

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

UNDER the Resource Management Act 1991

IN THE MATTER an application by **ALL GOOD PROPERTIES LIMITED** for resource consent to subdivide land at Tawa Street, Inglewood into 13 unit titles ("Proposal")

Council Ref: SUB21/47746 and
LUC21/47933

**REPLY LEGAL SUBMISSIONS
ON BEHALF OF THE APPLICANT**

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1. **Introduction**

- 1.1 These reply submissions on behalf of the Applicant address and reply to matters raised during the hearing of the above application for a unit title subdivision and the construction of 13 residential units at 13 Tawa Street, Inglewood.
- 1.2 The matters that will be addressed are as follows:
 - 1.2.1 Controlling the age of the owners of the proposed units and the use of the garages of the proposed units;
 - 1.2.2 The ongoing responsibility for the maintenance of the proposed units;
 - 1.2.3 Application of the National Policy Statement on Urban Development 2020 (“NPS-UD”) to the Proposal;
 - 1.2.4 Responses of Mr Paul Stanley to the Commissioner’s queries; and
 - 1.2.5 Consent conditions.
- 1.3 These submissions will address each matter in turn.

2. **Body Corporate Rules – garaging and age restriction**

Use of garages

- 2.1 The Commissioner during the hearing queried whether there was any intention to control the use of the garage for each unit, noting experience that where there has been intensive development, garages have been seen to be colonised for other uses such as storage or living activities. It was noted by the Commissioner that if adopted, this behaviour could also have a flow on effect on the parking on Tawa Street.
- 2.2 At the hearing Ms Symons noted that she did not consider a condition was required to govern the use of garages to address any relevant adverse effects.

- 2.3 The Applicant submits that there is no evidence before the Commissioner that the occupants of these units in particular will not utilise the garage and car parking spaces provided by the Proposal such that there will be resulting adverse effects.
- 2.4 Mr Skerrett's evidence at the hearing was that any additional carparking on Tawa Street as a result of the Proposal will not result in any adverse traffic effects, noting that increased parking may have a slowing effect which he did not consider to be of any concern. Further, as noted by Ms Laurenson and Ms Symons, as a result of the NPS-UD on-street parking is to be expected.
- 2.5 The Applicant submits that in the event the Commissioner considers that the use of garaging should be controlled, the most appropriate mechanism to do so would be through the Body Corporate Operational Rules. The Applicant is therefore willing to include in the Body Corporate Operational Rules, a rule requiring that the garages of each unit be used for the primary purpose of carparking.
- 2.6 To provide for this, the Applicant is willing to incorporate this requirement into a condition of land use consent as set out further below in this section.

Occupants

- 2.7 At various points in the hearing, questions were raised regarding the future occupants of the proposed units in relation to the traffic generation rate adopted by Mr Skerrett, and whether it was appropriate for the Applicant to volunteer a condition to restrict the age of the owners of the proposed units.
- 2.8 As set out in the opening submissions on behalf of the Applicant¹ it is submitted in the first instance, that the characteristics of the Proposal, particularly the low maintenance of the units and outdoor areas, small number of bedrooms, small square meterage and outdoor areas and the shared common areas, will attract a particular demographic, being elderly persons seeking lower maintenance, smaller homes.

¹ Paragraph 10.3.

- 2.9 As addressed by Ms Laurenson and Ms Symons during the hearing, the Application as filed did not include a formal legal mechanism restricting the age of owners of the units to a particular age. Both the traffic expert engaged by the Applicant, the Council's Development Engineer and Rooding Engineer have assessed the Application on this basis and have concluded that a traffic generation rate of 6 is appropriate and Ms Symons concluded that traffic effects are no more than minor.² Ms Symons noted during the hearing that she did not consider that an age restriction was required or appropriate.
- 2.10 During the hearing Mr Skerrett also noted, notwithstanding his position that the traffic generation rate applied is appropriate, in the event that there was a higher traffic generation rate, Tawa Street and its intersections as well as the local roading network have sufficient capacity to absorb this higher rate without any significant impact.
- 2.11 Accordingly it is submitted that there is sufficient evidence before the Commissioner to grant the Application without the inclusion of a formal legal restriction on the age of occupiers. The Applicant therefore submits that a formal age restriction is not required. This is the Applicant's primary position.
- 2.12 However, in the event that the Commissioner considers that a formal age restriction is required to justify the applied traffic generation rate and/or to avoid, remedy or mitigate traffic or other environmental effects, the Applicant is willing to volunteer a condition restricting the age of occupiers of the units as set out further below in this section.
- 2.13 It is confirmed that such a condition would be offered as an Augier condition.³
- 2.14 The Applicant has proposed the age restriction at 55 years or more on the basis that this age is broadly the demographic that will seek the housing choice provided by the Proposal and is consistent with the age restriction imposed in similar developments across New Zealand.⁴

² Council Planner's Report at paragraph 10.24.

