

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

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER Residential apartment addition (one additional storey) to the top of an existing commercial building in the Business B Environment Area at 1-3 Dawson Street, New Plymouth

Legal submissions on behalf of Regina Properties Limited

Date: 22 September 2021



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MAY IT PLEASE THE PANEL:

- 1 These legal submissions provide an overview of the proposal, the matters at issue and the evidence to be called. The focus is to provide a legal framework to enable resource consent for the proposal to be issued. Specific matters arising in the hearing will be addressed in the applicant's reply.

- 2 The applicant agrees with the conclusions and recommendations reached in the expert evidence that it has presented, and the Council's section 42A report, that the resource consent sought should be granted on the conditions as set out in the evidence of Ms Martin.

- 3 As a preliminary matter, as advised late last week, one of the applicant's expert witnesses, Ms Emily Batchelor, is no longer able to attend the hearing for health reasons. Ms Batchelor has provided written architectural design and shading evidence in support of the application. Her colleagues Kyle Arnold (shading) and Murali Bhaskar (architectural design) will be present and available to answer questions from the Commissioner. They will outline their expertise and involvement with this proposal at the relevant time. In response to a query from Sarah Ongley for the submitters, I have provided this update to her.

Overview of the Proposal

- 4 The applicant, Regina Properties Limited, has sought a land use consent for a residential apartment addition to the top of an existing commercial building at 1-3 Dawson Street, New Plymouth (**Site**).¹

¹ The site is comprised of three separate titles Lot 1 DP 19148, Lot 2 DP 19418 and Lot 1 DP 10510. The applicant owns Lot 1 DP19148 and Lot 1 DP10510 but the Council owns Lot 2 DP 19418 which is the landscape strip to the north of the site.



Figure 2: Dawson Street Elevation

- 5 The Site is located in the Business B Environment Area under the Operative District Plan (**the Plan**), and the Mixed Use Zone under the Proposed District Plan. The Site is subject to three overlays, being the Cameron Street Viewshaft, the Marsland Hill Viewshaft and the Coastal Hazard Area (Lot 2 DP 19148 only).

- 6 The surrounding environment is a mixed land use. Commercial buildings and residential apartments are located to the south and east of the site. The area to the west is generally in low to medium density residential use. A strip along the western side of Dawson Street is zoned Business D Environment Area, but developed as residential sites. St Aubyn Street supports of mixture of residential and commercial uses.

- 7 The proposal requires resource consent as it does not comply with the following permitted activity rules:²
 - 7.1 Bus 13 - specifies a 10m height limit. At its maximum, the building is 15.4m, although the height varies across the site. The existing building already exceeds this height limit.

² Noting there are no relevant rules in the Proposed Plan that have legal effect.

- 7.2 Bus 19 - specifies that seven landscaping trees would be required. Two are proposed, as the proposal does not impose planting on the Council-owned landscape strip to the north of the building within the Site, where the existing established planting will be maintained.
- 7.3 Bus 87 - the proposal would require 16 carparks. Thirteen are proposed.³
- 7.4 Bus 88 - the proposal requires a designated loading and standing space. A shared parking / loading space is provided.
- 7.5 Bus 91 - queuing space of 6m at the front boundary is required. This is considered to be a technicality in respect of parking space 4 as there is considered to be sufficient space within the aisle to accommodate cars waiting, and parking space 4 is an existing parking space already authorised under the existing consent.
- 7.6 OL 63 - requires a maximum height of 10m in the Cameron Street Viewshaft. At its maximum, the building is 15.4m, although the height varies across the site.
- 7.7 OL 71 - requires a maximum height of 10m in the Marsland Hill Viewshaft. At its maximum, the building is 15.4m, although the height varies across the site.

8 As a result, the proposal is classified as a restricted discretionary activity. As the development is neither non-complying or prohibited, it is submitted that a development of this nature is contemplated by the Plan (subject to an assessment of the matters restricted by the Plan). In accordance with section 104C of the Resource Management Act 1991

³ As explained below, this carparking requirement will need to be removed from the Plan by February 2022.

