

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

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application under section 88 of the Act by **REGINA PROPERTIES LIMITED** to the **NEW PLYMOUTH DISTRICT COUNCIL** for land use consent for a residential apartment addition to the property at 1-3 Dawson Street, New Plymouth

OUTLINE OF SUBMISSIONS

Dated: 22 September 2021

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INTRODUCTION

1. Regina Properties proposes to undertake substantial additions and extensions which will include a fourth storey on top of the existing three storey GQ building with an adjoining three storied annex to be built on 3 Dawson Street. The proposed extension will result in a maximum building height of 15.4 metres above the existing ground level within Lot 1 DP 19148 and will result in an infringement of 5.4 metres above the permitted 10 metre height line for the zone. The existing GQ building is already approximately 1.7 metres taller than permitted as of right.
2. There are 10 submitters that I represent, all in opposition to the application.
3. The evidence that will be called by the submitters derives from Mr Jackson, a local architect, who will discuss the above issues. The location of the submitting households can be seen in the aerial photograph at page 16 of Mr Jackson's evidence.
4. Mr Comber is a submitter and an immediately adjoining property owner. Mr Comber's evidence is that of a submitter however as a courtesy to the Commissioner and to the Applicant, such evidence was filed in advance of hearing to enable digestion of the planning aspect of Mr Comber's evidence. It is of course accepted, that Mr Comber cannot give evidence as an expert because he is not independent. That with respect however does not merit a rejection of Mr Comber's evidence given his many years of planning experience and his knowledge of planning issues within the New Plymouth District.
5. These submissions focus on legal matters, and in particular Rule Bus 13 of the Operative District Plan. Mr Jackson and Mr Comber will speak to other issues e.g. viewshaft issues. The submitters agree with the Applicants' assessment that the Operative District Plan should be afforded more weight to the Proposed District Plan, due to the latter document's early stage in the hearings process.

RULE BUS 13 OPERATIVE DISTRICT PLAN

Character and Amenity:

The extent to which the extra Height of the proposed BUILDING will:

- *Adversely affect the character and visual amenity of the surrounding area;*

6. The proposed building is to occur in the Business B Area. With a few exceptions, almost all of the property in the zone, is occupied for residential

purposes. The application itself is for a single family residence but is not within keeping of the surrounding residences. That is, it will be out of character.

7. Although putting different emphasis on the Richmond Estate tower and the four-storey high Devonport apartments, Ms Martin's evidence appears to accept that it is the character and amenity of the *area in question* that must be considered.¹
8. Issue 7, page 44 of the Operative District plan states in relation to the City's Business Environment Areas:

"Each of these business areas has developed a different character based on the predominant uses of the area, catchment size and the sensitivities of the surrounding areas. Buildings and structures that are out of scale, or create a visual distraction, can adversely affect this character. Hence it is important to ensure that the development is of a similar visual character in terms of bulk, height and location of development to the area in which it is located, or that any significant adverse effects are mitigated."
9. As was accepted in a previous application for this site, amenity in this area is atypical for the Business Areas.² The Reporting Planner accepts the character of this locality is largely residential.³
10. Looking at the immediate 'catchment', certainly the area has evolved into a residential area, with living defined by the open outlooks and sea views, sun, proximity to the coastal walkway and the open space within the Richmond Estate site. It is the immediate catchment you must consider – that is the ordinary meaning of "*surrounding area*" – which are the words used in the assessment criteria.
11. The previous application referred to, was made by Dawson Development Limited for a land use consent to construct at 122 St Aubyn Street a 7-storey apartment building. Coincidentally Regina Properties Limited appeared as a submitter in opposition to that applicant.
12. That proposal was for a building with an overall height to be just under 23 metres, and was declined. Obviously the current proposal is for a lesser height, but it should be recognised that:

¹ Martin EIC at [100]. Also evident in the Operative District Plan Objective 1, Policy 1.1, Policy 1.2, Policy 1.3.

² Dawson Development – LUC 08/44744 publicly notified in 2008, at [11.12].

³ S42A Report at [69].