³ Being a condition volunteered by an applicant which the consent authority could not lawfully impose as a way of mitigating adverse effects; *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219(QBD).

⁴ Including the Te Kowhai development raised by Ms Laurenson during the hearing.

- 2.15 During the hearing the Commissioner queried whether such a restriction would be contrary to human rights legislation. Notwithstanding the Applicant's primary position that a formal age restriction is not required for the granting of consent, it is submitted that this condition is not contrary to or in breach of the Human Rights Act 1993 ("HRA") or the Bill of Rights Act 1990 ("BORA").
- 2.16 The HRA and BORA are not entrenched constitutional law and both pieces of legislation recognise that the provisions prohibiting discrimination (including age discrimination) are not absolute. In particular the BORA recognises that rights must be assessed against any "justified limitation"⁵. The HRA also includes a number of limitations and exclusions to breaches of the HRA for actions amounting to discrimination⁶, including specific exclusions relating to accommodation provided for persons of particular sex, marital status, religious belief or in a particular age group.⁷
- 2.17 Accordingly it is submitted that in the event the Commissioner considers that such a condition is required, this condition is not in breach of the above legislation.
- 2.18 Further to the above, it is noted that in the event this condition is included by the Commissioner, this would be directly connected to a resource management matter (again, noting the Applicant's primary position), and accordingly would meet the requirements of sections 108AA(1)(a) and (b) of the RMA.
- 2.19 Finally, it is submitted that the inclusion of age restrictions in Body Corporate Operational Rules and conditions of consent is a common practice throughout New Zealand, with a number of established developments providing for older occupants. Accordingly, it is submitted that there is clear precedent for this approach.

Applicant volunteered condition

- 2.20 Noting the Applicant's primary position, the Applicant is willing to offer the below condition of land use consent in the event that the

⁵ Section 5 BORA.

⁶ See for example section 73 HRA.

⁷ Sections 54 - 56 HRA.

Commissioner considers that this is required.⁸ It is noted that the Council does not consider that this condition is required or appropriate and therefore have not agreed to the inclusion of this condition.

Prior to the issue of section 223 and 224 certificates for SUB21/47746, the consent holder shall provide a copy of the Body Corporate Operational Rules to the New Plymouth District Council, which as a minimum will include the following:

- (a) A rule requiring that the units must be occupied by a person aged 55 years or more (or where a unit is occupied by more than one person, at least one of those persons is aged 55 years or more);
- (b) A rule requiring that the garage of each unit is used for the primary purpose of carparking; and
- (c) A rule confirming that the above rules must not be varied without the consent of the New Plymouth District Council.

Pursuant to section 128 of the Resource Management Act 1991, the Council may serve notice on the consent holder of its intention to review Condition [x] of this consent:

- (a) At such time that the consent holder proposes to sell any interest in the site, and by no later than within 12 months of any such change of ownership being brought to the attention of the Council; and
- (b) to deal with any adverse effect on the environment which may arise from the exercise of the consent.

All costs associated with any review shall be met by the consent holder.

⁸ The Applicant notes the discretion afforded to a consent authority in accordance with section 104B and 108 of the RMA.

3. **Ongoing maintenance of the Proposal**

- 3.1 During the hearing, the Commissioner queried whether there would be any clarification regarding the responsibility for the ongoing maintenance requirements for the Proposal.
- 3.2 Further to the response included in verbal reply during the hearing, the Applicant can confirm that the intention is for the Body Corporate to carry out maintenance on the common areas, including the landscaping along the boundaries of the Site and boundaries between the unit titles (which will be reflected in the Body Corporate Operational Rules). The Applicant also intends to include rules in the Body Corporate Operational Rules which will allow and govern situations where the Body Corporate can carry out maintenance works on individual units to ensure consistency across the units.
- 3.3 The Applicant can also confirm that the Body Corporate Operational Rules will specify where individual unit owners are responsible for maintenance of the units, outdoor areas and planting and where the Body Corporate will undertake such maintenance and the mechanisms for doing so. The Body Corporate Operational Rules will refer to any relevant conditions of consent where required.