(RMA) and the Plan, discretion is limited to the matters listed in Appendix 1 to these submissions.

Summary of restricted discretion

9 The list of traffic and transport related matters of discretion appears to provide a broad discretion to consider adverse effects. However, it is important to highlight in the context of this application that issues in respect of parking, loading and queuing are not matters of significance for this application or the focus of submissions. In addition, on closer examination, the discretion on the remaining issues (ie, primarily visual amenity effects) are constrained:

9.1 In respect of visual amenity and character, discretion is limited to effects arising from the height above the permitted height limit.

9.2 Overbearing effects are limited to those on sites in the Residential Environment Area. Given the location of this proposal, that discretionary matter is not relevant to this application.

9.3 Landscape and viewshaft effects are limited to those on outstanding and regionally significant landscapes or urban viewshafts. Not all landscape effects are to be considered.

9.4 In respect of natural character, consideration of effects is limited to those on the natural character of the coastal environment and priority waterbodies. Neither of which applies here due to the proposal's location.

9.5 In respect of landscaping of the road boundary, the only relevant effects are the adverse effects of the reduced planting on the streetscape of the area and any alternative methods used to soften the appearance of the building from the road and enhance the streetscape.

9.6 Finally, once those effects are determined, the decision maker is required to consider the extent to which site layout, separation distances, topography, planting or setbacks can mitigate the adverse effects of extra height or reduced landscaping. This is not about bulk, but rather is focused on height and landscaping of road boundaries.

10 The reason for the focus in these submissions on the matters of discretion in the Plan that are relevant to this application is that it is submitted that the following effects concerns that have been raised through submissions yet are not within the Commissioner's scope of discretion:

10.1 Submissions have been made on the area being predominantly residential, and accordingly exceeding the 10m limit would not be possible in a residential zoned area. However, the development is in the Business B Environment Area and not Residential Environment Area. The Plan therefore has different controls on development and land use, and different matters for discretion when assessing applications. The Commissioner is limited to considering those matters of discretion applicable to a site zoned Business B Environment, and cannot consider the matters of discretion from the Residential Environment Area rules.

10.2 Several submissions raise concerns over the precedent effect that granting this consent would create, or inconsistency with the current precedent set by the Council for declining consents for buildings greater than 10m. There is concern from submitters that, if granted, property owners in the vicinity will apply for and receive approval for other developments exceeding height limits, and equally concern that granting this consent would go against the precedent set by the Council in declining or requiring amendments to similar proposals. However, while it is submitted that no precedent effect would be set, as a matter of law this is not something that the Commissioner has the discretion to

consider in this circumstance as it is not within the specified matters of discretion. While precedent effects may be relevant for non-complying or discretionary activities, they are not relevant to restricted discretionary activities unless otherwise specified.⁴

- 10.3 Several submissions raise the issue of the reduction of property values. This is not an effect in and of itself recognised in the RMA.⁵ Further, it is not a matter over which the Council has retained discretion.
- 10.4 Concern that the height of the development is such that several balconies will be overlooked, leading to an invasion of privacy. Privacy is not retained as a matter for discretion. As set out below, this is a point of difference to the Residential Environment Area zone, which indicates a deliberate differentiation between the intended function and amenity of the two zones.
- 10.5 Submissions also raise concerns in respect of effects on landscape character. Other than landscape effects on outstanding and regionally significant landscapes, and as a result of reduced road frontage landscaping, these are not matters within the Commissioner's discretion.
- 10.6 Submissions raising concerns as to impacts on views, including the coastal viewshafts and sky views and loss of sunlight, are also beyond the scope of the matters of discretion, other than where these are effects on visual amenity and character arising from the additional height. The relationship between views and visual amenity effects are

⁴ *Kirton v Napier City Council* [2013] NZEnvC 66 at [71]; *Campbell v Napier City Council* EnvC Wellington W67/05, 8 August 2005 at [58] to [65].

