BEFORE AN INDEPENDENT COMMISSIONER APPOINTED
BY THE NEW PLYMOUTH DISTRICT COUNCIL

IN THE MATTER	of the Resource Management Act 1991 ("RMA")
AND	
IN THE MATTER	an application under s221(3) of the RMA to vary a consent notice condition applying to the property at 263 Weld Road Lower, Oakura

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LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANTS

15 July 2025

Solicitors acting:
SJ Mutch
ChanceryGreen
223 Ponsonby Road
Auckland 1011

INTRODUCTION

1. These submissions are on behalf of Sophie and Heinrich Fourie (the "Applicants"), who have applied to vary a consent notice condition to reposition the prescribed location for a habitable dwelling within their property at 263 Weld Road Lower, Oakura (the Property" and "Proposal").

2. The application is supported by rigorous independent expert assessment which demonstrates that adverse effects will be acceptable and that the Proposal is consistent with the applicable planning framework. I submit that the Commissioner can justifiably conclude that the Proposal satisfies the relevant provisions of the RMA and that the application should be granted subject to appropriate conditions.

Scope of submissions

3. These submissions:

   (a) outline the context and the Proposal;

   (b) introduce the Applicants' witnesses;

   (c) provide an initial comment on submissions;

   (d) address the legal framework;

   (e) respond to matters raised by Ms Hooper on behalf of the submitters;

   (f) address conditions; and

   (g) set out the principal submission in support of the Proposal.

CONTEXT

4. The Applicants have a young family and purchased the Property in late 2022 with the intention of building their family home. The Property is in the Rural Production Zone in the Proposed New Plymouth District Plan ("Proposed Plan"). As a result of a previous subdivision, the Property is subject to a consent notice imposing a range of controls on development.[1] The consent notice specifies that only one habitable

[1] It does not control the number or location of non-residential buildings on the site.

dwelling may be constructed on the Property and prescribes controls on the location and form of any dwelling.

5. Changes in personal/financial circumstances – coupled with needing somewhere to live – meant that the Applicants converted a proposed shed on the Property into their family home. The Proposal will regularise the situation with respect to the consent notice, enabling the Applicants to live in the building as their family home.

6. The Applicants have undertaken a range of improvements at the property, including landscape planting to minimise visual/landscape effects on neighbours.

THE PROPOSAL

7. The application as lodged was simply to vary a single consent notice[2] condition to reposition (and reduce the size of) the prescribed location for a habitable dwelling within the Property. The amendment sought to the consent notice is:[3]

> *A maximum of one habitable dwelling shall be permitted on Lot 2 LT 582431. This building shall be located within the Area marked ~~'Z'~~ 'A' on Lot 2 LT 582431 as shown on the Site Plan by BTW Company, Drawing No. 230274-SU-01, Sheet 1, Rev B. The habitable building shall not be erected outside of the Area marked ~~'Z'~~ 'A' on Lot ~~1~~ 2 LT 582431.*

8. The application was originally for a proposed Area A footprint of approximately 500m^2, however this was amended by the Applicants to a significantly reduced 216m^2 area corresponding with the existing northern building onsite.

9. The prescribed dwelling footprint under the existing consent notice ("Area Z", purple) versus the proposed dwelling footprint ("Area A", orange) is shown below:

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2 Instrument 12565106.1 on the record of title.

3 Additions are shown in blue underlined text, and deletions in blue strikethrough text. The application also seeks to correct a typographical error in the consent notice condition, which should refer to "Lot 2", not "Lot 1".

10. Conditions are addressed in detail by Ms Carvill, and by Mr Bain. Notwithstanding that the Applicants' experts agree that the effects of the Proposal are acceptable without the additional conditions proposed in the s42A Report or in Ms Hooper's evidence, in good faith the Applicants are willing to accept an amended set of conditions to further manage effects, including additional planting and other restrictions. The latest set of conditions proposed by the Applicants[4] incorporate many of the conditions proposed in the s42A Report and by Ms Hooper. The Applicants have demonstrated a genuine effort to meaningfully address neighbours' concerns.

11. All experts agree, and I submit, that the Proposal is to be assessed as a discretionary activity.

Consultation

12. The Applicants have made genuine efforts to engage with neighbours.[5] As a result, written approvals have been provided by the owners/occupiers of 249 Weld Road (G and T Beatson, the original subdividers); Lot 2 DP 486355 (V and B Kalin); and 283

4 Attached to Ms Carvill's supplementary statement of evidence.
5 Refer to the application material and the submissions.

Weld Road Lower (G Mockett). The Applicants requested a pre-hearing meeting with submitters, however this was rejected by the submitters. The submitters also refused Mr Bain's request to visit their properties. Notwithstanding, Mr Bain confirms in his evidence he has been able to comprehensively and effectively undertake his assessment without visiting the submitters' properties.

THE EVIDENCE

13. Two highly experienced independent experts have assessed the Proposal for the Applicants and have provided statements of evidence:

    (a) **Richard Bain**, Bluemarble Landscape Architects (landscape effects); and

    (b) **Jennifer Carvill**, Tonkin & Taylor Limited (planning).

14. The s42A Report includes visual/landscape evidence (Mr Dobson) and planning evidence (Ms Manning). Only expert planning evidence has been provided by the submitters (Ms Hooper).