- 12.1. As stated by Mr Jackson *“the vicinity of the subject site is characterised by 2 & 3 storey high residential buildings, not tall buildings”*.⁴
- 12.2. The proposal, although said to be only ‘one’ (very tall) additional storey, is still proposed to be substantially over the height allowed, this being height exceedance of:⁵
- 12.2.1. West elevation: 2m to 3.7m (to a 37% exceedance).
- 12.2.2. North elevation: 3.7m to 4.7m (to a 47% exceedance).
- 12.2.3. East elevation: 1.4m to 5.4 m (to a 54% exceedance).
- 12.2.4. South elevation: 0.6m to 2.1m (to a 21% exceedance).
- 12.3. The proposal is by no means an orthodox residence, and will appear in stark contrast to surrounding residences.
13. Mr Jackson’s evidence raises significant concerns regarding the visual montages that have been produced, including that the glazing has been shown (as un-tinted). Mr Jackson’s evidence also shows the potential effects should the assessment take into account more comprehensive vantage points (his ‘string’ diagrams).
14. The submitters will speak further to the ‘character’ element.
15. Some of the submitters live in the Richmond Estate. The Richmond Estate Tower is an historical building, having been built in the 1960’s. It has long been accepted as the only building with substantial height along this coastal strip. If it were relied upon to form the backdrop for one or more other over height buildings in this precinct, a precedent would be set undermining the District Plan’s intention regarding the scale of development in this Area.
16. As well as for “character”, you should have regard to the submitters’ evidence on amenity. This encompasses the following concerns:
- 16.1. Shading.
- 16.2. Blocking of access to the sky.
- 16.3. Compromised privacy with the addition of a three-storey glasshouse/balconies looking down on the submitters.
- 16.4. Loss of access to sun and its health effects.
- 16.5. Domination of the neighbourhood.

⁴ Jackson EIC at [5.1].

⁵ Mr Comber’s evidence.

16.6. Blocking of views.

17. The Act defines “amenity” widely, as:

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

18. The concept of amenity is assessed in the context of the particular neighbourhood. The Environment Court has accepted that the evidence of those that live in the area, is highly pertinent - *Panuku Development Auckland Limited v Auckland Council* [2020] NZEnvC 24 (Harland J presiding):⁶

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

[91] We are also of the view that what might be appropriate mitigation of an adverse effect on amenity values is most likely to require not only a technical or expert suggested solution, but an understanding and appreciation of the amenity values that are currently enjoyed by those experiencing them, and an understanding in a practical sense of how that solution intersects with the way in which they are currently experienced. It is impossible to understand how a practical and suitable solution can be offered as mitigation to an adverse effect on amenity values without consulting those that enjoy that amenity value. It was therefore surprising that few if any attempts had been made by Panuku or the Council before the hearing to engage with the residents about these matters. However, as a result of this hearing, we now have a sound understanding of the amenity the residents

⁶ Refer also *Blueskin Energy Ltd v Dunedin City Council*, [2017] NZEnvC 150, (11/9/2017):

“[158] When considering amenity values, in particular, our usual approach is to start with the residents' views. We regard their views on their existing amenity as subjective as they may be influenced by personal feelings or opinions, including the strength of their attachment to this place. Second, we look to what the District Plans have to say about the area's amenity values; subject to any submissions or appeals on a proposed plan, the court is usually able to regard this as an objective record. Third, having ascertained the values we would expect them to be objectively tested by landscape experts who will advise whether the basis for those values are reasonably held and then assess whether the proposal gives rise to landscape and visual effects. If it does, the next step is to consider whether there are any consequential effects on the existing amenity values. Finally, we would assess the landscape and visual effects and the effects on amenity values in light of the outcomes for the relevant resources and values under the District Plans.”

(Emphasis)

(Footnotes omitted)

that appeared before us consider they currently enjoy, and their concerns about how this could change if the appeal is granted.”

(Emphasis)

19. Reasons this previous proposal on this site was rejected, included: “[t]he 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... .”

(Emphasis)

20. The submitters I represent, were not consulted by the Applicant or design/planning advisors in the planning stages of this proposal.