⁵ See *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 137 at [57] to [60] for a summary of the case law authority on this point.

discussed further below in the environmental effects section, but generally speaking, there is no absolute protection for privacy and outlook, and no right to a view.⁶

10.7 Impacts on the community or cultural ties are also not relevant beyond consideration of the matter of discretion where effects of the additional height on the character of the surrounding area is to be considered. The character of the building is also not a relevant matter of discretion.

10.8 Noise is not a relevant matter of discretion, and the permitted activity thresholds are complied with in any event.

11 The assessment of this application is limited to the relevant matters of discretion.

EFFECTS ASSESSMENT

12 As set out in section 104C of the RMA, consideration of this application is limited to only those matters over which the Council has restricted the exercise of discretion in the Plan. Those are the matters addressed above, and included in Appendix 1. Notably, the matters of discretion in respect of height limit that consideration to the *additional* or *extra* height.

13 The policy framework remains relevant to assessment of a restricted discretionary activity under section 104 of the RMA to the extent it is relevant to, and provides an understanding of, those matters of discretion.⁷ In essence, matters raised that fall outside the listed matters of discretion are not relevant.

⁶ *Anderson v East Coast Bays City Council* (1981) 8 NZTP 35, page 37 (HC), cited with approval by the Environment Court in *Re Meridian Energy Ltd* [2013] NZEnvC 59.

⁷ *Edens v Thames-Coromandel District Council* [2020] NZEnvC 13.

- 14 In accordance with section 104(3)(a)(ii) of the RMA, the Commissioner must not consider any effect on a person who has given written approval. In this case, those parties are set out at section 4.1 of the assessment of environmental effects. The effects on the owners of 2 and 4 Dawson Street, 3 Hine Street, 141 St Aubyn Street, Unit 7A Richmond Estate, and Unit 2I (Apartment 38) Devonport Apartments must not be considered.
- 15 It is submitted that in accordance with section 104(2) of the RMA, the Commissioner, when considering the effects of this proposal, may disregard the adverse effects permitted by the Plan. This permitted baseline assessment is set out in paragraphs 21 to 26 of Ms Martin's evidence and pages 13 to 15 of the section 42A report. That assessment is a key part of the applicant's case, and does not appear to have been properly understood or assessed by submitters. The permitted baseline addressed in this case is *non-fanciful* and *credible*.⁸ It reflects the likely development reality if this proposal did not progress, even though the permitted baseline development would arguably impose greater effects on submitters than the proposal that consent is sought for.