INITIAL COMMENT ON SUBMISSIONS

15. There are five submissions in opposition.[6] The Applicants have engaged experienced experts to comprehensively assess the effects of the Proposal and to respond to submissions. As outlined, they have accepted a range of conditions proposed by submitters.

16. Some matters raised in submissions are legitimate RMA issues, for example regarding the effects of the Proposal. However, submissions raise a range of issues that I submit are not relevant to the application[7] or are entirely without merit.[8] Other submissions include purported personal grievances that serve only to evidence a breakdown in neighbourly relations. These legal submissions and the Applicants' evidence focus on the pertinent RMA issues.

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6 Refer the s42A Report at [3.7].

7 Some submissions address matter unrelated to the Proposal. For example, the submission by Steven and Angela Blair states that *"[o]ur main concern is the applicants' intention to develop a horse school at the property"* (page 9).

8 The submission by Rebecca and Leanne Shaw questions the independence of Mr Bain, without any basis in my submission.

17. The submissions, and the evidence of Ms Hooper, include various allegations that the application undermines the previous subdivision process, consent notices generally, and the District Plan.[9] Section 221(3) of the RMA explicitly enables owners to apply to vary or cancel consent notice conditions. The submitters were notified of the application and have taken up the opportunity to be involved.

LEGAL FRAMEWORK

Variation of consent notice conditions

18. Section 221 of the RMA provides:

> *(3) At any time after the deposit of the survey plan,—*
>
> *(a) the owner may apply to a territorial authority to vary or cancel any condition specified in a consent notice…*
>
> *(3A) Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted under subsection (3)*

19. Therefore, the normal RMA decision-making process for resource consents applies to the application. As the High Court confirmed in *Brial v Queenstown Lakes District Council ("Brial"),*[10] for applications under s221(3) of the RMA, s104 applies and the decision-maker must have regard to the effects on the environment and to the relevant planning documents.[11]

20. I submit that Ms Hooper fundamentally misconstrues the applicable legal framework in asserting as a common theme in her evidence that the Proposal must be demonstrated to be "better" than the *status quo*. For example, Ms Hooper states:

> *The fact remains though that we must weigh the status quo ('Area Z') against the proposal ('Area A') and determine which option better avoids, remedies or mitigates the effects.*[12]

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9 See for example Ms Hooper's statement of evidence ("SOE"), at [16] and [18], and [21(b)].

10 [2021] NZHC 3609 at [130]: *"Under s 221(3A) RMA, the… application was essentially to be treated the same as an application to vary or cancel a consent condition (ss 88—121 and ss 127(4)—132 RMA applying). Accordingly, s 104 RMA applied and the decision-maker had to have regard to the effects on the environment and to the relevant planning documents."* The Court of Appeal's decision on appeal in *Brial v Queenstown Lakes District Council* [2022] NZCA 206 upheld the High Court's decision on the consent notice issue.

11 See 104 and 104B of the RMA.

12 Ms Hooper SOE at [104].

> *To justify moving the building platform and varying the consent notice, in my opinion, the applicant must demonstrate that the proposed varied platform would sit equally well, or better than the one currently secured by way of consent notice against the policy framework...*[13]
>
> *…**[I]**t may be possible to demonstrate that the applicant is offering to put a dwelling somewhere that equally or better avoids, remedies or mitigates effects than 'Area Z'.* [14]
>
> *…This would, in my opinion, enable the situation to be framed as a 'change in circumstances' that 'better achieves the original purpose of the consent notice' by resulting in the same or less effects on the environment than the status quo.*[15]

21. The above (incorrect) framework has, in my submission, inappropriately coloured Ms Hooper's assessment. There is no requirement for the Proposal to have *"the same or less effects on the environment than the status quo"* or to "better" manage effects or better achieve the requirements of the consent notice.[16]

22. As the High Court found in *Green v Auckland Council*[17] *("Green"),* which was a judicial review decision concerning consents granted on a non-notified basis to move a prescribed building platform (i.e. similar facts as the current application):[18]

> *[123] Inevitably there will be an effect on the plaintiffs' land. The fact of the new position, coupled with a shorter separation distance, a greater altitude and elevation, and impeded view lines must have an adverse effect on the plaintiffs.* ***Whether, in the round, such adverse effect is minor or more than minor and if so, what mitigating conditions might be imposed and indeed what form of planning decision should be made, all lie ahead. Those are indeed discretionary areas within which [the] Council would need to make planning decisions.***

23. Notwithstanding the above, the Applicants agree with Ms Hooper that changing a consent notice condition is not a matter to be "taken lightly"[19] or approved without careful consideration; and cannot be done "easily".[20] The current process, including

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13 Ms Hooper SOE at [140].
14 Ms Hooper SOE at [87] (see also [119] and [88]).
15 Ms Hooper SOE at [88].
16 Refer also to Ms Carvill's supplementary SOE at [19]-[22].
17 [2013] NZHC 2364, emphasis added.
18 [2013] NZHC 2364 at [123], emphasis added.
19 Ms Hooper SOE at [110].
20 Ms Hooper SOE at [124] and [166], citing case law including *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2884.

the comprehensive application material and expert evidence for the Applicants, reflects this.