21. The Bluemarble LVIA assessment 11 February, grouped the assessment of effects on the (a) Oceanside Apartments, and then (b) Richmond Estate (not individual apartments). This assessment did not involve speaking to submitters/apartment visits, but did involve a “*Private Views – Assessment*” for these two groupings. This was rectified to some extent in the s92 request that recommended actually visiting apartments and further consideration of privacy effects.⁷ At such a late stage in the application process, one struggles to see how that fed into mitigations.

22. Of course submitters do not have a ‘right of veto’, but the evidence is that their level of amenity will be significantly affected including through privacy (overlooking) and dominance effects i.e. views/shading are not the only considerations.

23. The proposed dwelling is to have windows and balcony oriented toward the Oceanside Apartments and Richmond Estate. The effects on privacy at 122 St Aubyn Street (Bill and Dianne MacArthur) are particularly remarkable. The main living area of this property is proposed to be directly overlooked by a balcony off an office/library and bedroom, through to the new dwelling’s adjoining lounge (top floor). The bedroom and balcony on the floor below will

⁷ The Section 92 Bluemarble Response was to the following Council request:

“Several property owners including 2 within the Devonport Apartments, 6 within the Richmond Estate and 1 in the Oceanview apartment complex have identified that their existing views, sky and/or outlook would be blocked or partially blocked by the proposal. Noting that there are height and viewshaft encroachments, please give further consideration to effects on views from the relevant properties. If possible seeking permission from apartment owners to make an assessment from the relevant properties would be beneficial.
3. Please give further consideration on effects relating to privacy, particularly on 122 St Aubyn Street.”

also have visibility into the MacArthur's first floor living areas and ground floor bedrooms. In this regard, the section 92 Reponse Blue Marble states:

The submitter will be overlooked but there is no Operative District Plan assessment criteria that explicitly requires privacy in this environment area. Privacy is explicitly listed as one of the assessment criteria for over-height buildings in the residential environment area, but not business. However, this property will likely experience dominance effects, but as an amenity effect, this does not necessarily translate to a loss of pleasantness or coherence (notwithstanding shade effects), especially when compared to permitted activity. The primary visual amenity from 122 St Aubyn Street derives from its north-eastern orientation and sea views which will be unaffected (pg 6)

24. But the RDA assessment criteria should not be read down, due to "privacy" not being explicitly mentioned, or the "dominance" criteria only referring (expressly) to the Residential zone.

Interpretation of Assessment Criteria

25. Section 87A(3) states:

(a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise).

26. Section 104C provides:

" ... a consent authority must consider only those matters over which -

...

(b) it has restricted the exercise of its discretion in its plan or proposed plan."

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27. The considerations of "amenity", and character, are not further restricted.

28. Privacy and dominance have been singled out as considerations for the Residential Areas because they are *a/ways* considerations for Residential Areas. These are not *a/ways* part of amenity considerations for Business Areas – it depends on the situation. In this case, we have an atypical Business Area. Here, privacy and dominance (or lack of) *are* a key part of amenity considerations.

29. Section 104 applies - the decision-maker must *have regard to* the effects on amenity and character of allowing the activity. "Have regard to" has long been interpreted as meaning the requirement for the decision-maker to give genuine attention and thought to the matters.
30. For #122 St Aubyn Street, while the MacArthurs are enjoying their view to the north-east, they will experience the potential 'gaze', and dominance, of the proposed dwelling (i.e. should this application be approved in its current form). That will be a significant loss of pleasantness and coherence.

Dominance and Shading

31. The building is intended to be a single family home and yet has unusual bulk and height for this purpose. It will dominate the neighbourhood casting shadows and denying access to natural light.
32. It is accepted that to some extent, Rule Bus 13 of the Operative District Plan endorses the permitted baseline through its focus upon the 'over height' elements of the building. You must consider whether the *over height* element of the building makes it particularly 'dominant', or introduce shading effects that are unacceptable. In relation to the duration of shading effects, in the Dawson Developments application, it was found that shading of a short duration during the day, may constitute a material adverse effect:⁸

"Mr Brabant's submission [for the Applicant] 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 portion 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 or diminish it. It will be material adverse whilst it occurs. The effect will be most significant during winter when sunlight access is highly valued."