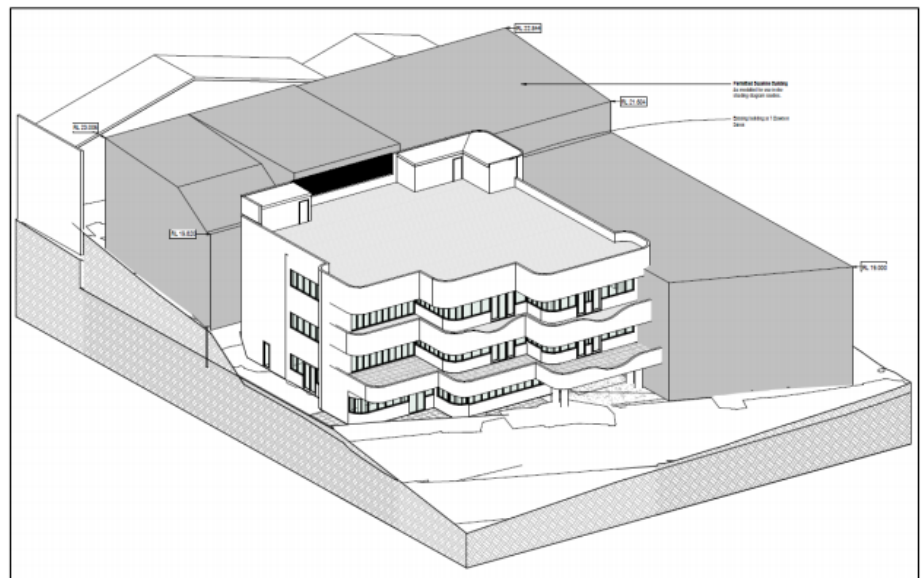


Figure 5: Permitted Baseline

⁸ *Rodney District Council v Eyres Eco-Park Limited*, at [38].

- 16 The permitted baseline would enable the applicant to construct a 10m building on the eastern boundary with no daylighting requirements or requirements for windows or façade treatment. Further while the Plan sets a permitted height standard of 10m for the site, there are no restrictions on building bulk, design, site coverage, setback or location. No reasons have been provided as to why the permitted baseline should not be applied.
- 17 In respect of shading, the shading of the proposal over that generated by the permitted baseline is generally limited to relatively small patches and slivers in terms of area, a noticeable proportion of which are on roofs, with most shade on any location disappearing from one hour to the next. Visual amenity and character are not impacted. Shading is generally limited to certain times of the year and hours of the day:
- 17.1 In most cases, shading effects are greater from the permitted baseline than the proposal.
- 17.2 At 122 St Aubyn Street, shading greater than the permitted baseline is essentially limited to half an hour from 4pm to 4.30pm in June and July.
- 17.3 At 122A St Aubyn Street, shading greater than the permitted baseline is essentially limited to an hour from 3 to 4pm in February, March and September and for 2 to 2 and a half hours in January, October, November and December from about 2.30pm.
- 17.4 At 122B St Aubyn Street, shading greater than the permitted baseline is essentially one hour around 5.30pm to 6.30pm in January and November and for an hour in March, April, August and September between 4.30pm and 5.30pm.
- 17.5 At Richmond Estate, shading greater than the permitted baseline occurs for half an hour from 5pm in April and August and for half an hour to an hour from 4pm in May and June.

17.6 Overall, shading effects additional to those arising under a permitted baseline are minor, and the character and visual amenity of the surrounding environment will largely be maintained.

18 As a result of the above, it is submitted on behalf of the applicant that the effects of the proposal are acceptable. In summary:

18.1 In respect of effects on character and visual amenity, the proposal is consistent with the residential character of the surrounding area (albeit not in a residential zone) as it provides for residential living.⁹

18.2 Effects on landscapes and viewshafts will be minor and therefore acceptable.¹⁰

18.3 Effects on the coastal environment will be minor and therefore acceptable.¹¹

18.4 The effects of the reduced landscaping are less than minor.¹²

18.5 Any effects associated with transport related matters, including parking, queueing and loading, will be minor in nature and the proposal will result in much less traffic than the permitted baseline would allow.¹³ The commercial section of the building will have 2 more off-street car parks than the existing situation. Further, recent internal amendments (no change to external dimensions) to the plans for the apartment have increased the garage to take three cars instead of the two previously shown.

⁹ Council section 42A report, at 90.

¹⁰ Council section 42A report, at 101.

¹¹ Council section 42A report, at 108.

¹² Council section 42A report, at 111.

¹³ Council section 42A report, at 118.

19 Several submitters have raised amenity effects. 'Visual amenity' is referred to in one of the matters of discretion. Amenity effects are not defined in the Plan, but 'amenity values' are defined in the RMA as:

means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes

20 This phrase is more broad than *visual* amenity (which is what discretion is limited to) but is directly relevant to the matter of discretion that enables the Commissioner to consider the extent to which the extra height (ie over 10m) adversely affects the character and visual amenity of the surrounding area. In assessing this matter, it is important to distinguish visual amenity from concerns that are essentially based on privacy and view protection. There is no absolute protection for privacy and outlook, and no right to a view.¹⁴ Further, as set out above, the discretion in the Plan is limited to visual amenity, which does not extend to privacy. It is submitted that a critical analysis of submissions is required in order to understand the extent to which the genesis of concerns raised rests in view protection.