Relevant considerations identified in case law

(i) Comparative assessment

24. In *Green*[21] the High Court found:

> *[128] … [W]hen Auckland Council considered the application to vary the consent notice, there should have been some comparative analysis of the designated site and the proposed new site. [Counsel] are correct when they submit there is no statutory requirement for such a comparison. Applications for variation under s 221(3) clearly (as specified in s 221(3A)) trigger a s 104 consideration. That is a discretionary exercise. But, as a matter of commonsense (again) an application for variation necessarily entails an examination of the condition which is to be varied.*
>
> *[129] I am reluctant to lay down a firm rule for the process of consent notice variation applications. But certainly, on the facts of this case, insofar as a designated building site was concerned, the discretionary planning evaluation under s 104 should sensibly consider the original building site and the reasons for it and then, by way of comparison, evaluate the environmental impact of the proposed new site…*

25. Following this approach, for the consideration of this application, the s104 assessment should include consideration of the consented Area Z and the reasons for it, and a comparative evaluation of the effects of proposed Area A versus proposed Area Z. This Applicants' expert assessment is consistent with this.

(ii) Other considerations

26. A number of decisions, including *Green,*[22] provide that a range of other factors may be relevant in any particular case concerning a consent notice condition variation/cancellation, including: an examination of the reasons for, or the circumstances relating to, the imposition of the consent notice condition; and how the relevant circumstances may have changed to justify any change or cancellation.[23] The

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21 [2013] NZHC 2364, emphasis added.

22 [2013] NZHC 2364.

23 *Green v Auckland Council* [2013] NZHC 2364 states at [129]: *"[Mr Putt's] evidence states that good planning practice should require an examination of the purpose of the consent notice and an inquiry into*

decisions express the relevant considerations using various language, and Ms Hooper refers to several such cases in her evidence.[24]

27. However, the recent High Court decision in *Brial*[25] confirms that previous decisions (including *Ballantyne*[26] and *Foster*[27] cited by Ms Hooper) did not purport to exhaustively state all relevant considerations:[28]

> *Counsel referred to two decisions of this Court:* Green v Auckland Council *and* Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council. *The latter cites with approval the Environment Court's earlier decision in* Foster v Rodney District Council*.* ***The Courts in those cases did not purport to exhaustively state the considerations that apply on an application for variation or cancellation of a consent notice. Considerations which those cases suggest are likely to be relevant include:***
>
> *(a) the circumstances in which the condition was imposed, having regard to the original site and the reasons for the consent conditions;*
>
> *(b) the environmental values the consent notice sought to protect and a comparative evaluation of the environmental impact which would result from cancellation or variation of the consent notice;*
>
> *(c) any pertinent general purposes of the RMA as identified in pt 2 RMA; and*
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> *(d) whether there has been a material change of circumstances (such as rezoning) which renders the consent notice of no value or means that it obstructs the sustainable management purpose of the RMA.*

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whether some change of circumstances has rendered the consent notice of no further value." See *Waimarino Queenstown Ltd v Queenstown Lakes District Council* [2024] NZEnvC 176 which provides a summary of case law on s221(3) (see [108]-[119]), including *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2884 which stated at [45] that consent notices should only be altered where when there is a material change in circumstances which means the consent notice condition no longer achieves, but rather obstructs, the sustainable management purposes of the RMA. *Frost v Queenstown Lakes District Council* [2021] NZHC 1474 cites *Ballantyne Barker* and other relevant decisions at [87]-[89].

24 Ms Hooper SOE at [45]-[55].

25 [2021] NZHC 3609.

26 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2884.

27 *Foster v Rodney District Council* [2010] NZRMA 159 (EnvC). *Brial v Queenstown Lakes District Council* [2021] NZHC 3609 also post-dates *Frost v Queenstown Lakes District Council* [2021] NZHC 1474, which is referred to by Ms Hooper.

28 *Brial v Queenstown Lakes District Council* [2021] NZHC 3609 at [131]. Footnotes omitted and emphasis added.

28. As highlighted by the High Court in *Green*,[29] context is important for applications under s221(3). I submit that excerpts from previous decisions (including regarding the matters identified by the Court in *Brial*[30] in (a)-(d) above), which are based on specific fact scenarios, should not be elevated to universally applicable strict legal tests or thresholds. To do so would inappropriately distort the decision-making framework required under s104, which s221(3A) of the RMA specifically applies. The various findings or observations in the case law need to be interpreted in light of the circumstances of each case. They are potentially relevant considerations, as opposed to universally applicable individual threshold tests.[31]

29. As outlined above, the decision the Commissioner must make is based on a s104 assessment. As opposed to fixating on whether there has been a material change in circumstances (or some other "test" identified in the numerous decisions on consent notices), I submit that fundamentally what is required is the normal s104 assessment involving consideration of:

    (a) whether adverse effect can be appropriately managed;

    (b) whether the Proposal is consistent with the relevant planning framework; and

    (c) ultimately, whether the Proposal is should be granted on its merits.

30. It should be borne in mind that this is not an application to *delete* the consent notice condition and allow a dwelling anywhere on the Property. It is to *change* the location of the *prescribed* dwelling footprint (and substantially reduce its size). Considerations identified in the case law, including the decisions cited by Ms Hooper, need to be considered in this context.

31. Notwithstanding the above, and contrary to assertions in Ms Hooper's evidence,[32] the application material and evidence addresses relevant matters raised in the case law. I submit the Proposal is consistent with the key considerations from the case law.[33] For example:

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29 [2013] NZHC 2364, at [123], and [128]-[129].

