DECISION REPORT ON RESOURCE CONSENT APPLICATION LUC24/48512 TO NEW PLYMOUTH DISTRICT COUNCIL

BRYAN & KIM ROACH AND SOUTH TARANAKI TRUSTEES LTD

24 & 26 Woolcombe Terrace, New Plymouth

4 June 2025 (including a minor amendment to Condition 1 under s133A of the RMA on 9 June 2025)

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OVERVIEW

Decision following the hearing of an application for resource consent under the Resource Management Act 1991 ("RMA").

This resource consent is GRANTED subject to conditions for the reasons herein.

Table 1 – Application Summary Details

Application Number:	LUC24/48512
Applicant:	Bryan & Kim Roach and South Taranaki Trustees Limited
Proposal Summary:	Retrospective resource consent is sought for the construction of a new dwelling and associated fencing and retaining walls
Site Address:	24 & 26 Woolcombe Terrace, New Plymouth
Legal Description:	Part Lot 1 DP 4522 & Part Lot 2 DP 5012 (RT 961499)
Site Area:	904m^2
Date of Application:	10 June 2024
Relevant District Plan:	Proposed New Plymouth District Plan (Appeals Version 7, 23 December 2024F)[1]
Applicable Zoning and Overlays:	Medium Density Residential Zone / Coastal Environment
Relevant District Plan Provisions:	Strategic Direction – Urban Form & Development, Medium Density Residential Zone, and Coastal Environment Chapters.
Application Activity Status:	Discretionary Activity (Rule CE-R5) is the overall status.[2]

Table 2 – Hearing Summary Details

Hearing Date:	27 March 2025

[1] Being the version of the Proposed District Plan applying at the time of the hearing, Appeals Version 8 is now the current version as I set out in the body of this decision.

[2] The Land Use Consent is also potentially subject to MDRZ rules: MRZ-R1, MRZ-R4, MRZ-R31 and MRZ-R33, which result in Restricted Discretionary Activity status as outlined in the body of this decision. There was disagreement amongst the planning witnesses as to whether MRZ-R1 and MRZ-R33 apply. Whether those rules are applicable or not, would have no effect on the determination of overall status.

Independent Commissioner:	Philip McKay
Appearances for Applicant:	Scott Grieve – Legal Counsel Bryan Roach – Applicant Representative Kyle Arnold – Architecture Jono Mudoch – Architectural Shadding Assessment Daniel McEwan – Landscape & Visual Effects Richard Bain – Landscape & Visual Effects Peer Review Benjamin Lawn – Planning *(Alan Doy – Surveying, prepared a statement of evidence but was excused from attending the hearing).*
Appearances for Submitters:	Aiden Cameron – Legal Counsel Geoffrey Whyte – Submitter on behalf of himself and Johanna Whyte Emma McRae – Landscape & Visual Effects Kathryn Hooper – Planning
Appearances for New Plymouth District Council:	Campbell Robinson – Section 42A Reporting Officer Julie Straka (Manager Governance) – Hearings Administrator
Commissioner's Site Visit:	Undertaken on 27 March 2025 (prior to hearing)
Hearing Closed:	13 May 2025

1. INTRODUCTION

1.1 DELEGATION

1. This decision is made on behalf of the New Plymouth District Council ("Council" or "NPDC") by an independent hearing commissioner, Philip McKay,[3] appointed under section 34A of the Resource Management Act 1991 ("RMA") to hear and decide this application.

1.2 PROCEDURAL MATTERS

2. The resource consent application by Bryan & Kim Roach and South Taranaki Trustees Limited ("the Applicant") was limited notified to the owners and occupiers of 28 Woolcombe Terrace, New Plymouth.[4] A submission in opposition was subsequently received from the owners[5] and occupiers of that property, Geoffrey and Johanna Whyte.[6]

3. I was appointed to hear and determine the application in December 2024. Directions for the pre-exchange of reports and evidence were issued as part of the hearing notice, on 27 January 2025.

4. I conducted a visit to the site of the application, 24 & 26 Woolcombe Terrace, New Plymouth ("the Site") on the morning of the hearing 27 March 2025. I was accompanied by a Council Governance Advisor, Ms Claire Kelly, who was not involved with the processing of this application nor the hearing. We also visited the submitter's property and residence at 28 Woolcombe Terrace, New Plymouth.

1.3 MATERIAL CONSIDERED AND HEARING PROCESS

5. Prior to the commencement of the hearing the following documentation was provided to me and reviewed:

    a. The retrospective resource consent application and assessment of environmental effects for 24 / 26 Woolcombe Terrace, New Plymouth for Bryan & Kim Roach prepared by McKinlay Surveyors, and dated 7 June 2024 ("the Application" or "the AEE");[7]

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[3] Who is certified with a Chairing Endorsement under the Making Good Decisions programme and is a planner and resource management practitioner with over 31 years of practice.

[4] Following the Notification Decision of Campbell Robinson and Richard Watkins under delegated authority for New Plymouth District Council, dated 30 October 2024.

[5] As trustees of the G & J Whyte Trust.

[6] Dated 5 December 2024.

[7] Including appendices: A - NPDC Resource Consent Application Form; B – BOON Architectural Drawings for the as-built dwelling including shading diagrams; and C – Record of Title.

b. Various items relating to further information including: a request for further information from NPDC dated 4 July 2024, initial response e-mail from B Lawn, McKinlay Surveying dated 14 August 2024, e-mails seeking additional clarifications from NPDC dated 12 September 2024 and 7 October 2024, and respective responses from B Lawn, McKinlay Surveying dated 23 September 2024 and 7 October 2024.

c. The submission made on the application by Geoffrey and Johanna Whyte ("the Submitter") dated 4 December 2024 and attaching as an appendix the affidavit in support of an application to the Environment Court for enforcement orders by Mr Whyte dated 21 March 2024. That affidavit includes annexure GW1 comprising some 113 pages of: photographs of the neighbouring building development at various stages, architectural plans from Boon Architects, a ground level assessment provided to Boon Architects by BTW Company,[8] e-mail correspondence with NPDC,[9] permitted activity assessments prepared by Bland & Jackson Surveyors Ltd for NPDC,[10] letter from Pidgeon Judd to NPDC dated 18 March 2024 seeking that an abatement notice be issued for breaches of relevant height and height in relation to boundary standards. The affidavit also includes annexure GW-2 comprising a table setting out a chronological order of events.

d. A report on the Application and submission received prepared under section 42A of the RMA by Mr Campbell Robinson ("the s42A Report"),[11] Senior Planner (Consultant), for the Council. That report also contained the section 95A and 95B Notification and Limited Notification Assessment Report as an Appendix.[12]

e. Statements of Evidence ("SOE's") in support of the Application from Bryan Roach (applicant), Kyle Arnold (architecture), Jono Murdoch (architecture – shadow diagrams), Daniel McEwan (landscape architecture), Richard Bain (landscape architecture peer review), Alan Doy (surveying), and Ben Lawn (planning).[13]

f. SOE's on behalf of the submitter from Geoffrey Whyte (submitter), Emma McRae (landscape architecture), and Kathryn Hooper (planning).[14]

g. Legal submissions on behalf of the Applicant from Mr Scott Grieve dated 26 March 2025.

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8 Dated 12 December 2023.

9 From December 2023 – March 2024.

10 Dated 6 March 2024 and 19 March 2024 respectively.

11 Dated 4 March 2025.

12 Also prepared by Mr Robinson and dated 30 October 2024.

13 All dated 12 March 2025.

14 All dated 19 March 2025.

6. The s42A Report analysed the information received in relation to the Application along with the submission received, and following assessment under sections 104 and 104B of the RMA, recommended that consent be granted to the retrospective land use consent application subject to conditions.

7. The s42A Report was taken "as read" at the hearing, as were the statements of pre-exchanged expert evidence. Experts on behalf of the Applicant presented both supplementary evidence and a verbal summary of their pre-circulated evidence at the hearing, while experts on behalf of the submitter presented a verbal summary of their pre-circulated evidence.

8. At the commencement of the hearing, I asked if there were any procedural matters that needed to be addressed.

9. There were no conflicts of interest or other procedural issues raised at the hearing.

10. At the end of proceedings, after hearing from the Applicant's legal counsel and witnesses, the submitter's legal counsel and witnesses, the s42A reporting officer, and closing verbal comments from the Applicant's counsel, the hearing was adjourned. The adjournment was made pending receipt of various matters[15] including a complying permitted baseline plan set, pergola design plans and Proposed New Plymouth District Plan ("PDP") compliance assessment of these plans, peer reviews of the PDP compliance assessments, and a written right of reply from the Applicant's legal counsel.