21 Further as set out in *Re Meridian Energy Ltd*:¹⁵

...a landowner is permitted to use their land as they see fit, providing that the use of it does not breach any legal requirement. It follows that the use of land by a neighbour in some circumstances can lawfully change an existing view.

22 Based on the policy framework discussed below,¹⁶ and this activity's status as restricted discretionary (not non-complying or prohibited), the need to protect character and visual amenity must be balanced with the owner's reasonable expectations to develop land.¹⁷ Regardless, the

¹⁴ *Anderson v East Coast Bays City Council* (1981) 8 NZTP 35, page 37 (HC), cited with approval by the Environment Court in *Re Meridian Energy Ltd* [2013] NZEnvC 59.

¹⁵ At [112].

¹⁶As set out at [113] of *Re Meridian*, an analysis of the District Plan provisions relating to amenity is important because that is the framework against which local expectations about amenity must be measured.

¹⁷ *McGrade v Christchurch City Council* [2010] NZEnvC 172, at [44].

applicant's expert evidence is that the potential loss of view elements (landscape elements screened by the proposal) does not reach a threshold whereby the viewers' sense of place is adversely affected.¹⁸

23 Contrary to submissions received, and the evidence of Mr Jackson, the Plan does not set an absolute height limit of 10m. That is the permitted height limit, a threshold above which resource consent is required. It is important to reiterate that the activity status for any breach of that height limit is restricted discretionary. Accordingly, over height buildings are clearly anticipated in this location by the Plan.

24 Further while submissions variously refer to the building as being 15.4m, that is a simplistic analysis due to the architectural design of the proposed building. The additional height ranges from 1.2m up to 5.4m.

25 This is relevant to matter of discretion 2 under Rule Bus 13 that requires the Commissioner to consider the extent to which site layout, separation distances, topography, planting or setbacks can mitigate the adverse effects of extra height. The applicant has taken extreme care to ensure the site is responsive to the surrounding environment, including through:

25.1 Neutral colours will be used, including through modernisation of the existing office building on site.

25.2 Alignment with higher density development principles generally accepted as appropriate for this zone, through vertical development instead of solely increased site coverage.

25.3 Site layout includes the maintenance of the existing carparks and reducing the visibility and overbearing effects that would be permitted if the carpark were to be developed.

25.4 Provision of the required permitted frontage landscaping along Dawson Street, with the non-compliance coming in

¹⁸ Refer evidence of Mr Bain.

respect of the northern frontage, which is the Council owned land, on which the existing landscaping will be maintained in accordance with the existing consenting requirements, noting that the current application seeks to replace the existing consent.¹⁹ A planting plan has been provided through this application in conjunction with retaining existing vegetation.

- 25.5 Increasing the bulk of the existing building and adding new bulk on the portion of the building that is stepped back further from the Regina Place / coastal walkway boundary, instead of increasing site coverage and bulk on other areas of the site.
- 25.6 Not projecting significantly towards the western boundary.
- 25.7 The extension to the south of the building is wholly set back at least 10m from the Dawson Street boundary.
- 25.8 Glazing that provides modulation to the façades and a degree of transparency.
- 25.9 Design changes, including to internal layouts and overhangs and reduction of height to the north of the Site have been made in response to issues raised by submitters.

26 In respect of this application, it is important to highlight that as this activity is located in the Business B Environment Area, different assessment criteria apply to it than would apply to the same development if it were located in the Residential Environment Area. This is a factual matter of difference between this application and a recent application by Mr Melody at 2 Richmond Street (which was declined by the Commissioner). Significantly, while the 2 Richmond Street proposal required express consideration of daylighting requirements from side boundaries, privacy and outlook of adjoining

¹⁹ With the existing consent being surrendered at that point.

sites, with specific policy support from protection of amenity of the residential environment, the provisions here are more limited.