30 [2021] NZHC 3609.

31 In *Waimarino Queenstown Ltd v Queenstown Lakes District Council* [2024] NZEnvC 176 the Environment Court found that it was bound to follow the approach in *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2884 in the context of that case. See [115]-[120].

32 Ms Hooper SOE at [57].

33 See for example Ms Carvill's SOE at [36] and [22]-[24] respectivley.

(a) *Consent notice circumstances/purpose:* The purpose of the consent notice condition prescribing a dwelling location was to manage landscape and visual impacts, primarily on neighbouring properties. Ms Hooper agrees that the purpose of the consent notice condition is to control the position of the dwelling on the allotment to manage effects on rural character and amenity.[34] All independent visual and landscape experts agree that the proposed dwelling location (Area A) will appropriately manage visual/landscape effects. The consent notice's original purpose will therefore not be compromised. The principal environmental effects sought to be addressed through specifying Area Z will also be addressed by specifying Area A.

(b) *Comparative assessment:* As outlined, a comparative evaluation of Area A versus Area Z forms an integral part of the assessment of effects by the Applicants' (and the Council's) experts. There is agreement between all visual/landscape experts and the Applicants' and Council's planners that effects will be no more than minor.[35]

(c) *Change in circumstances:* Circumstances have changed since the original subdivision consent was granted. For example:

(i) From a statutory planning perspective, whereas the original subdivision was considered under the notified version of the Proposed Plan and the Operative District Plan, the Rural Production Zone Chapter of the Proposed Plan is now beyond challenge, meaning a new planning framework is in effect.[36] As outlined in Ms Carvill's supplementary statement of evidence, the Proposed Plan Rural Production Zone objectives and policies explicitly recognise that low density rural dwellings are an integral part of the predominant character of the rural environment and make specific mention of residential activities; whereas the Operative Plan objectives and policies did not contain equivalent recognition of residential dwellings.[37] In her supplementary statement of evidence, Ms Carvill concludes:[38]

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34 Ms Hooper SOE at [68], [77], [120].

35 With proposed conditions, in the case of the s42A Report.

36 As recorded in Ms Carvill's SOE at [21], appeals on the Proposed District Plan have advanced to the stage where all rules in the Rural Production Zone of the Proposed Plan can be treated as operative (under s86F of the RMA) and no Rural Production Zone objectives or policies are under appeal.

37 Ms Carvill supplementary SOE at [8]-[12].

38 Ms Carvill supplementary SOE at [12].

> *…[T]he current policy framework of the [Proposed Plan] provides greater recognition of and support for residential activities in the Rural Production Zone than the policy framework of the [Operative Plan] that applied at the time the subdivision consent was granted.*

I therefore submit that, contrary to Ms Hooper's opinion,[39] the current policy framework is more enabling of dwellings in the rural environment.

(ii) There have been material changes to the existing physical environment. Mr Bain describes additional development that has occurred on the properties surrounding the application site, including the establishment (or consenting) of additional dwellings, sheds, a garage, and a dwelling extension.[40] On the application site, a building has been constructed within the proposed dwelling footprint location (Area A) and a shed has been constructed to the south. A driveway dissecting consented Area Z on the Site has also been constructed. Mr Bain's evidence is that the local area is now relatively developed compared to the surrounding landscape and its character aligns more closely with a rural lifestyle living environment.[41] Mr Dobson states that the landscape is now functionally transitioning toward a rural lifestyle environment.[42]

In *Drach v Tasman District Council*[43] the Environment Court found that *"[i]t was not a matter of dispute that a 'change in circumstances' can encompass both changes to the physical environment and the District Plan framework."* In that case, a factor going towards the Court finding changes in circumstances had occurred (in the context of the applicant seeking to delete a consent notice preventing further subdivision) was further development in the nearby area. The Court ultimately approved deletion of the consent notice, in the face of opposition from nearby residents.

(iii) Further, Mr Bain's evidence is that, while he did not actively recommend Area Z as part of his involvement with the original subdivision, part of the rationale for Area Z being created was, at least in part, with respect to

39 Ms Hooper SOE at [150].
40 Mr Bain SOE at [17].
41 Mr Bain SOE at [23].
42 Mr Dobson SOE at [14.4].
43 [2021] NZEnvC 118 at [25].

views from 249 Weld Road Lower.[44] The owners of 249 Weld Road Lower – along with two other neighbours – have provided their written approval to Proposal.

Collectively, I submit there have been material changes in circumstances that justify the Proposal. The "materiality" of any relevant changes in circumstances should be assessed in a manner that is commensurate with the nature and scale of the impacts associated with the proposed change to the consent notice. All visual/landscape experts confirm the Proposal will have no more than minor impacts.

(d) *Sustainable management/Part 2:* In the context of this application, adopting the language in *Ballantyne,*[45] the consent notice no longer achieves, but rather obstructs, the sustainable management purpose of the RMA. In accordance Part 2 of the RMA, the Proposal will continue to appropriately manage landscape/amenity[46] effects of development on the Property (in accordance with the purpose of the original consent notice condition) while also enabling the Applicants to provide for their social, economic, and cultural wellbeing and the enabling efficient use and development.[47]

Section 104 and Part 2

32. The Applicants agree with the s42A Report that the objectives and policies of the relevant statutory documents were prepared having regard to Part 2 of the RMA, capturing all relevant planning and policy considerations and providing a clear framework for assessing all relevant potential effects, meaning independent recourse to Part 2 would add little in this case.[48]

Potential adverse effects (s104(1)(a))

33. The Applicants' experts and the Council's experts agree that:

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44 Mr Bain SOE at Appendix 1.