11. The permitted base line plan set, pergola design plans, and compliance assessment of those plans was provided by the Applicant's experts on Friday 11 April 2025. Respective peer reviews from Mr Robinson and Ms Hooper of the PDP assessments of those plans were provided on Wednesday 16 April 2025. After considering those peer reviews, both of which identified a breach of the PDP standards in the pergola design, I issued Post Hearing Minute 2 on 17 April 2025 requesting the Applicant provide an amended complying pergola plan and a PDP compliance assessment of it to be filed with the Applicant's Right of Reply by 28 April 2025 and invited an extension of time to be requested if necessary. Following receipt of a memorandum from the Applicant's Counsel seeking an extension of time until 9 May 2025, I issued Post Hearing Minute 3 granting that extension.[16]

12. The Applicant's Right of Reply contained four 3D model images[17] and was received on 9 May 2025. The Right of Reply was accompanied by an alternative planter design to the pergola and a PDP compliance assessment included within a supplementary SOE from Mr Lawn. The statement from Mr Lawn provided additional comments on the

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15 As set out in a Post Hearing Directions Minute dated 28 March 2025.

16 Dated 22 April 2025.

17 Being screenshots from the dwelling model with recession planes shown by Mr Arnold at the hearing.

pergola plan and the alternative planter mitigation option. Mr Lawn provided further justification to why the pergola plan does comply with the PDP in his opinion. He also provided a PDP compliance assessment of the additional privacy mitigation of louvers on the eastern bay window, along with draft consent conditions covering different options dependent on a determination of whether the proposed pergola complies with the PDP and whether MRZ-S4 is applied.

13. Finally, the Right of Reply also attached a SOE from the Roach's builder, Mr Christopher Bell, dated 28 April 2025. That statement comments on the feasibility of moving or modifying the dwelling and provides an estimate of the demolition and rebuilding cost to achieve a dwelling that is fully compliant with the PDP.

14. On 12 May 2025 Mr Cameron submitted a *'Memorandum of Counsel for the Submitters' for* consideration. That memorandum referred to the Applicant's reply documents, and specifically the SOE from Mr Bell, and records the submitters objection to the admission of that evidence *"at this very late stage"*.

15. On 13 May 2025 I issued Post Hearing Minute 4 upholding that objection, on the grounds that accepting Mr Bell's evidence without providing an opportunity for the submitters to respond to it would not accord with the principles of natural justice. I determined that I had sufficient information to decide on the application without the admission of Mr Bell's evidence. I therefore recorded in Minute 4 that Mr Bell's evidence is to be disregarded.

16. Finally in Post Hearing Minute 4 I declared the hearing closed as of 13 May 2025.

1.4 SUMMARY OF EVIDENCE

17. Section 113(1)(ad) requires a decision on a resource consent application to include a summary of the evidence heard. A summary of the evidence heard at the hearing is included in Schedule 1 to this decision. Where necessary, I discuss evidence directly relevant to the issues in contention with the Application in the body of this decision. I also note that copies of all written material and statements of evidence associated with this hearing are held by Council and currently available on its website.[18]

2. DESCRIPTION OF THE PROPOSAL & SITE

18. In summary, the proposal seeks retrospective land use consent for a second dwelling and associated retaining and fence structures on the front (or northern) boundary of the site. The second dwelling breaches the PDP height in relation to boundary standards, and the front retaining wall / fence breaches fence height standards.

[18] Bryan and Kim Roach & South Taranaki Trustees Limited

Proposed, but yet-to-be implemented privacy mitigation, includes a vertical louver screen across the eastern end of the first-floor front deck.

19. The proposal is described in further detail in the AEE,[19] and the s42A Report.[20]

20. The Site at 24 / 26 Woolcombe Terrace, New Plymouth[21] and its surrounds are described in the AEE (including photographs),[22] the s42A Report,[23] and the submitter's evidence.[24] In summary, the following are key descriptors of the Site and surrounds:

    a. The Site contains two existing dwellings including a recently built two-storied home located on the eastern side (number 26) and is comprised in one title with two allotments.[25]

    b. The Site is 904m^2 and flat in contour aside from the sloping entry, with an existing residential dwelling of approximately 240m^2 in size located on the western side of the site (24 Woolcombe Terrace). A second dwelling on the eastern side of the site (26 Woolcombe Terrace) was removed to allow for the construction of the subject dwelling. A shared vehicle access point provides access to both dwellings.[26]

    c. The Site is bound by residential properties to the south, east and west and to the north by the Woolcombe Terrace legal road. Beyond the roadway is the New Plymouth foreshore.[27]

    d. The foreshore land parcel includes common greenspace and planting at the top of the coastal escarpment as well as the New Plymouth coastal walkway located at the foot of the cliff immediately adjacent the foreshore.[28]

    e. Woolcombe Terrace is characterised by detached, one or two storied dwellings which face the street, taking advantage of sea views.[29] There are a range of building forms and architectural styles along the street, with many dwellings

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19 McKinlay Surveyors, 7 June 2024 (page 4).

20 Pages 2 – 3.

21 Legally described as Part Lot 1 DP 4522 and Part Lot 2 DP 5012 (Record of Title: 961499).

22 Pages 5 – 8.

23 Page 2 (paragraphs 10 – 12).

24 *Statement of Evidence of Emma McRae*, 19 March 2025 ("SOE of E McRae") (paragraphs 5.1 – 5.3).

25 S42A Report (paragraph 10) and AEE (page 5).

26 AEE (page 6).

27 S42A Report (paragraph 11).

28 S42A Report (paragraph 12).

29 I also note the AEE which includes a photograph of a three level residential dwelling to the east of the site on Woolcombe Terrace (Figure 3) and states that the character of the area is towards higher density development with the majority of buildings being two or three level residential dwellings (page 6).

sharing the typology of large front windows or balconies which face the street and the coastline. There is little vegetation present along the street front.[30]

3. RESOURCE CONSENT REQUIREMENTS AND ACTIVITY STATUS

21. The relevant district plan for assessing the status of the resource consent is the PDP as at the time that the application was lodged, June 2024, the PDP decisions on submissions had been made and the appeal period had expired. These decisions were publicly notified on 13 May 2023.

22. There is agreement amongst the planning experts that the Operative New Plymouth District Plan is not relevant for the assessment of this application. The reasoning for this is set out by Mr Robinson in the S42A Report[31] and need not be repeated here.

23. At the time of the hearing there was also agreement amongst the planning experts that the relevant district plan for assessing the application is the PDP (Appeals Version 7 updated on 23 December 2024).[32]

24. Under the PDP the Site is located within the Medium Density Residential Zone ("MRZ") and is within the Coastal Environment ("CE").[33]

25. I note that since the hearing held on 27 March 2025 there has been a further update to the PDP, with the current version now being 'Appeals Version 8 updated on 3 April 2025.' It is that current version of the PDP that this decision must be issued under and hereafter my references to the PDP are referring to Appeals Version 8. For completeness I note that based on Mr Robinson's advice,[34] there are no appeals relevant to the provisions of the relevant rules or effects standards of the MRZ. There are however amendments to the Coastal Environment Chapter of the PDP in Appeals Version 8, accordingly where I am referring to evidence regarding the provisions of that PDP chapter, I will cross check those provisions against the now current version of the PDP and take into account any changes in my decision.

26. The s42A Report sets out the relevant PDP rules for assessing the status of the land use consent application and identifies that resource consent is required under the following rules:[35]

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30 SOE of E McRae (paragraph 5.3).

31 S42A Report (paragraphs 21 – 23).

32 *Statement of Evidence of Benjamin Lawn*, 12 March 2025 ("SOE of B Lawn") (paragraph8.2), *Statement of Evidence of Kathryn Hooper,* 19 March 2025 ("SOE of K Hooper") (paragraph 24), and S42A Report (paragraph 19).

33 S42 Report (paragraph 18), SOE of B Lawn (paragraph 6.1), and SOE of K Hooper (paragraph 20).

34 S42A Report (paragraph 23).

35 S42A Report (paragraph 19, Table 2).

a. CE-R5 Building activities – Residential Zones – Discretionary Activity (as the proposal fails to meet the effects standards of the underlying MRZ).

b. MRZ-R1 Residential activities (excluding residential buildings) – Restricted Discretionary Activity (the proposal fails to comply with 2 separate effects standards).

c. MRZ-R31 Building activities – Restricted Discretionary Activity (the proposal fails to comply with 2 separate effects standards).

d. MRZ-R33 Building activities that do not comply with MRZ-S3 Height in Relation to Boundary but comply with MRZ-S4 Alternative Height in Relation to Boundary – Restricted Discretionary Activity (the dwelling does not comply with effects standard MRZ-S3 but complies with MRZ-S4).

27. Based on that assessment Mr Robinson concludes that overall, the proposal is a Discretionary Activity under Rule CE-R5 of the PDP being the highest activity status.[36] There is agreement amongst all three planning experts that the overall status is a Discretionary Activity under Rule CE-R5 of the PDP and that the effects standards of the MRZ that are breached are MRZ-S3 Height in Relation to Boundary ("HIRB") of the dwelling and MRZ-S10 Maximum fence or wall height of the front retaining wall and glass balustrade,[37] but there are however, differences in opinion between the experts as to the applicable rules of the MRZ.

