BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL

Independent Hearing Commissioner(s)

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an application by Bryan and Kim Roach & South Taranaki Trustees Limited for construction of a new dwelling and associated fencing and retaining walls (retrospective) at 24/26 Woolcombe Terrace, New Plymouth

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MEMORANDUM OF COUNSEL FOR THE SUBMITTERS

12 MAY 2025

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May it please the Commissioner

1. Counsel refers to the applicant's reply, and in particular, the statement of evidence of Mr Chris Bell dated 28 April 2025 provided with the reply.

2. The submitters object to the admission of Mr Bell's statement of evidence at this very late stage. Mr Bell did not provide evidence as part of the applicant's case. His evidence refers to having been provided (the day after the hearing) with a copy of Ms McRae's evidence in these proceedings. That evidence was pre-circulated on 19 March 2025, some nine days prior.

3. If the applicants wished to respond to Ms McRae's primary statement of evidence through Mr Bell, the appropriate time and place to do so would have been at the hearing itself. Mr Bell could have been made available to answer any questions or respond to points raised in that evidence then orally. That would have provided an opportunity for the submitters, and in particular, Ms McRae, to respond as part of their case. The applicants did not call any evidence from Mr Bell at the hearing. No explanation is given for not doing so.

4. While the Commissioner has broad powers to receive evidence (s 41) and to establish a procedure that is appropriate and fair in the circumstances (s 39), that should not be at the expense of the submitters' rights to natural justice enshrined under s 27(1) of the New Zealand Bill of Rights Act 1990. The submitters would be unduly prejudiced by the very late admission of this evidence, and their inability to respond to the points raised.

5. Counsel invite the Commissioner to disregard the statement of Mr Bell, and/or to refuse to accept it as part of the formal record.

6. If the Commissioner is minded to receive Mr Bell's evidence, then the submitters ought to be provided with a formal opportunity to respond to it, including by way of further evidence, supplementary legal submissions and/or, potentially, a resumed hearing.

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No judicial notice should be taken of the likely cost of remedial work

7. Nor should the Commissioner take any "judicial notice"[1] of the likely cost of any remedial work to the building itself. Again, that is a matter on which the applicants could have responded to (through evidence) at or before the hearing. Likely cost is a matter of expert opinion, which does not meet the threshold of being "*too notorious to be the subject of serious dispute*" so as to qualify as a fact capable of judicial notice.[2]

8. If the applicants' argument is that the cost of remediating the building is disproportionate to the infringements of the relevant standards, it was incumbent on them to lead that evidence in the appropriate way – rather than to backfill it in the manner proposed.

Direction sought

9. Counsel respectfully seek a direction that Mr Bell's statement of evidence does not form part of the applicant's reply, nor any part of the formal record of the hearing of this application for resource consent.

Dated 12 May 2025

Aidan Cameron
Counsel for the submitters

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1 To the extent that a Commissioner under the RMA can take judicial notice of a fact, which is usually the realm of the judiciary: see s 128 of the Evidence Act 2006 and the definition of "Judge" in s 4 – and leaving to one side the ability of Mr Bell to comment on such matters as a matter of expert opinion.

2 *R v Cohen* HC Auckland T-2355, 11 October 2001 at [9].