45 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2884 at [45].

46 Refer to s7(c) of the RMA.

47 Refer to s5 and 7(b) of the RMA.

48 Section 42A Report at [4.73]-[4.75]. In summary, recourse to Part 2 is permissible – and in some cases necessary – in the context of decisions under s104 (*R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316). The Court of Appeal held at [74]-[75] that while reference to Part 2 would *"likely not add anything"* where a plan has been prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes; if it appears that the plan has not been prepared in a manner that reflects the provisions of Part 2 (and/or has not been competently prepared), then it will be appropriate and necessary to refer to – and give emphasis to – Part 2.

(a) landscape and visual effects are the principal effects at issue; and

(b) any adverse effects of the Proposal will be (at worst) minor.[49]

34. Those experts are closely aligned: the Applicants' experts consider that adverse effects, including on neighbours, will be (at worst) less than minor; while the Council's experts consider they will be (at worst) minor.

35. For the Applicants:

(a) Mr Bain's evidence records:[50]

> *I conclude that the adverse effects of the proposal, including on all nearby neighbours, will be **very low and acceptable** within the context of the surrounding environment and the applicable planning framework.*

Mr Bain also identifies that for some neighbours, the adverse effects associated with proposed Area A would be lower than those of Area Z.[51]

(b) Ms Carvill concludes:[52]

> *In my opinion, any adverse effects associated with the proposed repositioning of the authorised location of the habitable dwelling on the site will be **less than minor** and the proposal is wholly consistent with the relevant objectives and policies of the Proposed New Plymouth District Plan and the Taranaki Regional Policy Statement. My conclusions include consideration of the original purpose of the consent notice, and a comparison of effects of the consented dwelling location (Area Z) and the proposed dwelling location (Area A) (among other matters).*
>
> *I also note that the establishment of a dwelling in Area A would be a permitted activity under the Proposed Plan. It is only the Consent Notice condition that needs to be varied to authorise a dwelling in Area A. The existing building in this location complies with all relevant effects standards in the Proposed Plan as well as all of the other applicable requirements of the Consent Notice.*

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49 With proposed conditions, in the case of the s42A Report.
50 Mr Bain SOE at [7]. Emphasis added.
51 Mr Bain SOE at [8].
52 Ms Carvill SOE at [10]-[11]. Emphasis added.

36. For the Council:

(a) Mr Dobson concludes:[53]

> *Overall, the landscape effects are assessed as **Low**, and visual effects range from **Very Low** to **Low–Moderate**, depending on the viewpoint.*

(b) Ms Manning concludes:[54]

> *…[O]verall, the effects related to the proposal to vary the consent notice can be sufficiently managed through additional conditions, should consent be granted, such that the proposal will result in **no more than minor** adverse effects on rural character and amenity.*

37. Under s104(3)(a)(ii) of the RMA, the Commissioner must not take into account effects on those parties who have provided their written approval, as recorded above.[55]

Response to Ms Hooper's assessment of effects

38. Ms Hooper agrees that the key potential effects relate to rural character and amenity.[56] However, she asserts that the effects of the Proposal will be "significant".[57] Ms Hooper's conclusion is not supported by any expert landscape/visual assessment – she confirms she relies on the submitters' evidence.[58] It is unclear how Ms Hooper has disregarded the closely aligned expert views of Mr Bain and Mr Dobson. Ms Hooper's assessment of effects is also, with respect, difficult to follow, including because it is affected by her incorrect interpretation of the applicable decision-making framework (outlined above). Without belittling the genuine views of the submitters, in my submission the submitters' and Ms Hooper's concerns regarding adverse effects are overstated, and the independent expert evidence of Mr Bain and Mr Dobson should be preferred.

39. Ms Hooper refers to effects being inappropriately discounted by way of a "permitted baseline" argument,[59] or by "reliance" on the existing built form of the "shed" on Area A.[60] She agrees that a shed could be established anywhere on the Property, but states

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53 Mr Dobson SOE at [3.6] and [14.5]. Emphasis added.
54 Section 42A Report at [4.79]. Emphasis added.
55 Mr Bain's and Ms Carvill's assessments address effects on all relevant neighbours, including those who have provided written approvals.
56 Ms Hooper SOE at [90].
57 Ms Hooper SOE at [18(h)].
58 Ms Hooper SOE at [8].
59 Ms Hooper SOE at [107].
60 Ms Hooper SOE at [96]. This contradicts Ms Hooper's SOE elsewhere (see [94] where she states that the relevant rural character and amenity effects are those as between a "shed" and a "dwelling").

that this does not *"…automatically make turning a shed into a house acceptable or appropriate".*[61]

40. The careful, comprehensive, and conservative manner in which Mr Bain has assessed effects is clearly spelt out in his Addendum Report and evidence.[62] Ms Carvill's evidence explains the basis for her assessment. In line with the case law cited above, the Applicants' assessment of effects appropriately includes a comparative assessment between the impacts associated with Area A versus Area Z. This necessarily includes consideration of a dwelling (including built form and associated activities) in Area A versus a dwelling in Area Z. The existing built form in Area A assists with this assessment.[63]

41. What is permitted by the Proposed Plan has (appropriately) been identified by the Applicants' and Council's experts for context. However, while the Proposal (activity, bulk, and location) would be permitted under the Proposed Plan, given the context of this application, the Applicants' assessment of effects has not been undertaken on the basis of, and the Applicants are not advancing, a permitted baseline argument for the wholesale discounting of effects (i.e. a "no effects" scenario). The Applicants are not asserting that the Proposal is "automatically" appropriate, as implied by Ms Hooper. Rather, careful independent analysis has demonstrated it is appropriate.