28. Mr Lawn disagrees with Mr Robinson that MRZ-R1 is applicable because it only relates to residential activities as a land use and not to buildings. He supports his opinion with a quote from the PDP Independent Hearings Panel which states that the zone effects standards are irrelevant to the use of land (under R1) for residential activities (as opposed to buildings).[38]

29. Ms Hooper also disagrees with Mr Robinson that MRZ-R1 is applicable, and rather that MRZ-R4 'Up to three residential units per site' applies.[39] In his supplementary statement, Mr Lawn agrees with Ms Hooper that MRZ-R4 is applicable.[40] As I have recorded in Schedule 1 'Summary of Evidence' to this decision, Mr Robinson in his verbal statement at the conclusion of the hearing also agreed that MRZ-R4 applies. The remaining area of disagreement then on this matter, is that Mr Robinson considers that both rules MRZ-R1 and MRZ-R4 are applicable, while Mr Lawn and Ms Hooper consider that MRZ-R4 applies but MRZ-R1 does not. I find that this matter is of

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36 S42A Report (paragraph 20).

37 S42A Report (paragraph 19, Table 3), SOE of B Lawn (paragraphs 8.4 – 8.5, Table 1), SOE of K Hooper (paragraphs 25 & 31).

38 SOE of B Lawn (paragraphs 8.5 and 8.6).

39 SOE of K Hooper (paragraphs 26 – 28).

40 Supplementary Statement of Evidence of B Lawn ("SSE of B Lawn") (paragraph 3.1).

no consequence to my decision as either way the MRZ effects standards are triggered and there is agreement amongst the three planning experts that MRZ-R31 applies and that neither standard MRZ-S3 nor MRZ-S10 are met, therefore triggering Restricted Discretionary Activity resource consent.

30. A more material matter of disagreement is that both Mr Robinson and Mr Lawn consider that rule MRZ-R33 applies, and Ms Hooper considers that it does not.[41] The significance is that restricted discretionary rule MRZ-R33, which applies to buildings that don't comply with MRZ-S3 HIRB but do comply with MRZ-S4 Alternative Height in Relation to Boundary ("AHIRB"), has some differences in matters of discretion to MRZ-R31.[42] Further to this, activities that comply with MRZ-R33 and all other MRZ effects standards, are precluded from limited and public notification. Of course, that preclusion does not apply to this case as standard MRZ-S3 is breached by the rear of the subject building and MRZ-R10 is breached by the front retaining wall and fence structure.

31. Ms Hooper's opinion is that the AHIRB standard MRZ-S4 does not apply as the Applicant's building does not sit entirely within 20m of the site frontage, and that this standard does not apply to part of a building.[43] Ms Hooper refers to the PDP definition of 'Building Activities'[44] and to the Kāinga Ora evidence presented at the PDP hearings which promoted the use of the AHIRB standard.[45]

32. Mr Lawn points out that HIRB standard MRZ-S3 includes a list of circumstances when that standard does not apply, which includes *"9. Buildings or parts of buildings that utilise MRZ-S4 Alternative Height in Relation to Boundary standard."*[46] Mr Lawn also goes into the Kāinga Ora evidence presented at the PDP hearings including its reference to the Auckland Unitary Plan on which the AHIRB rule was based.[47]

33. Mr Lawn also advises that he requested information from NPDC as to resource consent applications that had utilised the AHIRB standard and that there were seven of these, five of which involved buildings that extended further than 20m from the site frontage. With a summary of these applications provided in Appendix 1 of his evidence, and an example of such an application and the NPDC report on it provided in Appendix 2.[48]

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41 SOE of K Hooper (paragraphs 30 and 32 – 45).

42 I note the different matters of discretions are set out in a table comparison format in Appendix 1 to Ms Hooper's SOE.

43 SOE of K Hooper (paragraph 37).

44 SOE of K Hooper (paragraphs 39 – 40).

45 SOE of K Hooper (paragraphs 38 and 41).

46 SOE of B Lawn (paragraph 8.16).

47 SOE of B Lawn (paragraph 8.18 – 8.20).

48 SOE of B Lawn (paragraphs 8.21 – 8.22).

34. While I agree that as raised by Ms Hooper, and Mr Cameron,[49] MRZ-S4 itself does not refer specifically to 'parts of buildings', I find Mr Lawn's evidence compelling that the exemptions referred to in MRZ-S3 include parts of buildings that utilize MRZ-S4. I also consider it significant that NPDC has been consistently administering the PDP that MRZ-S4 can be used for the front portion of buildings that extend beyond 20m from the site frontage. I therefore find that both rules MRZ-S31 and MRZ-S33 are applicable to this decision.

35. In summary then, I find that this land use consent application has the overall status of a discretionary activity under rule CE-R5, and that the following rules are also applicable, MRZ-R4, MRZ-R31 and MRZ-R33, each of which has a Restricted Discretionary Activity status.

36. The s42A Report states that there are no applicable National Environmental Standards to the Application.[50] There being no expert evidence to the contrary I also find this to be the case.

37. The Application is therefore to be assessed with an overall discretionary activity status.

4. RELEVANT STATUTORY REQUIREMENTS

38. Section 104(1) of the RMA sets out the mandatory matters to which I must have regard when considering the Application and submission received. These include any actual or potential effects on the environment of allowing the activity, and the statutory instruments set out in subsection (1)(b). Those instruments considered relevant in this case are set out latter in this decision.

39. Section 104B of the RMA states that after considering an application for a discretionary activity, the application may be granted or refused, and if granted conditions may be imposed under s108 of the RMA.

40. As this case involves retrospective resource consent, the respective counsel for the Applicant and submitter have provided legal submissions on the principles applying to retrospective applications for resource consent.

41. Mr Grieve in his legal submissions on behalf of the Applicant sets out the limited circumstances where the RMA addresses retrospective consenting (which do not apply to this case) including a s330 Emergency Works case (*Harris v Bay of Plenty*

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[49] *Legal Submissions on Behalf of Geoffrey & Johanna Whyte*, dated 27 March 2025 ("Legal Submissions for the Submitters") (paragraphs 3.16 – 3.20).

[50] S42A Report (paragraph 17).

Regional Council EnvC W72/2008),[51] sets out the circumstances of this case[52] and cites various cases of where retrospective resource consents have been subject to court decisions.[53] Mr Grieve then comments on prior conduct and proportionality citing *Hinsen v Queenstown-Lakes District Council* [2004] NZRMA 115 and submitting that the Roach's situation differs in arising from a genuine mistake and that the cost of adjusting the building to make it comply would be out of proportion to the effects caused by the non-complying elements.[54] Finally on this subject Mr Grieve refers to proportionality having regard to enforcement cases and submits that enforcement orders would unlikely be made when effects are de minimus.[55]

42. Mr Cameron submits that if an existing activity does not have the necessary consent, it should not be given any de facto advantage because of that fact,[56] and there should be no presumption that what exists should remain, simply because it would be difficult or expensive to remove it.[57] Mr Cameron also cites from *Strata Title "that the application must be considered as a greenfields proposal, which stands or falls on its merits when assessed against the relevant statutory and planning provisions."* [58]

43. Mr Cameron disagrees with Mr Grieve's use of *Hinsen* to distinguish the Application from *Strata Title* and states that the *Hinsen* decision is consistent with *Strata Title*.[59]

44. Mr Grieve in the Applicant's Right of Reply submits that the Environment Court ultimately took account of proportionality in deciding to grant retrospective consent in *Hinsen* in citing paragraph 130 of that decision.[60] Mr Grieve submits that I am bound to follow the Court's approach in *Hinsen "and take into account the extent to which the cost of complying would be disproportionate to the benefit of doing so, and so would become a penalty."*[61]

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51 *Outline of Submissions on Behalf of the Applicant Bryan & Kim Roach & South Taranaki Trustees Ltd (Roach),* dated 26 March 2025 ("Legal Submissions for the Applicant") (paragraphs 24 & 25).

52 Legal Submissions for the Applicant (paragraphs 26 & 27).

53 Legal Submissions for the Applicant (paragraphs 28 – 33).

54 Legal Submissions for the Applicant (paragraphs 34 – 38).

55 Citing *Hill Park Residents Association Inc v Auckland Regional Council* EnvC A30/2003, Legal Submissions for the Applicant (paragraphs 39 – 40).

56 Citing *Strata Title Admin Body Corporate 176156 v Auckland Council* [2015] NZEnvC 125, Legal Submissions for the Submitters (paragraph 3.2).

57 Citing *NZ Kennel Club Inc v Papakura District Council* W100/2005, Legal Submissions for the Submitters (paragraph 3.3).

