(s) at the time of planting, and*
 - c) *Works to protect the replacement amenity tree(s) from vehicle damage, and*
 - d) *The maintenance of the tree in accordance with good arboricultural practice.*

17.2 The District Plan definition of 'amenity tree' is

'a tree that is either of six metres or more in height, excluding the species listed in Table 24.1 in Appendix 24 [which does not list Banksia], or is a replacement tree installed as a requirement of rules Bus69 and OS62, and is located within the New Plymouth Amenity Tree Area.'

17.3 The applicant proposes to replace the Banksia with a pohutukawa. It will be one of 5 pohutukawa proposed for the yard area adjacent to the Regina Place boundary as detailed on Mr Bain's landscaping plan (Revision 03 dated 16th June 2010). That landscaping plan specifies that all trees, including the replacement pohutukawa, are to be a minimum of 1.5 metres high at the time of planting. The plan also details other quality, mulching and maintenance requirements.

17.4 Mr Bain discussed in his evidence his experience of planting and transplanting pohutukawa trees of different ages and sizes in the New Plymouth coastal environment. He has extensive experience of this having assisted the Council with landscaping the coastal walkway. He stated that, based on that experience, similar heights of tree can be achieved over a long period of time by either transplanting large trees or by planting smaller and younger trees. Transplanting larger semi-mature trees achieves substantial vegetation quickly but these trees do not then grow as quickly as younger trees. It was his recommendation that younger nursery-grown, rather than transplanted mature, trees should be used to enhance long term chances of survival and growing rates.

¹⁷ Rule Bus 69 on page 301 of the District Plan

- 17.5 Pohutukawa trees are accepted by the Council and the landscape experts as being appropriate amenity trees in this environment. According to Mr Bain, the proposed size, quality and maintenance regime for the trees specified on the landscaping plan will result in large replacement amenity trees over time in accordance with the District Plan's objectives and policies.
- 17.6 Ms Lauren Wallace, Solicitor representing Govett Quilliam, raised concerns about the amenity values that would be lost with the removal of the Banksia. No evidence was presented refuting Mr Bain's evidence that the proposed replacement pohutukawa trees would provide an appropriate replacement. I note that the District Plan does not prevent – rather, contemplates – the removal of amenity trees provided they are replaced with suitable species.
- 17.7 I find that the proposed removal of the amenity Banksia tree can be supported provided the specifications of the landscaping plan are adhered to.

18 Other Matters Raised In Submissions

- 18.1 **Necessity:** Mr Sewell asserted, in his oral evidence, that there is no 'need' for the proposed apartments. Necessity for a proposal is not a matter that is relevant under the RMA when considering a restricted discretionary activity such as this.
- 18.2 **OnTrack Submission – Noise And Vibration:** Ms Butler proposed, in her tabled statement, some conditions that would address OnTrack's concerns about potential future reverse sensitivity in terms of noise and vibration. I observe that the wording of those suggested conditions devolves a high level of discretion to a third party and would not meet the usual 'Newbury' tests. Mr Brabant and Mr Pritchard considered that the measures proposed by the applicant in designing the apartment structure would, in any event, address OnTrack's concerns. Mr Schofield confirmed that he had not had an opportunity to confer with Ms Butler about the detailed wording of her suggested conditions. I am satisfied that these are matters that could be addressed by the imposition of appropriately-worded consent conditions.

19 Overall Conclusion

- 19.1 My consideration of all of the relevant matters, in terms of section 104 (1) of the RMA, is subject to Part 2. An overall judgment has to be made of the merits of the proposal considering both its potential adverse effects and its potential positive benefits.
- 19.2 I have detailed in the preceding sections of this decision the material adverse effects of this proposal. It would also have positive benefits. It would expand the residential living opportunities within New Plymouth and, in so doing, would create high quality living environments close to existing community and recreational facilities and the commercial services and employment available in the CBD. In this respect, the proposal will enable some people and the community to provide for their social, economic and cultural wellbeing.
- 19.3 I find that the proposed use is, in principle, an appropriate use for this site given its location close to other residential apartments and the facilities and services of the CBD. I also find that the proposal would contribute positively to the

diversity of activities and built form along this part of the coastal edge of the City. I find that the proposed height of the building is not out of character with the overall built form of central New Plymouth or the near vicinity of the site. I also find that the proposed building will not compromise the natural character of this part of the coastal environment.