42. In short, while the context of this application introduces some nuances to the effects assessment required (compared with a "standard" resource consent application), I submit that following any reasonable effects assessment, the evidence is clear that the Proposal's adverse visual/landscape effects will be acceptable.

Planning framework (s104(1)(b))

43. Ms Carvill and Ms Manning agree that the Proposal is consistent with the relevant planning framework, including the Proposed Plan and the Taranaki Regional Policy Statement ("RPS").[64] In my submission, this is not surprising. The Proposed Plan Rural Production Zone provisions recognise that rural dwellings are part of the rural experience throughout the district.[65] Indeed, the Proposal would be a permitted

61 Ms Hooper SOE at [95].
62 Mr Bain SOE at [8]; and Addendum Report (May 2025) at [1.4].
63 As is often the case for retrospective consents, not all effects have to be "imagined". See Ms Hooper's SOE at [30].
64 See for example Ms Carvill's SOE at [43]-[47]; and the s42A Report at [4.15] and [4.34].
65 See for example Ms Carvill's SOE at [22] and [35].

activity under the Proposed Plan. However, Ms Hooper is incorrect that the Applicants and the s42A Report "rely on" the fact that the Proposal complies with the permitted activity standards to confirm consistency with the policy direction.[66] This mischaracterises Ms Carvill's, and Ms Manning's, planning assessments.[67] The fact the Proposal would be permitted simply serves to reinforce its consistency with the policy direction.

44. Ms Hooper concludes that the Proposal is inconsistent with the RPS and the Proposed Plan. I submit this does not bear careful scrutiny. It is difficult to understand how a single (permitted) dwelling on a site in the Rural Production Zone can be inconsistent with either planning instrument. The analysis by Ms Manning and Ms Carvill demonstrates the Proposal is consistent with the relevant objectives and policies. As Ms Carvill concludes:[68]

> *I consider that the proposed repositioning of the authorised location for a dwelling on the Site from Area Z to Area A will be wholly consistent with these objectives and policies. In particular, the low density built form of the Site will be maintained, and the authorisation of a dwelling in Area A will remain consistent with the role, function and predominant character of the surrounding rural area as the number of dwellings authorised on the Site will remain unchanged.*

45. For the reasons outlined above, I agree with Ms Carvill that there is no apparent basis for Ms Hooper's assertion that the policy direction relating to land use and subdivision in the rural zones has become more stringent since the original subdivision.[69] Ms Hooper's opinion that, if the original subdivision was applied for today, it would be unlikely to be granted,[70] is both highly questionable and purely speculative.

46. In addition, I agree with Ms Carvill that because the application is not a subdivision, the subdivision objectives and policies in the Proposed Plan are not applicable.[71] Ms Carvill and Ms Manning's evidence confirms that the Proposal is appropriate with or without reference to the subdivision provisions.

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66 Ms Hooper's SOE at [117].
67 As outlined in Ms Carvill's supplementary SOE at [13]-[14].
68 Ms Carvill SOE at 47.
69 Ms Hooper SOE at [150].
70 Ms Hooper SOE at [150].
71 Ms Carvill SOE, footnote 12.

47. Overall, for the reasons outlined in these submissions, I submit that the Commissioner should prefer the evidence of Ms Carvill and Ms Manning regarding consistency with the planning framework.

48. For completeness, all planning experts agree that the National Policy Statement for Highly Productive Land represents no impediment to granting the application.[72] I agree.

Retrospectivity

49. Several submissions go into detail on who said, did, or knew what, and when. Ms Hooper also makes a range of assertions in her evidence in this regard, including that the Applicants "always intended" that the "shed" would become a dwelling.[73] The Applicants refute this. As outlined, changes in personal/financial circumstances and the need for a home meant that, after commencing construction of what was proposed to be a shed on the Property, the Applicants converted this into their family home. The application is to regularise this situation.

50. The application is to vary a consent notice condition. It is not an enforcement proceeding under the RMA. The case law is clear that there is nothing inherently wrong, or untoward, with retrospective consents.[74] The consenting provisions of the RMA, with which the application is concerned, should not be used punitively.[75]

51. In *Hinsen v Queenstown-Lakes District Council*[76] the Environment Court confirmed: that commencing an activity without the necessary authorisations, and other conduct by an applicant, should not influence the judgement of a resource consent application in a punitive manner; that it would be wrong to confuse a decision on a resource consent application with a prosecution or enforcement proceeding; and that an applicant should not benefit by prior irregular conduct.[77] The Court found that prior

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72 Ms Carvill SOE at [38]-[41].

