

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

**SUPPLEMENTARY LEGAL SUBMISSIONS
ON BEHALF OF 10 SUBMITTERS**

Dated: 24 September 2021

COUNSEL INSTRUCTED:

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1. The Applicant's approach to interpretation of assessment criteria in Bus Rule 13, would effectively render the following criteria obsolete:
 - *The extent to which the extra Height of the proposed BUILDING will:*
 - ...
 - Adversely affect the character and visual amenity of the surrounding area;*
2. Legal submissions for the Applicant state *inter alia*:
 - 2.1. Overbearing effects are not to be considered.¹
 - 2.2. The character of the building is not a relevant matter of discretion.²
 - 2.3. 'Views', other than in respect of identified viewshafts, are not a relevant matter of discretion.³
 - 2.4. Discretion is not retained over privacy.⁴
3. Shading is left - but Ms Martin's Summary Statement says this is only a "minor" part of character and visual amenity in this Business Area.⁵
4. Given that there is no level at which a proposal breaching the height limit would become fully discretionary/non-complying, one wonders how a building of *any* height could ever be declined, using this analysis.

Section 104 RMA

5. In my primary legal submissions, I referred to section 104 of the Act. Section 104C cannot be used to override section 104.
6. The Courts have attempted to read s104 and 104C without conflict. That is, in a case such as this, we must attempt to reconcile the two.
7. In *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2013] NZEnvC 238 the Environment Court said:⁶

¹ At [9.2].

² At [10.2].

³ At [44.5.1].

⁴ At [44.3.1].

⁵ At page 9, responding to Mr Jackson's [4.4].

⁶ This approach was upheld in the High Court - *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878: The High Court also held that the 2009 amendments to the Act, and in particular s87A, mean that Part 2 cannot be an additional reason to either grant or decline a consent, overturning the decision in *Auckland City Council v John Woolley Trust* [2008] NZRMA (HC) under which the pre-2009 version of the Act was considered.

"[23] Section 104 is generic - in the sense that it applies to the consideration of an application for consent to any class of activity for which a consent may be sought - and s 104C confines the range of considerations relevant to an application for a restricted activity consent. ..."

8. There is a question as to how ss 104 and 104C must be reconciled in this case.
9. I submit the Applicant's approach would have s 104C override s104, based on a contextual analysis of the Operative District Plan. Although it is acknowledged that a contextual analysis *is* relevant⁷, the submitters *disagree* with the Applicant's rather convoluted contextual analysis.
10. The principles for plan interpretation are set out by the Court of Appeal in *Powell*:⁸

"[35] ... while we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Rattray*, regard must be had to the immediate context ... and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgement of this Court in *Rattray* or with the requirements of the Interpretation Act."

"[37] We add that, for subordinate legislation, where examination of the immediate context of the plan leaves some uncertainty, it is also permissible to consider provisions in light of the purpose they fulfil in the authorising legislation (in this case, the RMA). Similarly, the fact that a district plan is to give effect to a [regional policy statement] can make the latter of some relevance to the interpretation of the former."

(Emphasis)

11. When interpreting Bus Rule 13, we must consider the provisions in relation to the purpose they fulfil - in this case being the Resource Management Act 1991.

⁷ The principles for the interpretation of a subordinate RMA planning instrument are well settled, and are guided by the Interpretation Act 1999 - particularly s 5:

5 Ascertaining meaning of legislation

- (1) *The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
- (2) *The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
- (3) *Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

This is otherwise known as 'purposive' interpretation

⁸ *Powell v Dunedin City Council* (2005) 11 ELRNZ 144.

12. It has long been the case that the purpose and scheme of the Resource Management Act, involves public participation in decision-making.⁹

13. In *Wellington Fish and Game Council v Horizons Regional Council* [2017] NZEnvC 37 the Court said, in relation to restricted discretionary activities:

[91] In closing, the applicants submitted that the statement in Mr Willis's evidence that for restricted discretionary activities, objectives and policies must be directly relevant to the matter of discretion and ... *not open up ... a fundamental assessment of whether the activity can be considered appropriate in a zone or catchment* ... is not supported by the Act. We concur. ... The statement by Mr Willis reflects the *controlled activity* (which must be approved but can be subject to conditions) and not the *restricted discretionary activity* status, where a proposed activity may be declined consent. (Emphasis)

14. That case is authority that it is appropriate to consider relevant objectives and policies to inform its understanding of the matters over which discretion is restricted.

Consider Objective 1 and Policies 1.1 – 1.3 and Policy 7.1 e.g.

Policy 1.2:

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

Policy 7.1:

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

15. These Objectives and Policies indicate that the amenity of *each area* is to be considered i.e. essentially a factual analysis. Based on the planning evidence of Ms Martin, in answer to the Commissioners questions, there is *no* well-defined ‘vision’ for the amenity and character of the Business Areas. Rather,

⁹ *Westfield (NZ) Ltd v North Shore District Council* [2005] NZSC 17, Elias J.

the Objectives and Policies require a detailed analysis of the factual character and (visual) amenity of the area in question.

16. To decide otherwise, on the basis of a forensic comparative exercise with other Area provisions, would have wide-reaching implications for the Operative District Plan - which contains numerous RDA's, and is 'effects-based', including in the Business Areas.

DATED at New Plymouth this 24nd day of September 2021

S J Ongley

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