- 27 Privacy and daylighting are not matters over which discretion has been limited by the Plan for this Site. Further, effects on amenity are limited to visual amenity and character as set out above, with 'overbearing effects' only being applicable to Residential Environment Areas (of which there are none of relevance here). The policy direction is also less directive in respect of these matters, with no requirement here to *ensure protection of* visual or aural amenity.

POLICY ASSESSMENT

- 28 The full policy assessment is contained in the AEE and in the Council's section 42A report. In respect of the issues highlighted above as to amenity effects on neighbours, the following provisions are considered to be the most relevant:

28.1 Objective 1 and Policies 1.1, 1.2, 1.3:

Objective 1 - To ensure activities do not adversely affect the environmental and amenity values of areas within the district or adversely affect existing activities.
Policy 1.1 - Activities should be located in areas where their effects are compatible with the character of the area.
Policy 1.2 - Activities within an area should not have adverse effects that diminish the amenity of neighbouring areas, having regard to the character of the receiving environment and cumulative effects.
Policy 1.3 - New activities that are sensitive to the elements that define the character of the area in which they intend to locate should be designed and/or located to avoid conflict.

28.2 Objective 5 and policies 5.2 and 5.3:

Objective 5 - To maintain and enhance the character and coherence of the urban areas of the New Plymouth District.
Policy 5.2 - Buildings and structures should not detract from or reduce the visual amenity of the Urban Viewshafts.
Policy 5.3 - The positive contribution vegetation makes to urban amenity should be recognised, maintained and, where possible, enhanced.

28.3 Objective 7 and policies 7.1 and 7.2:

Objective 7 - To ensure the attractive, vibrant, safe, efficient and convenient character of the business environment is maintained.
Policy 7.1 - Buildings, signs and other structures should be designed and/or located to avoid, remedy or mitigate adverse effects on the character and visual amenity of business areas.
Policy 7.2 - Buildings and structures within business areas should be designed and/ or located to ensure that areas of high pedestrian usage have access to daylight and sunlight and protection from the weather.

- 29 The development is considered to be compatible with the character of the area (being a business environment), maintain the visual amenity of

the subject viewshafts and urban character of the area while enhancing the area's vibrancy, maintain character and visual amenity in the business area and the design appropriately minimises effects on and maintains the amenity values of pedestrian usage areas.

30 It is therefore consistent with the relevant objectives and policies of the Plan.

31 In respect of the Proposed District Plan, the proposal demonstrates consistency with the relevant strategic Urban Form and Development objectives through qualities such as concentrating residents near an urban hub, safety of public spaces through passive surveillance, comprehensive redesign of the whole building to enhance the site architecturally, providing quality office space for commercial tenants, creation of employment for design professionals and the construction industry, and increasing the variety of housing types in the area.

PART 2

32 Consideration of an application under section 104 of the Act is 'subject to Part 2' (sections 5, 6, 7 and 8) of the RMA. Part 2 sets out the purpose and principles of the RMA.

33 The caselaw direction in *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 is that the statutory language in section 104 plainly contemplates direct consideration of Part 2 matters, when it is appropriate to do so. Further, the Court considered that where a plan has been competently prepared under the RMA it may be that in many cases there will be no need for the Council to refer to Part 2 because it would not add anything to the evaluative exercise.

34 However, if there is doubt that a plan has been “competently prepared” under the RMA, then it will be appropriate and necessary to have regard to Part 2. While it is submitted that the relevant Operative and Proposed District Plans were competently prepared, the age of the Operative Plan, the significant policy shift since, including in respect of the number of national policy statements, and the current Proposed

District Plan, are acknowledged. Out of an abundance of caution, a Part 2 assessment can be completed.