58 Citing Strata Title as above in 55, Legal Submissions for the Submitters (paragraph 3.3).

59 Legal Submissions for the Submitters (paragraphs 3.5 – 3.7).

60 Right of Reply for the Applicant Bryan & Kim Roach & South Taranaki Trustees Limited (Roach) ("Reply submissions") (paragraphs 14 – 16).

61 Right of Reply for the Applicant (paragraph 16).

45. In his reply Mr Grieve goes onto quantify the costs of compliance relying on the evidence of Mr Bell. As stated above, I have disregarded Mr Bell's evidence and accordingly also disregard paragraph 18 of Mr Grieve's reply but in doing so note that it is self-evident that the cost of altering the building to comply with MRZ-S3 would be reasonably significant.

46. Having carefully considered the legal submissions of Mr Grieve and Mr Cameron on the principles applying to retrospective resource consents I find that in the first instance I should assess the application on its merits under sections 104 and 104B of the RMA as if the building were proposed, rather than built. If I were to find that at least some part of the building needed adjusting to be more, or fully, compliant, or that the application should be declined, in appropriately avoiding, remedying or mitigating adverse effects, then I should consider the principle of 'proportionality'.

47. Mr Cameron raises the matter of the past conduct of the Applicant in his Legal Submissions for the Submitters,[62] and states that there has been disregard for the rules of the PDP by the Applicant and their consultants. Having also reviewed the evidence of Mr Roach and Mr Arnold and the legal submissions of Mr Grieve I find that while the outcome has been a breach of the PDP standards (and I do not belittle the impact of that from the Whyte's perspective), that breach has not been deliberate with the building design being based on the ODP which was in effect at that time, and that the breach of the standards (of the ODP initially and the PDP by the time the resource consent application was lodged) also resulted from a ground level surveying error. In these circumstances I do not consider 'prior conduct' to be a relevant issue in exercising my discretion under sections 104 and 104B of the RMA.

5. CONSIDERATION OF THE PRINCIPAL ISSUES IN CONTENTION

5.1 ASSESSMENT OF EFFECTS ON THE ENVIRONMENT

48. The following considers my findings on the actual or potential effects on the environment of allowing the activity as is required under section 104(1)(a).

49. The S42A Report helpfully categorises the relevant effects to be had regard to. I set out these effects categories under the subheadings below and consider the evidence received, and points raised in the submission regarding each effect.

50. Prior to undertaking that exercise however and having determined that standard MRZ-S4 and rule MRZ-S33 apply, I have considered the relevant PDP assessment criteria that apply in informing my consideration of effects under s104(1)(a) of the RMA. In

[62] Legal Submissions for the Submitters (paragraphs 3.12 – 3.15).

doing so I note that Ms Hooper's evidence helpfully appends a table setting out the applicable PDP assessment criteria.[63]

51. Rule MRZ-R33 includes additional matters to those listed against standards MRZ-S3 and MRZ-S10 including details of acceptable sunlight access and overlooking and privacy. In terms of the latter, matter (3) states: *"the extent to which direct overlooking of a neighbour's habitable room windows and outdoor living space is minimised to maintain a reasonable standard of privacy, including through the design and location of habitable room windows, balconies or terraces, setbacks, or screening."*

5.1.1 Effects on Streetscape and Coastal Environment

52. The S42A Report does not provide any additional assessment of streetscape and coastal environment effects to the Notification Report, for the reason that: *"Given no further submitter evidence has been presented regarding either matter, I maintain my view that effects are minor and ultimately acceptable."*[64]

53. The submitter, Mr Whyte in his hearing statement, disagrees with Mr Robinson's comments on streetscape character at paragraphs 85 and 87 of the S42A Report, which refer to the effects of streetscape being compatible with the character of the area in the context of the MRZ objectives. Mr Whyte refers to the surrounding area being dominated by flat roof designs as shown in Ms McRae's evidence.[65]

54. Ms McRae's assessment of the effects of the front wall / fence infringement and on streetscape character are that the adverse effects are "very low adverse."[66] Ms Hooper also agrees that the activity has negligible effect on streetscape stating: *"Effects on wider streetscape have been considered by the experts they agree that these effects are negligible."*[67]

55. In terms of the coastal environment Mr Robinson, Mr Lawn and Ms McRae are in agreement that the effects on the coastal environment, which is heavily modified in the area surrounding the site, are less than minor.[68] Ms Hooper does not comment on the potential effects on the coastal environment but does state her agreement with Mr Robinson and Mr Lawn that the proposed activity is consistent with the New Zealand Coastal Policy Statement ("NZCPS") and the coastal environment objectives and policies in the PDP.[69]

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63 SOE of K Hooper (Appendix 1).

64 S42A Report (paragraph 33).

65 Hearing Statement of Geoffrey Whyte ("Statement of G Whyte") (paragraph 5.12).

66 SOE of E McRae (paragraphs 11.1 and 13.16).

67 SOE of K Hooper (paragraph 73).

68 S42A Report (paragraph 33), SOE of B Lawn (paragraphs 9.32 – 9.33), SOE of E McRae (paragraph 14.1).

69 SOE of K Hooper (paragraph 88).

56. Given the above, I find that there is no contest of expert evidence on the effects of the proposal on streetscape and the coastal environment, and that such effects are no more than minor, and acceptable.

Shading Effects on Submitter

57. There is also agreement amongst the experts that the effects of shading on the submitter are no more than minor, which I will return to. I note however that Mr Whyte is very clear in his statement that he remains *"concerned by the degree of shading and ensuring the appropriate comparison with a building which could be constructed 'as of right' on the neighbouring property."*[70] Mr Whyte also explains in his statement how the area to the rear of their property, which will be subject to some shading effects from the Roach's dwelling, is utilised for outdoor living and as a play area for his grandchildren at different times, and is not simply a vehicle storage and manoeuvring area.[71]

58. The AEE, further information responses, and architectural evidence of Mr Murdoch[72] in particular, and Mr Arnold[73] spent considerable time assessing the effects of shading of the as built dwelling on the Whyte's property, and in particular a comparison of such effects with what would be a permitted activity under the PDP (i.e. 'the permitted baseline').

59. The S42A Report considers the shading effects to be *"less than minor and ultimately acceptable,"*[74] which Mr Lawn agrees with.[75] Ms McRae states that she agrees with the landscape architects for the Applicant, Mr McEwan and Mr Bain that the shading effects are low adverse given the level of shading that could occur from a fully compliant 11m high building.[76] Relying on Ms McRae's evidence Ms Hooper concludes that *"the shading effects are likely to be within or close to the effects associated with the permitted baseline and therefore acceptable."*[77]

60. Given the above, all the expert evidence agrees that the potential adverse shading effects from the as built dwelling is no more than minor and acceptable, given the

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70 Statement of G Whyte (paragraph 5.8).

71 Statement of G Whyte (paragraphs 3.3 – 3.7, & 5.7).

72 Statement of Evidence of Jonathan Murdoch ("SOE of J Murdoch) (paragraphs 6.1 – 10.4).

73 SOE of K Arnold (paragraphs 7.3 – 7.4)

74 S42A Report (paragraph 40).

75 SOE of B Lawn (paragraph 9.20).

76 SOE of E McRae (paragraph 8.7),

77 SOE of K Hooper (paragraph 72).

permitted baseline of the PDP. With no expert evidence to the contrary, I also find this to be the case.

Privacy Effects on Submitter

61. Effects on the submitter's privacy from the as built dwelling are contested by both the submitter and their experts. On this matter Mr Robinson considers the tinting of the infringed windows, and the views that could be obtained from them, as well as the proposed vertical louver screen to be placed on the eastern end of the first-floor deck,[78] prior to stating that *"adverse privacy effects are considered to be less than minor and acceptable."*[79]

62. In addition to the infringed windows commented on by Mr Robinson, Ms McRae points out that there is also overlooking from large windows in the centre of the eastern façade towards the Whyte's property as well as from the ground floor level outdoor deck area. Ms McRae states that from this deck area 7 habitable room windows of the Whyte's dwelling can be directly viewed, and that the rear first-floor deck also overlooks the rear of the Whyte's section. Ms McRae concludes that without mitigation the effects in relation to privacy and overlooking are low-moderate adverse.[80]

63. Ms Hooper adopts Ms McRae's conclusions on privacy and overlooking and states that the Applicant's vertical louver mitigation on the front deck will not address the privacy effects on the habitable rooms on the western side of the Whyte's dwelling, nor their rear yard outdoor living area. Ms Hooper goes on to state that the building dominance and privacy effects on the owners and occupiers of 28 Woolcombe Terrace, in the absence of appropriate mitigation, are unacceptable.[81]

64. Mr Arnold sets out the aspects of the architectural design intended to reduce privacy effects, these being: the proposed vertical louvers at the front upper level balcony; window orientation, location, size, and dark tinted glass; two triangle pop out windows to provide views of the sea from further back in the house and to ensure they did not overlook directly to the Whyte's; and larger glazing sections were deliberately set back from adjacent boundaries and positioned in circulation areas only to provide good natural lighting but not in locations where the residents would typically dwell for longer periods of time to mitigate any privacy concerns.[82]

65. Mr McEwan reiterates some of these points in stating his opinion that the dwelling has been designed in a way that minimises potential effects on privacy, noting the larger

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78 For which he recommends a condition of consent to ensure implementation.