4. **Application of NPS-UD**

- 4.1 The issue of the application of the NPS-UD was raised during the hearing, specifically regarding the definition of “urban environment”.

- 4.2 “Urban environment” is defined in clause 1.4 of the NPS-UD as:

“any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:

- (a) is, or is intended to be, predominantly urban in character; and
 - (b) is, or is intended to be, part of a housing and labour market of at least 10,000 people.
- 4.3 It is submitted that the NPS-UD is applicable to the Application. Both Ms Laurenson and Ms Symons confirmed that they considered the

NPS-UD was applicable, and that ultimately, the Inglewood area met the definition of urban environment.

- 4.4 It is noted in particular that in contrast to the approach under the former NPS-Urban Development Capacity 2016, the NPS-UD does not focus on a strict population (or intended population) figure, but rather on the functional housing and labour market of which the relevant urban area is a part. It is therefore submitted for the purposes of this definition, that Inglewood can be considered as a feeder settlement to the wider New Plymouth housing and labour market and therefore forms a part of a housing and labour market of at least 10,000 people.
- 4.5 Accordingly, it is submitted that the NPS-UD applies and must be had regard to in accordance with s104(1)(b)(iii) of the Resource Management Act.

5. **Responses of Mr Paul Stanley**

- 5.1 Due to Mr Stanley's absence due to illness at the hearing, the Commissioner directed that Mr Stanley's responses to questions raised be included in these reply submissions.
- 5.2 The Commissioner sought that Mr Stanley provide:
- 5.2.1 A general overview of the nature of the shallow rain cell system and process; and
- 5.2.2 An explanation of the secondary flow process as referenced at paragraph 4.4 of Mr Stanley's evidence.
- 5.3 A copy of the Cirtex Rainsmart Stormwater Modules 2019 is **attached** as **Schedule 1**. This document provides a general overview of the Raincell system.
- 5.4 Mr Stanley has advised the following in relation to the secondary flow process:

If there is a problem for any reason (for example where the system fails due to a blockage), the Building Code does not allow for stormwater to flood any properties. Therefore it is necessary to ensure that developments have adequate secondary or overland flow paths should a problem occur.

Accordingly, a developer needs ensure during site development that overland flow paths direct surface water in a particular direction. For this project, the secondary flow will be directed towards the common area/driveway and then it will naturally follow the existing contours on Tawa Street and enter the stream.

6. **Consent conditions**

6.1 The proposed consent conditions as agreed between the Applicant and the Council are attached as **Schedule 2**. It is confirmed that the Applicant and the Council are in agreement on all conditions contained in this Schedule. These conditions include:

6.1.1 the additional conditions suggested by the Applicant's experts as set out in evidence filed by the Applicant with subsequent agreed amendments;

6.1.2 Subsequent amendments and additional conditions to reflect the staged approach of the subdivision consent and best practice regarding the provision of services; and

6.1.3 Further incidental amendments to conditions to address errors and inconsistencies.

6.2 For the reasons set in these submissions, it is the Applicant's primary position that conditions regarding the use of garaging and the imposition of an age restriction are not required based on the evidence before the Commissioner. Further, and as noted by Ms Symons during the hearing and throughout communications in developing the agreed set of conditions, the Council does not consider that these conditions are required or appropriate.

6.3 The Applicant therefore submits in the first instance, that the agreed conditions contained in Schedule 2 are sufficient to avoid, remedy and mitigate any adverse effects of the Proposal and that no further conditions are required.

6.4 However, in the event that the Commissioner considers that such conditions are required to grant consent, the Applicant has volunteered the additional condition set out in section 2 above. Accordingly, a set of the consent conditions agreed with the Council with the addition of

the additional land use consent condition volunteered on the above basis by the Applicant is attached as **Schedule 3**.

6.5 For clarity, the Applicant volunteered condition in Schedule 3 is shown in underline and is not agreed by the Council.

DATED 15 July 2022



R E Eaton
Counsel for the Applicant

SCHEDULE 1

CIRTEX RAINSMART STORMWATER MODULES 2019

SCHEDULE 2

**PROPOSED CONSENT CONDITIONS AS AGREED BY THE APPLICANT AND
THE COUNCIL**

SCHEDULE 3

**PROPOSED CONSENT CONDITIONS AS AGREED BY THE APPLICANT AND
THE COUNCIL, WITH ADDITIONAL APPLICANT VOLUNTEERED CONDITIONS
(NOT AGREED BY COUNCIL)**