- 19.4 However, I find that the proposed height of the building would create significant adverse shading effects on the nearest two wings of the neighbouring Richmond Estate Apartments and on the lower floor of the Clarendon Apartment. I also find that the proposed height of the building, in combination with its near proximity to the boundary with the Richmond Estate Apartments, would create materially adverse visual dominance for people living in the nearest two wings of the Richmond Estate Apartments.
- 19.5 My conclusion is that these two effects are materially greater than would result from a permitted building on the site and would be experienced as significant adverse effects by the residents of the affected properties. In this respect, I consider that the proposed building will cause adverse effects on the actual character and visual amenity of part of the near surrounding area in a manner that is not consistent with the objectives and policies of the District Plan when these are read as a whole. The fact that the potentially affected properties are within the Business Environment Area and not within a Residential Environment Area does not diminish or override the obligation I have to consider actual and potential effects on the actual residential character and visual amenity of those properties. These considerations are explicitly one of the matters to which my discretion is restricted and are given particular emphasis in sections 7 (c) and 7 (f) of the RMA.
- 19.6 The shading and visual dominance effects I have described would, in my view, create an outcome that does not provide for the sustainable management of the natural and physical resources of both the site and its neighbouring site. I acknowledge that the potential adverse effects of shading and building dominance would affect a small number of people. Equally it must be acknowledged that the number of apartments proposed, and therefore the population of people who will benefit directly and indirectly from the apartments proceeding, is also small.
- 19.7 The mitigation measures proposed by the applicant do not, in my view, mitigate these adverse effects that are caused by the building's height above 10 metres. A grant of consent would fail to give effect to the sustainable management purpose of the RMA and the objectives and policies of the District Plan. My conclusion is that consent for the proposed apartment building should be refused.
- 19.8 Although removal of the Banksia tree is required only to enable construction of the apartment building as proposed and is, in this sense, integral to the proposal I note that I do not have discretion to refuse consent for the tree's removal. My conclusion is that the tree can be removed provided it is replaced by a pohutukawa tree of mature size and that its replacement is appropriately maintained so as to successfully establish and thrive. Accordingly, I have separately determined below a grant of consent for removal of the Banksia tree.

20 Consent Refused Except For Tree Removal

20.1 Pursuant to the authority delegated to me by New Plymouth District Council and pursuant to Section 104C of the Resource Management Act, I **refuse consent** to the application by Ian Pritchard Architects on behalf of Dawson Developments Limited to construct a 7-storey apartment building on Lots 1 and 2 DP 8836 (at 122 St Aubyn Street, New Plymouth) for the reasons given below:

- (a) The proposed height of the apartment building would cause significantly adverse shading effects for the nearest two wings of the Richmond Estate Apartments and for the lower floor of the Clarendon Apartments; and
- (b) The proposed height of the apartment building, in combination with its near proximity to the boundary with the Richmond Estate, would create significant adverse visual dominance for people living in the nearest two wings of the Richmond Estate Apartments; and
- (c) The shading and visual dominance effects that can be attributed to the part of the proposed building higher than 10 metres would be experienced as significant adverse effects on the character and visual amenity of the affected properties; and
- (d) The mitigation measures proposed by the applicant do not mitigate the shading and visual dominance effects that would result; and
- (e) The overall result would not give effect to the sustainable management purpose of the Resource Management Act 1991 or to the objectives and policies of the District Plan.

20.2 Pursuant to the authority delegated to me by New Plymouth District Council and pursuant to Section 104A of the Resource Management Act, I **grant consent** to the application by Ian Pritchard Architects on behalf of Dawson Developments Limited to remove a mature Banksia tree from Lots 1 and 2 DP 8836 (at 122 St Aubyn Street, New Plymouth) subject to the conditions set out in (a) and (b) below for the reasons that removal of the tree is contemplated by the District Plan and that the species and size of replacement tree proposed by the applicant are appropriate for this locality:

- (a) The consent holder shall, within the first planting season following removal of the Banksia tree, replace that tree with a mature pohutukawa tree having a height no less than 1.5 metres.
- (b) The consent holder shall maintain the replacement pohutukawa tree in the manner detailed on the landscaping plan prepared by Richard Bain Landscape Architects (Revision 03 dated 16th June 2010) for a period of no less than 3 years from the date of planting the replacement tree

Christine Foster
(Independent Commissioner)



10th January 2011