79 S42A Report (paragraphs 41 – 44).

80 SOE of E McRae (paragraphs 8.9 – 8.10).

81 SOE of K Hooper (paragraphs 74 – 79).

82 SOE of K Arnold (paragraphs 4.10 – 4.13).

east facing windows are in passageways not lending themselves to static viewing. He considers that any potential adverse effects on privacy are to an acceptable level and align with the MRZ effects standards.[83]

66. Mr Bain agrees with Mr McEwan and states: *"It is unlikely that the constructed dwelling creates a loss of privacy for the submitters as the main activities (living, kitchen) … primarily face north and west."*[84] He also points out that the constructed dwelling creates no additional loss of privacy, as the height to boundary breach areas do not include any windows other than a small slither of the window at the northern end.[85] Mr Lawn quantifies the extent of the MRS-S3 HIRB breach as being 0.6m and states that if the windows were 0.6m lower he would not expect any difference in privacy effects.[86]

67. Mr Lawn notes in his supplementary evidence that Ms McRae bases her assessment of privacy impacts on the front and rear decks, the eastern deck and the windows from the passageway and states that these are all compliant aspects of the building which are able to be achieved without infringement of MRZ-S3.[87] Mr Lawn goes onto point out that in the context of the PDP, the level of privacy and overlooking is provided for.[88] I agree with the points made by Mr Lawn and Mr Bain on this matter.

68. I find that a building could be established at the same distance from the boundary with a similar window and deck configuration on its eastern elevation to the as built dwelling (I say similar as the windows and decks could be in the same position but slightly lower as part of a building achieving overall compliance with the PDP). As such, I find that adverse privacy effects resulting from the window and deck locations are effects permitted by the District Plan and are appropriate for me to disregard under section 104(2) of the RMA. In this context, and considering the conditions offered for vertical louvers at the eastern end of the front deck and over the main living area window, and for planter screening on the middle deck, I generally agree with the conclusion of Mr Robinson and the Applicant's experts in finding privacy effects to be no more than minor.

69. In saying this I acknowledge that what may be considered minor or less than minor adverse effects on privacy in RMA planning terms, due to the extent of such effects permitted by the PDP in the MRZ, may be perceived as significant by Mr & Mrs Whyte.

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83 SOE of D McEwan (paragraph 9.4

84 Statement of Evidence of Richard Bain ("SOE of R Bain") (paragraph 8.8).

85 SOE of R Bain (paragraph 8.9).

86 SOE of B Lawn (paragraph 9.23).

87 Supplementary Statement of Evidence of B Lawn (paragraph 2.12) ("SSE of B Lawn")

88 SSE of B Lawn (paragraph 2.14).

70. I also find that the mitigation options offered at, and post, the hearing, would appropriately reduce privacy effects in reaching my conclusion that such effects will not be significant.

Building Dominance / Outlook / Sense of Enclosure Effects on Submitter

71. Mr Robinson describes the effects that he assesses under this heading as being the sense of building enclosure or the sense of a building being too close or being overbearing. He states building dominance can contribute to a feeling of a lack of visual or built relief between buildings impacting on the sense of outlook or amenity.[89] Due to the length of the HIRB infringement at 21.9m being 75% of the building length Mr Robinson considered it would create a sense of being dominated or enclosed on the Whyte property to the extent of being at least minor effects in meeting the limited notification threshold.[90]

72. Mr Whyte makes it clear in his statement that he and Mrs Whyte are "*extremely concerned about the effects that the large overbearing and visually dominant property will have on our residential amenity, our sense of privacy, and our enjoyment of our property."*[91]

73. It is those type of effects that Ms McRae is most concerned with in her assessment stating: "*The greatest effects on amenity in relation to 28 Woolcombe Terrace are in relation to 'sense of enclosure'.*[92] Ms McRae notes that a complying building of the same design would have to be set back further from the side boundary reducing the sense of overlooking and enclosure that the as-built dwelling creates, before concluding that the sense of enclosure effect is 'low-moderate adverse'.[93]

74. Ms Hooper references that part of Ms McRae's evidence before concluding that in the absence of appropriate mitigation, these effects are not acceptable.[94]

75. Mr Bain has a different opinion in stating: *"Based on my site visit, I agree that the building's form creates a lesser effect than those potential effects from a building that complies with the permitted building standards. In my view, the building's 'height to boundary' breaches create a minimal additional sense of enclosure and or dominance. This is primarily due to the small scale and extent of the breaches in the context of the building's eastern façade. I viewed the breach areas from several positions when visiting the Whyte property. Photographs of from (sic) these*

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89 S42A Report (paragraph 45).

90 S42A Report (paragraph 46).

91 Statement of G Whyte (paragraph 6.4).

92 SOE of E McRae (paragraph 8.11).

93 SOE of E McRae (paragraph 8.12).

94 SOE of K Hooper (Paragraph 79).

viewpoints are appended to this evidence. From these viewpoints, while the breach areas are identifiable, in my view they contribute little additional enclosure and/or dominance over and above if the breach areas were not there. The constructed dwelling at 26 Woolcombe Terrace is substantial and visually dominates the western flank of the submitters' property. However, this dominance is created primarily by the compliant parts of the dwelling."[95]

67 At this point I find it necessary to draw a conclusion on whether there is a permitted baseline that would result in similar, or greater building dominance effects than the as built dwelling. During the hearing doubt was raised by the submitter's witnesses as to whether the permitted baseline model presented by Mr Arnold was fully compliant with the PDP. I therefore directed at the adjournment of the hearing for a plan set of that model to be prepared and assessed for compliance against the PDP with that assessment to be peer reviewed by Mr Robinson and Ms Hooper. That exercise resulted in agreement that the 3-storey model with a maximum height of 11m and the ground floor situated a similar distance from the eastern boundary than the as built dwelling, would comply with the PDP.

76. I therefore find that the permitted baseline model presented by Mr Arnold is compliant with the PDP. I also find it to be non-fanciful and credible and in accordance with the various legal tests applied by the Courts, as set out in Mr Grieve's opening submissions on behalf of the Applicant.[96] In reaching this conclusion I have also considered Mr Cameron's submissions that the roofline of the permitted baseline model is fanciful.[97] I am satisfied that it is not fanciful based on review of the Boon Architects plan set provided of the permitted baseline model which includes coherent building floor plans and of the examples of similar asymmetrical roof designs in existing buildings provided In the supplementary statement of Mr McEwan.[98]

77. In addition to the permitted baseline model, I consider it necessary to also quantify the extent of the breach of PDP standard MRZ-S3. As mentioned, Mr Robinson estimates the breach at 21.9m in length being 75% of the total building length.[99] Ms McRae's calculations are in general agreement with this by breaking the length down to the front 14.663m and rear 7.863m of the building (being 22.56m in total).[100] Mr Lawn is also in agreement with Ms McRae that the total length of the breach is 22.56m.[101]

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95 SOE of R Bain (paragraph 8.5).

96 Opening Submissions for the Applicant (paragraphs 61 - 69).

97 Legal Submissions on Behalf of G & J Whyte, dated 27 March 2025 (paragraph 3.11).

98 Supplementary Statement of Evidence of D McEwan (Figures 2 & 3) ("SSE of D McEwan")

99 S42A Report (page 46).

100 SOE of E McRae (paragraphs 8.1).

101 SOE of B Lawn (paragraph 9.11).

78. There was some contention around the vertical height of the breach at the hearing with Ms McRae's evidence providing figures of 2m closest to the road to 1m at the southern extent of that section of breach with the rear section ranging from 1.505m to 0.668m.[102] This contrasts with Mr Lawn who states that the maximum breach of the front section of the building is 0.56m high,[103] which is consistent with Mr Murdoch's statement of evidence.[104] Mr McEwan sets out in his supplementary statement that the vertical height of the breach needs to be considered from the point of intersection with the recession plane and with reference to a diagram calculates this to be 0.725m at its highest point.[105] Based on the diagrammatic information provided by Mr McEwan, and questioning of the witnesses at the hearing, I prefer the approach of Mr McEwan which takes into account the three dimensional nature of the required recession plane and which measures the breach at its maximum extent. I therefore determine the maximum extent of the breach at the front end of the building to be 0.725m above the permitted recession plane of MRZ-S3.