33. The Application documents establish that there *will* be additional shading, compared to a permitted building that filled the entire envelope. These shading effects are significant. Shading to the dwellings to the west will occur in the

⁸ Above-cited at [11.59].

evening and in winter months where (Ms Martin also accepts) sunlight is most important. This includes effects of shading on balconies, as well as primary indoor living spaces.

34. Unfortunately the shading analysis has again grouped the Richmond Estate Apartments - stating additional shading will occur during March-September and “typically” the proposed shading are similar to what would be created with a permitted baseline development.⁹ Ms Batchelor does note that the greatest impact will be on the Stewarts, but she fails to point out that the permitted baseline assessment does not hold true for the Stewarts. The relevant shading effect on the Stewarts living areas, would be due to the increase in height of the current GQ building, not a permitted building created over the current carpark area.

Permitted baseline

35. The Applicant’s comparison extends beyond a building with allowable height, to a hypothetical building that is also hard up against site boundaries.
36. The permitted baseline is discretionary. You must consider whether that comparison is realistic. The Applicant has produced little evidence, that this baseline is ‘realistic’. Further inquiry is required.¹⁰
37. As stated in Mr Comber’s evidence, it is fanciful that a building would be erected on this property with a firewall hard against the boundary, because that would not maximise the use of the site. Maximising the use of the site would require setback from the boundary for the purpose of building maintenance - similarly to the existing GQ building i.e. windows.
38. Even if the comparison is to be made with a warehouse-type building (with a firewall) as in the Boon diagrams SK3.10 – SK3.13, obviously the same privacy effects would not be generated on the eastern elevation from such a utilitarian

⁹ Batchelor EIC at 11.0 under heading “Richmond Estate”.

¹⁰ *Lyttelton Harbour Landscape Protection Association Inc v Christchurch City Council* C 55/2006 upheld in *Hanna v Whanganui District Council* [2013] NZHC 1360 at [37]: “a realistic counterfactual proposal or proposals must be put up for consideration and comparison” ...

[38] *At one level, comparing this proposal with a large scale dairy or dry stock farming operation is fanciful because the whole area in this case is broken up into one to two hectare blocks. A small farm comparison does not help because no lifestyle size farm would have this amount of equipment on site. Posing daily milk tanker visits as a counterfactual is also unrealistic given the subdivisional characteristics in this area. In truth any realistic comparator would have to relate to a small scale rural or cottage ...”.*

type home occupation.; refer also *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 where the Environment Court Judge relied on the concept of the permitted baseline to conclude that the effects of the earth mound were similar to the effects of tree planting along the same boundary, overturned on appeal.

building.

39. As pointed out by Mr Comber, the Applicant's permitted baseline also appears to have overlooked landscaping requirements on the Dawson St and Regina St frontages, on-sit parking, queuing and traffic/transport matters. The Applicant may wish to address these matters.

Mitigating factors and Measures:

"The extent to which SITE layout, separation distances, topography, planting or set backs can mitigate the adverse effects of extra HEIGHT.

40. If an Applicant is proposing an over-height building, under the Operative District Plan it is incumbent to consider mitigation of effects, including effects on amenity values. It appears mitigations have focussed almost exclusively on mitigating effects on the public viewpoint from the coastal walkway.

41. Page 14 of application document - under heading 4.6 "Mitigating factors and Measures" states:

"The LVIA explains that mitigation recommendations will be made where significant adverse effects are identified. No mitigation recommendations are then made in the LVIA and it therefore follows that there are no significant adverse effects that require them.

(Emphasis)

42. Conclusion of application document states (page 26)

"Any actual and potential adverse effects on the wider environment resulting from the proposal are balanced against a number of positive beneficial effects and, with no suggested mitigation measures nor identified significant adverse effects in the LVIA, overall effects are considered to be acceptable."

(Emphasis)

43. In other words, because the Applicants' LVIA February 2021, came to the conclusion that there were no "significant" adverse effects, no mitigation recommendations were made. (The reasoning in the Application document is circular, as it also states that no recommendations in the Bluemarble Report *means* that there are no "significant effects").