73 Ms Hooper SOE at [16].

74 *Strata Title Admin Body Corporate 176156 v Auckland Council* [2015] NZEnvC 125 at [15].

75 *Colonial Homes Ltd v Queenstown Lakes District Council* W104/95 (PT). The Tribunal was clear that breaches of the RMA should be the subject of enforcement proceedings, rather than punishment through the refusal of resource consent.

76 [2004] NZRMA 115, summarising a range of decisions applying to retrospective consent applications (see paragraph 20 of the decision). The case concerned the construction of a new dwelling in place of an earlier one, without obtaining resource consent for building height and side-yard infringements.

77 The principle that if an existing activity does not have the necessary consent, it should not be given any *de facto* advantage because of that fact was also addressed in *Strata Title Admin Body Corporate 176156 v Auckland Council* [2015] NZEnvC 125. At [35], the Court in that case endorsed the principle that there should be no presumption that what exists should remain simply because it would be difficult or expensive to remove it or some similar reason (citing *NZ Kennel Club Inc v Papakura District Council*

conduct could be relevant, but that this cannot not be taken into account in a punitive manner and cannot override the applicable statutory criteria.[78] As the High Court found in *Suncern*[79], and as endorsed in *Hinsen,*[80] prior conduct as a consideration[81] *"could never be more than peripheral".* The Court in *Hinsen* ultimately granted retrospective consents, including because refusing consent would be disproportionate.[82]

52. Based on the applicable case law, I submit that the Commissioner should assess the application on its merits in accordance with the decision-making framework outlined above. The Applicants have not sought to promote an assessment of the Proposal that inappropriately benefits them by way of *de facto* advantage. It should be borne in mind that the bulk and location of the building in Area A are permitted under the Proposed Plan and do not breach the consent notice condition.[83] In addition:

(a) If the Commissioner considers prior conduct of the Applicants is relevant, then this can be no more than a peripheral consideration and cannot be taken into account in a punitive manner or override the applicable statutory framework.

(b) If the Commissioner is minded to impose conditions or to decline consent, the proportionality of doing so is relevant. In this case, declining the application would mean the Applicants could not lawfully live in their family home. The impacts of this would self-evidently be significant. I submit this would be a disproportionate outcome.

W100/2005). The Court found that the fact that the application in that case was retrospective made no difference to the level of detailed assessment required; and the application must stand or fall on its merits.

78 [2004] NZRMA 115 at [23], [30], [125], and [130].

79 *NZ Suncern Construction v Auckland City Council* 3 ELRNZ 230 (HC).

80 [2004] NZRMA 115 at [23], [125], and [128].

81 Under s104(1)(c) of the RMA

82 [2004] NZRMA 115 at [130].

83 A "habitable dwelling", the subject of the consent notice, is a combination of the building; the activities in it; and the building's facilities. "Habitable Building" in the Proposed Plan means: *"any building, group of buildings or part of a building that is, or will be, primarily used for living activities, which has sleeping, cooking, bathing and toilet facilities."*

OTHER MATTERS ARISING FROM THE EVIDENCE OF MS HOOPER

53. Below I comment on several other matters arising from Ms Hooper's evidence.

Advocacy

54. Ms Hooper makes a range of strong/absolute statements in her evidence, including regarding the conduct and knowledge of the Applicants. For example:[84]

> *The applicant **knew exactly** what the risk was when they embarked on this course of action.*[85]
>
> *They have had **deliberate and blatant disregard** for the existing consent notice, proceeding to establish and occupy a dwelling in 'Area A' despite this being unlawful and despite knowing it was unlawful.*[86]
>
> *It is apparent to me and the submitters that it was **always intended** that the 'shed' become a dwelling and it has been designed and constructed to residential dwelling standards from the outset.*[87]
>
> *Establishing a 'dwelling' in a manner which contravenes a consent notice, then retrospectively applying for consent, shows that the applicant **has no regard for the previous processes or the potential for their activities to affect others**.*[88]
>
> *On examination of relevant case law it is my opinion that they **most certainly are** [entitled to rely on the consent notice].*[89]

55. The basis for such statements is unclear. In addition, I submit that they cross over into advocacy, as opposed to expert opinion. Such advocacy is inconsistent with the role of an independent expert witness and in my submission mean the Commissioner should give Ms Hooper's evidence little weight.[90]

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84 Emphasis added.
85 Ms Hooper SOE at [170].
86 Ms Hooper SOE at [162].
87 Ms Hooper SOE at [16].
88 Ms Hooper SOE at [62].
89 Ms Hooper SOE at [43].
90 An example of a decision in which expert evidence has been given reduced weight due to issues of advocacy/lack of independence is *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150. The Court found: *"When an expert appears to take the position of an advocate this compromises the evidence they give. Given the strength of her views in the submission we are unable to give Dr Stephenson's evidence much weight, and this is so despite her assurances that her views did not taint the opinions expressed in evidence."* (Paragraph 203 of the decision (footnote 167)).

56. Overall, I submit that Ms Hooper's evidence exhibits an approach beginning with the premise that the Proposal is inappropriate, and then backfilling from this presupposition.