79. I am cognisant of the concerns raised by Mr and Mrs Whyte, and their witnesses and counsel regarding the domineering nature of the Roach's building as experienced from their property. When considering building dominance and sense of enclosure in my decision however, it is relevant that such effects are permitted by the PDP up to the level of the breach, being between 0.725m and 0.291m lower than the eastern extent of the roof of the as built dwelling. I also find it relevant that the as built dwelling is compliant with the PDP for the upper portion and majority of its roof line which according to Mr Arnold reaches a maximum height of 9.25m at the north ridge roof flashing.[106] The permitted baseline model would result in an 11m high building, albeit that the ridge of the roof would be set back slightly further from the boundary.

80. Having made these determinations I prefer the evidence of Mr McEwan and Mr Bain over that of Ms McRae and their respective conclusions that the effect of the breached portions of the as-built dwelling on sense of enclosure and dominance are 'low',[107] and the proposal at worst creates low adverse effects.[108]

81. For completeness, under this heading I note that effects of reduced outlook from the submitter's property have also been considered. A concern of Mr & Mrs Whyte

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[102] SOE of E McRae (paragraphs 8.1, 8.12, 13.10 & 13.14).

[103] SOE of B Lawn (paragraph 9.11).

[104] SOE of J Murdoch (paragraph 7.1(a)(iii). Also shown on Drawing SK1.0 of Appendix 1 of SOE of J Murdoch noting the cross section showing the 0.56 height of the breach is positioned further back on the building than the maximum extent of the breach.

[105] SSE of D McEwan (paragraph 2.2 and Figure 1).

[106] SOE of K Arnold (paragraph 7.1).

[107] SSE of D McEwan (paragraph 3.1).

[108] SSE of R Bain (paragraph 3.1).

included an obstruction in views from the Roach's front fence and the effect that the rear of the Roach's dwelling has on blocking views of Taranaki Maunga. I observed the obstruction in views to Mt Taranaki from the rear deck of the Whyte's property on my site visit.

82. The submitter's experts, Ms McRae and Ms Hooper do not consider the effects of reduced outlook to be significant in an RMA sense, with Ms Hooper stating: *"Compared to the permitted baseline, I consider the effects on the outlook from the submitters' property would be negligible."*[109] I agree with Ms Hooper and the witnesses for the Applicant on this matter, and need not consider it any further.

Planned Character and Changes to Amenity in the MRZ

83. Mr Robinson observes that the MRZ of the PDP deliberately uses the term 'planned character' rather than 'existing character' in allowing for character and amenity levels to change over time. He states that this is consistent with PDP strategic objective UDF-18(9) which acknowledges change to increase housing densities may detract from amenity values appreciated by existing communities.[110]

84. Mr Robinson then sets out extracts from the overview section of the MRZ Chapter that reference its purpose and intended character, which includes providing for medium density residential development up to three stories high.[111] Ms Hooper sets out the MRZ overview section in full, the third paragraph of which refers to ensuring that high standards of on-site amenity are achieved, including by requiring that residential properties are provided with good access to sunlight and daylight and have reasonable levels of privacy. It also refers to provisions requiring that site design and layout be considered in order to protect and enhance the amenity of the surrounding properties and the wider neighbourhood.[112]

85. I find it relevant that the MRZ overview also sets out that in providing for residential intensification the MRZ provides for the most infill development potential in the District and that: *"The amount of development that can be undertaken as a permitted activity, and the Effects Standards for such development, are the key differences with the… General Residential Zone."*[113]

86. Mr Robinson goes onto conclude that larger scale and bulkier dwellings are generally consistent with the planned character of the MRZ subject to them meeting the effects standards, and that *"the PDP also makes it clear that negative changes in amenity*

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[109] SOE of K Hooper (paragraph 82).

[110] S42A Report (paragraphs 48 – 49).

[111] S42A Report (paragraphs 50).

[112] SOE of K Hooper (paragraph 95).

[113] Ibid.

views may be created as a result of changes to urban environments. This is not to say that significant adverse changes to existing amenity levels is consistent with the direction of the PDP. In this instance, I have deemed the effects to be minor and at the lower end of magnitude which is consistent with the direction of UDF-18(9)."[114]

87. After completing an assessment of the objectives and policies of the MRZ, Ms Hooper states that she disagrees with the above conclusion of Mr Robinson. Her view is: *"that the proposal is inconsistent with those that relate to providing for amenity of neighbouring properties. It is therefore not consistent with the planned character of the MRZ."*[115] I return to the proposals overall consistency with the MRZ objectives and policies below.

88. On the matter of 'planned character' I agree with Mr Robinson's considered conclusion. I am therefore satisfied that the MRZ overview statement indicates that the zone provides for higher residential densities and building scale in implementing strategic objective UDF- 18(9). As set out above the MRZ overview still considers the amenity of surrounding properties but it is in the context of an expected change in character.

Mitigation

89. The S42A Report is outdated in its comments on mitigation as the Applicant has offered additional mitigation measures at the hearing and through their Right of Reply.[116]

90. I find however that the observations made by Mr Robinson are helpful, including that:

    a. Any screening or fencing would also need to comply with effects standards including MRZ-S10 (boundary fencing).

    b. The use of large planter boxes or vegetative screening would need to be carefully considered in terms of their effectiveness and would require the advice of a landscape professional.

    c. Requiring physical demolition of part of the building to reduce effects, whilst possible, would be disproportionate in terms of the level of effect being caused.

91. I am reminded by Mr Grieve in the Applicant's Right of Reply that adverse effects on the environment must be considered having regard to their mitigated version, also taking into account proposed conditions of consent.[117] The mitigation measures

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[114] S42A Report (paragraph 51).

[115] SOE of K Hooper (paragraph 103).

[116] S42A Report (paragraphs 53 – 55).

[117] Right of Reply for the Applicant (paragraph 43, citing *Guardians of Paku Bay Association Inc v Waikato Regional Council [2012] 1 NZLR 271 (HC), at [29].*

offered by the applicant in the form of conditions at the close of the hearing are summarised as follows:

a. Installation of the vertical louvers at:

   i the eastern edge of the first-floor balcony and

   ii the eastern bay window

   shall be completed within 40 working days from the commencement of this consent.

b. Installation of the proposed planter pots and trees on the eastern ground level deck shall be completed within 20 working days from the commencement of this consent. The proposed planter pots and trees shall have a combined height of a minimum of 1.6m.

c. Any planting that fails must be replaced at the expense of the consent holder within the next planting season (May to September). All plantings must continue to be maintained by the consent holder.

d. Construction noise from all remaining works shall comply with the relevant standards outlined under Rule NOISE-7 NZS6803:1999 requiring the noise generated complies with the noise limits set out in Tables 2 and 3 of NZS 6803:1999 Acoustics Construction Noise, with reference to 'construction noise' taken to refer to mobile noise sources.

92. The submitter's experts also commented on mitigation with Ms McRae setting out the following options to avoid, remedy or mitigate adverse effects:[118]

a. Redesign of building's eastern façade further away from boundary so it does not exceed HIRB envelope.

b. Reduction in height / angle of roof plane so it does not exceed HIRB envelope.

c. Installation of louvers / window tinting in appropriate locations to reduce overlooking and increase privacy.

d. Introduction of planting / planter boxes to soften the transition between properties and reduce overlooking / privacy effects from the eastern deck.

e. Increased permeability in materials of the boundary fence to remove tunnelling effect and allow increased sunlight into undercroft space.

93. While options (a) and (b) as listed above may have the effect of avoiding and remedying adverse effects, I do not find them to be valid mitigation options for this proposal. What has been applied for is to breach the HIRB standard MRZ-S3.

[118] SOE of E McRae (paragraphs 12.2 & 15.4).

Requiring either of those options as a condition would achieve compliance with standard MRZ-S3 which would likely be the same outcome as declining consent[119] (if subsequent enforcement proceedings resulted in building demolition and reconstruction to achieve compliance). It would also mean it would be necessary for me to find that any adverse effect beyond those permitted by standard MRZ-S3 are unacceptable. I therefore reserve judgement on the appropriateness of Ms McRae's options (a) and (b) to my overall decision on this application.

94. Ms McRae's option (c) has been largely agreed by the Applicant. As Mr Arnold sets out in his evidence the windows are already dark tinted.[120] The conditions offered by the Applicant now include vertical louvers at the eastern end of the first-floor balcony and over the eastern bay window (the first-floor window in the main living area).

95. Similarly, Ms McRae's option (d) has been agreed to by the Applicant with the planter pot and 1.6m high trees, based on plans prepared by Mc McEwan, offered as a condition for screening from the eastern deck.

96. Ms McRae's option (d) relates to the boundary fence which complies with the PDP. As the overall activity status is discretionary a condition requiring mitigation works on an otherwise complying part of the proposal could be set if deemed necessary for mitigating relevant effects. Requiring the planter pot screening of the eastern deck is an example of this as a way of reducing the overall privacy effects. While Ms McRae's option (d) may increase sunlight to the Whyte's property it would have a negative effect regarding privacy and has not been included in the conditions offered in the Applicants reply. Noting the experts' agreement that the shading effects of the as built dwelling are minor, I do not find Ms McRae's option (d) to be an appropriate mitigation option.