44. The assessment criterion does not refer only to effects that are deemed not to be significant (by the Applicants' experts).¹¹
45. Ms Griffiths recommended further mitigations including building colour, planting.¹² This is too little, and too late.
46. There are wholly insufficient design mitigations for privacy and dominance effects on the residents to the West. It is not as if such mitigation is precluded due to the proposed use of the site - the extent of height, dominance and over-looking that is proposed, is not required for the Applicant's purpose of a private residence with one additional storey. Without further mitigations proposed, I submit this is a fatal flaw in the application, under this assessment criterion.

NATIONAL POLICY STATEMENT URBAN DEVELOPMENT

47. The use of a large building that could accommodate numerous accommodation units, for one residence, does not fulfil the policies of the National Policy Statement on Urban Development 2020.
48. The proposal constitutes one 5 bedroom dwelling for one family on a site of 1478m². For a 'counter-factual', a one storey of residential building height is typically based on a ceiling height of 2.4m. Whereas the applicant is proposing a 4m stud height on the top floor for displaying art works. At 15.4m the proposal will be the equivalent of almost five stories over almost two thirds of its eastern and western elevations. This can only be described as low density residential development.
49. Under the NPS-UD, the proposal will not allow more people to live in the areas of the urban environment that is near a centre zone,¹³ or supply significant development capacity,¹⁴ or improve amenity for some people while reducing amenity for others (i.e. the NPS-UD would require consideration of improving

¹¹ "The extent to which SITE layout, separation distances, topography, planting or set backs can mitigate the adverse effects of extra HEIGHT." (Emphasis)

¹² Landscape s42A Peer Review (First Report):

"Mitigation recommendations should be developed to reduce the bulk and dominance of the building on submitters, a bulk that is exacerbated by the extra-height and colour of the building put forward in the latest renders. I note that in the original renders, the building was a tan like colour. I also consider it relevant to mitigate for bulk and dominance effects on the view from Holt (Devonport apartments), and the viewshaft from Marsland Hill, so that the building sits more comfortably within the chromatic theme of the area. This is not to say that dark areas are not desirable, 122A & B include darker areas to the facades.

5.3. Vegetation would be advantages within the eastern courtyard to assist with enhancing the general amenity and character of the internal space between the proposal, 122, 122A & B, reducing the apparent bulk and extra-height' of the proposal – as demonstrated in the Sharrock MRHS montage."

¹³ Objective 3. Under Objective 6(b) one is required to take a strategic decisions over the medium/long term.

¹⁴ Objective 6(c).

amenity for a body people for which new apartments are designed, where amenity for other people is to be adversely affected).¹⁵

CONCLUSION

50. These submissions focus on assessment criteria contain in Operative District Plan Rule Bus 13.

51. First, it would be an error to exclude consideration of privacy and dominance (as well as views, shading, light). All are *elements of* amenity and character, and must be had regard to under section 104.

52. Secondly, I have addressed the importance of lay evidence as well as expert evidence, in relation to effects upon character and amenity.

52.1. Expert evidence: The Bluemarble reporting contains limited discussion of privacy or dominance effects. Mr Jackson's evidence is that the proposal has little regard to the loss of amenity caused to the surrounding environment - which is predominantly residential in character and use.¹⁶

52.2. 'Lay' evidence: Expert witnesses do not have a monopoly over assessment of "amenity" and "character" – the evidence of submitters is highly relevant. Only the submitters can give evidence as to the important values they appreciate in this area.

52.3. It is accepted that you are required to apply an 'objective' lens when you undertake your assessment of all of the evidence.

53. Thirdly, mitigations for the effects on the submitters I represent have not been seriously considered. Instead, the building design does very little (if anything) to mitigate effects on the natural and physical qualities and characteristics of the area that contribute to the 10 submitters "*appreciation of its pleasantness, aesthetic coherence*". Having particular regard to the maintenance and enhancement of amenity values (s 7(c) RMA) and of the quality of the environment (s 7(f) RMA), the application should be declined.

DATED at New Plymouth this 22nd day of September 2021

S J Ongley, Counsel for the 10 Submitters

¹⁵ Policy 6(b)(i).

¹⁶ Jackson EIC at [10.1].