Precedent effect and integrity of planning decisions and consent notices

57. Ms Hooper raises potential precedent effect[91] and plan integrity[92] issues.

58. On the issue of precedent, the Courts have cautioned that the "floodgates" argument (that granting consent could lead to a deluge of applications for similar consents in respect of other properties) tends to be overused and needs to be treated with caution because each proposal must be considered on its own merits.[93]

59. The Court of Appeal in *Dye*[94] referred with approval to an Environment Court decision[95] noting that, *"to even consider future applications as a potential effect or a cumulative effect is to make a totally untenable assumption that the consent authority will allow the dyke to be breached without evincing any further interest in control, merely because it has granted one consent."*

60. With respect to plan integrity, s221(3) of the RMA expressly provides a mechanism to vary consent notice conditions, and Ms Carvill's evidence is that the Proposal is wholly consistent with the objectives and policies of the Rural Production Zone. No plan integrity or other RMA "integrity" issues arise in such circumstances.

61. The short point is that each application needs to be determined on its own merits. Including for the reasons outlined in Ms Carvill's evidence,[96] submitters' concerns as to precedent effect and plan/RMA integrity issues are misconstrued and/or overstated.

Cumulative effects

62. Cumulative effects include effects arising/building up over time, and effects arising in combination with other effects.[97] Cumulative effects can include the effects of the

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91 Refer for example [18(d)], [21(a)], [122-124], [163], and [165(e)].
92 Refer for example [125]-[126].
93 *Endsleigh Cottages Ltd v Hastings District Council* [2020] NZEnvC 64 at [181]-[182] and *Beacham v Hastings District Council*, ENC Wellington W075/09, 5 October 2009 at [24].
94 *Dye v Auckland Regional Council* [2002] 1 NZLR 337; (2001) 7 ELRNZ 209; [2001] NZRMA 513 (CA).
95 *Wellington Regional Council (Bulk Water) v Wellington RC* EnvC W003/98.
96 Ms Carvill SOE at [48]-[49].
97 The RMA defines "effect" to include (among other things) *"…any cumulative effect which arises over time or in combination with other effects – regardless of the scale, intensity, duration, or frequency of the*

proposed activity in combination with any "existing" effects, whether arising from existing uses, (non-fanciful) permitted activities, and consented and probable uses.[98]

63. The Applicants' and Council experts have addressed all relevant effects in their assessment, including any cumulative effects in the context of the existing environment/existing effects. Their combined evidence is that all effects of the Proposal will be acceptable. The expert landscape/visual evidence does not demonstrate any cumulative effect rendering the Proposal inappropriate or that the Proposal represents a tipping point in the context of the character of the surrounding environment.[99]

64. I therefore submit that Ms Hooper's concerns regarding cumulative effects are overstated.[100]

CONDITIONS

65. The Applicants and their expert team have carefully reviewed the conditions proposed in the s42A Report and Ms Hooper's evidence.

66. The Applicants' experts agree that the effects of the Proposal are acceptable without the conditions proposed in the s42A Report or by Ms Hooper. Notwithstanding, the Applicants are willing to accept an amended set of conditions which includes many of the conditions proposed in the s42A Report and in Ms Hooper's evidence.

67. Ms Carvill's supplementary statement of evidence attaches and includes a detailed analysis of the latest conditions proposed by the Applicants. I submit that these conditions are appropriate and proportionate. In contrast, some of the conditions proposed in Ms Hooper's evidence which have not been accepted by the Applicants are disproportionate, inappropriate, and unjustified. Some simply do not relate any adverse effect associated with the Proposal.[101]

68. Finally, notwithstanding the comments in Ms Hooper's evidence regarding compliance with conditions, I submit that the case law is clear that the Commissioner is entitled to rely on any conditions imposed being complied with.[102]

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effect…" (s3(d)).

98 *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424.

99 Ms Carvill supplementary SOE at [15]-[16].

100 Refer for example Ms Hooper's SOE at [128].

101 Refer s108AA(1)(b)(i).

102 An applicant is entitled to be treated on the basis that it will comply with the consents it holds, and with

PRINCIPAL SUBMISSION

69. The Commissioner's assessment of the application requires a pragmatic weighing and balancing of the evidence presented, including the concerns raised by submitters.

70. Ultimately, if the Proposal is declined, the Applicants will not be able to live in their family home. I submit this would be a disproportionate outcome.

71. The Applicants' principal submission is that the Proposal should be granted, subject to the conditions in Ms Carvill's supplementary statement of evidence, because:

    (a) the evidence demonstrates that the Proposal has been comprehensively considered and addressed by the Applicants and their independent experts, including that any adverse effects will be acceptable in the context of the planning framework; and

    (b) the Proposal satisfies the requirements of the RMA, including s221, s104, and s104B of the RMA.

Dated this 15th day of July 2025

SJ Mutch

Counsel for Sophie and Heinrich Fourie

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the RMA *(Guardians of Paku Bay Assn Inc v Waikato Regional Council* (2011) 16 ELRNZ 544, [2012] 1 NZLR 271 (HC)). In *Remediation (NZ) Ltd v Taranaki Regional Council* ([2024] NZEnvC 213) the Court considered arguments about the relevance of an applicant's past compliance record (under s104(1)(c) of the RMA 1991, at [481]). The Court concluded that it did not need to examine whether the applicant had a record that demonstrated it was unable or unwilling to comply in the future because that would involve a high degree of speculation. Instead, the enquiry should be as to actual and potential effects on the environment, and whether the applicant has proved it should be granted consent on appropriate conditions (at [485]).