Earthworks

97. On the matter of earthworks, Mr Robinson advises that the submission raised concerns regarding compliance with PDP rules EW-R10 (Earthworks for building activities) and CE-R1 (Earthworks (excluding network utilities)).[121] After considering the timing of the earthworks in question being prior to the PDP having legal effect, Mr Robinson concludes that land use consent was not required.[122] Mr Lawn assesses that the earthworks achieved compliance with the Operative District Plan.[123] Ms Hooper

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[119] Accepting that resource consent would still be required for the breach of MRZ-S10 for the front retaining wall and glass balustrade.

[120] SOE of K Arnold (paragraph 4.11) and SSE of K Arnold (paragraph 2.4).

[121] S42A Report (paragraph 57).

[122] S42A Report (paragraphs 58 - 60).

[123] SOE of B Lawn (paragraph 9.34(a)).

agrees with the assessments of both Mr Robinson and Mr Lawn.[124] There being no evidence to the contrary, I find that compliance of the proposal with PDP rules EW-R10 and CE-R1 is not relevant to this decision.

Positive Effects

98. The S42A Report does not consider positive effects; however Mr Lawn identifies such effects in his SOE.[125] Although there will be positive effects for the Applicant, I do not find those effects to be particularly relevant to my decision given the retrospective nature of this application.

Effects Conclusion

99. Mr Grieve has made comprehensive legal submissions on the consideration of effects both in his Legal Submissions for the Applicant[126] and Reply Submissions[127] which I have carefully considered.

100. In summary there is no contest amongst the experts who agree that the potential effects discussed under the following headings are minor or less than minor and therefore not significant in the context of section 104(1)(a) of the RMA: streetscape and coastal, shading, outlook, and earthworks.

101. There is a contest amongst the experts as to the degree of effects that the as built dwelling has in terms of privacy, building dominance and sense of enclosure. I have carefully considered the views of the submitter, and the expert evidence and legal submissions presented on these matters. Having regard to the AHIRB rule, the offered mitigation conditions and the credible and non-fanciful permitted baseline building model, I find that these effects are no more than minor and would not in themselves prevent me from allowing the activity with regard to section 104(1)(a) of the RMA.

102. In drawing that conclusion, I also find it significant that the MRZ is planned to have a changing character resulting from increased residential density and building scale under the PDP compared to its existing state.

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[124] SOE of K Hooper (paragraph 114).

[125] SOE of B Lawn (paragraph 9.36).

[126] Legal Submissions for the Applicant (paragraphs 5 -19).

[127] Reply Submissions (paragraphs 3 – 11).

6. STATUTORY INSTRUMENTS

6.1 PROPOSED NEW PLYMOUTH DISTRICT PLAN

103. The relevant provisions of the PDP require consideration under s104(1)(b)(vi) of the RMA.[128]

104. The s42A Report provides a comprehensive assessment of the relevant objectives and policies of the following PDP Chapters: Strategic Direction – Urban Form and Development (UFD), Medium Density Residential Zone (MRZ), and Coastal Environment (CE).[129] Mr Robinson does not identify any inconsistency of the proposal with UDF-18,[130] he then goes onto complete a point by point assessment of the MRZ objectives and policies and again does not identify any areas of inconsistency of the as built dwelling with those provisions, informed by his assessment of effects.[131] Finally Mr Robinson assesses the relevant CE objectives and policies and concludes that the development is consistent with them.[132] I have reviewed the CE provisions in PDP Version 8 and those objectives and policies reviewed by Mr Robinson remain generally unchanged (from PDP Version 7 which applied at the time of Mr Robinson's assessment).

105. Mr Lawn sets out in a table format what he considers to be the relevant UDF strategic objectives and the relevant objectives and policies of the MRZ and follows each table with his assessment of the as built dwelling. Mr Lawn concludes that the dwelling achieves consistency with relevant aspects of UDF-18, UDF-20 and UDF-24[133] and that it *"is complementary to the MRZ and existing / planned character of this location."*[134] He then makes the overall conclusion that the proposal is not contrary to, and consistent with, the relevant objectives and policies of the PDP.

106. Ms Hooper agrees with Mr Lawn as to the relevant UDF strategic objectives, but considers that the dwelling and site could have been better designed to mitigate effects on the neighbouring property and while still achieving all the benefits detailed by Mr Lawn.[135] Ms Hooper then goes onto provide an assessment of the as built dwelling against relevant MRZ objectives and policies concluding that the proposal is

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[128] The expert planners agree that the application only requires consideration under the PDP and that the Operative District Plan does not need to be assessed (S42A Report (paragraph 23), SOE of B Lawn (paragraphs 8.1 & 10.4), and SOE of K Hooper (paragraph 24).

[129] S42A Report (paragraphs 74 – 103).

[130] S42A Report (paragraphs 75 – 83).

[131] S42A Report (paragraphs 84 – 102).

[132] S42A Report (paragraph 103).

[133] SOE of B Lawn (paragraphs 10.5 – 10.8).

[134] SOE of B Lawn (paragraph 10.12).

[135] SOE of K Hooper (paragraphs 93 & 94).

inconsistent with those that relate to providing for amenity of neighbouring properties.[136]

107. Ms Hooper provides her opinion that the MRZ contains a generous permitted activity envelope.[137] She goes onto state that the AHIRB rule enables exceedance of the permitted activity rule provided the development is done well by identifying effects at the design stage and adopting mechanisms to ensure effects are appropriately avoided, remedied and mitigated,[138] and ultimately concludes that the application does not achieve this.[139]

108. I have carefully considered the PDP objective and policy assessments made by all three planning experts. Given my findings under s104(1)(a) on effects, I generally agree with the assessments and conclusions of Mr Robinson and Mr Lawn and find that the as built dwelling with the proposed mitigation conditions, will achieve general consistency with objectives UFD-18, 20 and 24 and the relevant objectives and policies of the MRZ and CE Chapters.

6.2 NATIONAL POLICY STATEMENTS

109. Under s104(1)(b)(iii) I am required to have regard to any relevant national policy statements. Mr Robinson considers the National Policy Statement on Urban Development 2020 (updated 2022) ("NPS-UD") to be relevant, and he sets out objectives 1, 4, & 5 and policies 1 and 6 of the NPS-UD alongside those UFD strategic objectives that relate to each of those provisions. He concludes that the proposal is generally consistent with the relevant objectives and policies of the NPS-UD as it provides for urban environments and amenity to change over time to provide for well-functioning environments.[140]

110. Mr Lawn agrees with Mr Robinson's assessment[141] as does Ms Hooper.[142]

111. There being no evidence to the contrary I find that the as built dwelling achieves general consistency with the NPS-UD.

112. Ms Hooper also notes that the proposal is also consistent with the New Zealand Coastal Policy Statement 2010 and the Regional Coastal Plan for Taranaki (2023)

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136 SOE of K Hooper (paragraphs 95 – 103).

137 SOE of K Hooper (paragraph 105).

138 SOE of K Hooper (paragraphs 106 & 107).

139 SOE of K Hooper (paragraph 109).

140 S42A Report (paragraphs 64 – 65).

141 SOE of B Lawn (paragraphs 10.2 & 10.3)

142 SOE of K Hooper (paragraph 89).

which contains similar objectives and direction.[143] With no evidence to the contrary, I also find this to be the case.

6.3 REGIONAL POLICY STATEMENT FOR TARANAKI 2010

113. There is agreement amongst the three planning experts that the RPS predates the NPS-UD and that the NPS-UD therefore takes precedence where there is conflict in the policies.[144] Mr Robinson identifies that a relevant policy of the RPS is SUD 1(a) which refers to amenity values being maintained or enhanced, and that this is inconsistent with NPS-UD objective 4 and policy 6 and amenity values being expected to change over time.[145]

114. Mr Lawn goes onto conclude that the development is not contrary to any of the RPS objectives and policies.[146] Ms Hooper reaches the opposite conclusion that the development is contrary to policy SUD 1(a) as *"the adverse effects of the subject dwelling, as assessed by Ms McRae, on the neighbouring property are not consistent with maintaining or enhancing amenity."*

115. Given my findings on the effects of the as built dwelling, I find that it is not contrary to the objectives and policies of the RPS, and that in any event the conflicting policy of the NPS-UD and amenity values being expected to change over time takes precedence over RPS policy SUD 1(a).

7. OTHER CONSIDERATIONS

7.1 OTHER MATTERS

7.1.1 Relevant Iwi Management Plan

116. In regard to s104(c) of the RMA and any other matter considered relevant, the s42A Report refers to Tai Whenua, Tai Tangata, Tai Ao, the Iwi Management Plan of Te Kotahitanga o Te Atiawa, and records that no comments have been received from Te Atiawa on the application and identifies that the application is consistent with the objectives and policies of the iwi management plan.[147] Mr Lawn agrees with that assessment.[148]

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143 SOE of K Hooper (paragraph 88).

144 S42A Report (paragraphs 67 – 70), SOE of B Lawn (10.14), and SOE of K Hooper (paragraph 90).

145 S42A Report (paragraph 69).

146 SOE of B Lawn (paragraph 10.15).

147 S42A Report (paragraphs 104 -106).

148 SOE of B Lawn (paragraph 11.2).

117. I agree with the conclusions of Mr Robinson and Mr Lawn on this matter.

7.2 PART 2 OF THE RMA

118. The Court of Appeal judgement *RJ Davidson Family Trust v Marlborough District Council* clarified that for resource consent applications where the relevant plan provisions have clearly given effect to Part 2, there may be no need for decision makers to refer to Part 2 if doing so *"would not add anything to the evaluative exercise."*

119. The s42A Report states that the PDP has been robustly prepared in accordance with Part 2 of the RMA, and therefore assessment of Part 2 would not add to the evaluative exercise.[149] I also find this to be the case.

8. CONCLUSIONS ON 104 ASSESSMENT

120. Following my analysis of the principal issues in contention with the Application and other relevant matters, I find that the Application merits approval under s 104B of the RMA.

121. I now turn to the issue of the conditions that ought to be imposed on the consent to be granted.

9. CONSENT CONDITIONS

122. Mr Robinson recommended three conditions in his S42A Report. Those conditions by way of summary being:[150]

    a. Requiring consistency with the information submitted in the application, further information and specified site and building plans.

    b. The installation of vertical timber louvers at the eastern end of the 1st floor balcony.

    c. Compliance with the construction noise effects under NOISE-7 NZS 6803:1999.

123. As a result of the conditions offered by the Applicant at the hearing and refined in the Right of Reply, Mr Lawn in his SOE in support of the Right of Reply (dated 9 May 2025) sets out three alternative draft conditions sets. The alternative options cover potentially different determinations on whether rule MRZ-R33 / standard MRZ-S4 are applicable, and whether the proposed pergola on the eastern ground level deck is considered a permitted activity.

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[149] S42A Report (paragraph 107).

[150] S42A Report (Appendix 3).

124. As set out above, I have determined that rule MRZ-R33 and associated standard MRZ-S4 are applicable.

125. At the conclusion of the hearing, I sought that the Applicant provide plans of the proposed pergola accompanied by a PDP compliance assessment. I also sought that the pergola compliance assessment be separately peer reviewed by both Mr Robinson and Ms Hooper. The Applicant's pergola plans, and Mr Lawn's PDP compliance assessment were provided on 11 April 2025, with Mr Robinson and Ms Hooper providing their peer reviews on 16 April 2025, both of which considered the pergola would constitute part of the fence and would therefore breach MRZ-S10.

126. I recorded in Post Hearing Minute 2[151] that I found there to be sufficient doubt that the pergola would comply with the PDP as a permitted activity and therefore requested that the pergola design be resubmitted. In his SOE in support of the Right of Reply Mr Lawn set out the reasons for his disagreement with the reviews completed by Mr Robinson and Ms Hooper based on his interpretation of the PDP definitions that the proposed pergola is neither a fence nor a wall. I have considered My Lawn's additional evidence but maintain my previous finding that in the circumstances of this case the proposed pergola would constitute an extension of the boundary fence and not comply with MRZ-S10. I consider the proposed planter pots and small trees set out in Mr McEwan's Plan LD.02[152] to be an appropriate alternative and complying mitigation to the pergola. Mr Lawn's Draft Conditions *'Scenario 2: The planter pots and trees are implemented and MRZ-S4 is applicable',*[153] therefore accord with my findings.

127. I summarise those conditions as follows:

    a. Requiring consistency with the information submitted in the application, further information and specified site and building plans, including the proposed planter plan and proposed louver elevations submitted with the Right of Reply.

    b. The installation of vertical louvers at the eastern end of the 1st floor balcony and the eastern bay window within 40 working days.

    c. Installation of the proposed planter pots on the eastern ground level deck within 20 working days.

    d. Requirement for plantings to be maintained.

    e. Compliance with the construction noise effects under NOISE-7 NZS 6803:1999.

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151 Dated 17 April 2025 (paragraph 4).

152 Appended to Mr Lawn's SOE in Support of the Right of Reply as Appendix A).

153 Appended to Mr Lawn's SOE in Support of the Right of Reply as Appendix C).

128. Differences to the conditions recommended by Mr Robinson include the offered condition of installing louvers over the living area bay window, removal of the word 'timber' from the louver conditions to enable aluminium louvers as an alternative, and an allowance of 40 working days for the louvers to be installed. The increase from 20 working days is requested to account for procurement, manufacture and delivery of the louvers.[154] I consider 40 working days to be appropriate on that basis.

129. The conditions included in Mr Lawn's reply evidence also cover the offered conditions of the planter pots on the ground floor deck as an alternative to the pergola and an associated maintenance condition.

130. I have carefully considered this set of post hearing conditions and find that they are appropriate for further mitigating the potential adverse privacy effects of the proposal with the addition of the louver over the living area window and the planters providing foliage screening from the ground floor deck.

131. I have made some minor typographical amendments Mr Lawn's proposed 'Scenario 2' condition suite, and with those amendments I adopt the conditions as set out in Appendix A to this decision.

[154] Mr Lawn's SOE in Support of the Right of Reply (paragraph 5.3(d).

10. DETERMINATION

132. Pursuant to the powers delegated to me by the New Plymouth District Council under section 34A of the Resource Management Act 1991, I record that having considered the application documents, the submission, the Section 42A Report, the expert evidence and legal submissions on behalf of both the applicant and submitter, and having considered the various requirements of the RMA, I find that:

    a. The actual and potential adverse effects of the application, are suitably avoided, remedied or mitigated with the imposition of the conditions in Appendix A; and

    b. The application is consistent with the relevant provisions of the Proposed New Plymouth District Plan, and the National Policy Statement for Urban Development 2020, and is not contrary to the relevant objectives and policies of the Regional Policy Statement for Taranaki.

133. I therefore **grant** subject to the conditions in Appendix A, the application lodged by Bryan & Kim Roach & South Taranaki Trustees Limited (LUC24/48512) for retrospective resource consent for the construction of a new dwelling and associated fencing and retaining walls, at 26 Woolcombe Terrace, New Plymouth, being legally described as Part Lot 1 DP 4522 and Part Lot 2 DP 5012 (RT: 961499).

Signed by Independent Commissioner

Philip McKay

Dated: 4 June 2025

APPENDIX A

Conditions of Consent –LUC24/48512

APPENDIX A – DECISION CONDITIONS - LANDUSE CONSENT LUC24/48512

Approved Plans

1. The use and development of the land shall be consistent with application No. LUC24/48512 including further information submitted during the processing of the application and with the following plans:

Plan No	Name	Date
SK1.0	Proposed Site Plan	20.09.24
SK2.0	Proposed Ground Floor Plan	20.09.24
SK2.1	Proposed First Floor Plan	20.09.24
SK3.0	Elevations	7.03.25
SK3.1	Elevations	20.09.24
LD.02	Planters	30.04.25
SK07	Proposed Louver Elevations	28.04.25

Installation of Louvers

2. Installation of the vertical louvers at the eastern end of the front first-floor balcony (refer drawings SK2.1 and SK3.0) and the eastern bay window of the first-floor living area (refer drawing SK07) shall be completed within 40 working days from the commencement of this consent. Photographic evidence confirming the installation shall be supplied to New Plymouth District Council's Monitoring Supervisor.

3. Following installation, the louvers shall be maintained in accordance with condition 2 by the consent holder thereafter.

Installation of Planters

4. Installation of the proposed planter pots and trees on the eastern ground level deck shall be completed within 20 working days from the commencement of this consent. The proposed planter pots and trees shall have a combined height of a minimum of 1.6m high from the time of installation (refer drawing LD.02). Photographic evidence confirming installation shall be supplied to New Plymouth District Council's Monitoring Supervisor.

5. Any planting under Condition 4 that fails must be replaced at the expense of the consent holder within the next planting season (May to September). All plantings must continue to be maintained by the consent holder thereafter.

Construction Noise Effects

6. Construction noise from all remaining works shall comply with the relevant standards outlined under Rule NOISE-7 NZS6803:1999 requiring that the noise generated complies with the noise limits set out in Tables 2 and 3 of NZS 6803:1999 Acoustics Construction Noise, with reference to 'construction noise' taken to refer to mobile noise sources.

General Advice Notes

1. *The land use consent lapses 5 years after the date of decision unless the consent is given effect to before that date; or unless an application is made before the expiry of that date for the Council to grant an extension of time for establishment of the use.*

2. *An application for an extension of time will be subject to the provisions of section 125 of the Resource Management Act 1991.*