35 The Part 2 assessment is not unconstrained. *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council*,²⁰ confirms that section 104C of the RMA prohibits the use of a matter under Part 2 of the RMA as an additional ground to grant or decline consent. Part 2 can only be applied to the extent that it relates to matters over which the Council has reserved its discretion.

36 Consideration of Part 2 is therefore relevant, but caution must be exercised by the Commissioner.

NPS-UD

37 The National Policy Statement on Urban Development 2020 (**NPS-UD**) came into effect in August 2020. It is relevant to this application and must be considered by the Commissioner in accordance with section 104(1)(b)(iii) of the RMA. The decision on the application is a planning decision affecting an urban environment.

38 As set out in the evidence of Ms Martin, the proposal is consistent with the provisions of the NPS-UD, specifically Objectives 1, 4, 6 and 8 and Policies 1 and 6. This view is supported by the section 42A report although the relevant provisions recorded in the section 42A report are Objectives 1, 3, 4, 5 and 6 and Policies 1, 2, 5 and 6, which differ slightly from the above.

39 In respect of carparking, noting that currently the proposal triggers a need for discretion under rule Bus 87 due to a shortfall in parking spaces, the NPS-UD directs the removal of minimum car parking requirements by 20 February 2022. After 20 February 2022, consent would no longer be required under this rule, and accordingly it is submitted that little weight should be provided to any adverse effects

²⁰ [2012] NZHC 735.

arising from the 3 carpark shortfall (which are considered to be minor in any event).

CONDITIONS

40 The applicant accepts the suitability of the conditions of consent proposed through the appendix to the Council's section 42A report, with the following minor exceptions:

40.1 minor grammatical and formatting changes;

40.2 deletion of the condition requiring a specified visual light transmission; and

40.3 deletion of the conditions relating to earthworks and construction management.

41 The proposed changes are set out in the statement of evidence of Ms Martin. In summary, both conditions that are opposed are not necessary to avoid, remedy or mitigate adverse effects of the proposal on the environment. The earthworks and construction management conditions are outside the scope of the relevant matters of discretion. A condition limiting visual light transmission to a minimum and maximum range does not address any of the effects of concern in terms of residential amenity values.

EXPERT EVIDENCE

42 The substance of the evidence of Mr Jackson will be addressed by the applicant's experts at the hearing, including through a written summary document that will be tabled at the hearing. Before that occurs, the context of that evidence must be addressed. Mr Jackson refers to, and confirms compliance with, the Environment Court Code of Conduct for Expert Witnesses, but:

42.1 it is unclear who the evidence is filed on behalf of.

Clarification of the specific submitters that this expert speaks

on behalf of is important in order to provide a link to the submissions as filed, and to understand the authority of the expert to address matters arising. His evidence simply refers to 'the group of objectors';

42.2 has failed to disclose a long-standing professional relationship with the applicant, including importantly the submission of a design for the development of a residential apartment on this site. That design submitted by Mr Jackson was ultimately not chosen by the applicant to progress. The professional relationship between the applicant and Mr Jackson includes multiple projects at the Devon Hotel and projects for family members. These factors are not disclosed, yet are important to the assessment of impartiality and independence, which are relevant factors to the Code; and

42.3 Mr Jackson confirms that he is a registered architect and a fellow of the New Zealand Institute of Architects, however, his statement of evidence addresses matters of architecture. He endeavours to address all effects as an expert on all such matters.

43 It is submitted that more weight should be given to the applicant's witnesses. In presenting their evidence to the Commissioner, each of the applicant's witnesses will address the matters raised by Mr Jackson, which in summary include:

43.1 Mr Jackson has inaccurately paraphrased the criteria under Rule BUS 13,

43.2 the location of the Site in the Business B Environment Area is relevant, and the application should not be assessed as if it were in a Residential Environment Area as suggested by Mr Jackson,

43.3 Mr Jackson's Appendix 3 is inaccurate as the scale is warped and overemphasises the proposed building on the subject site,

- 43.4 there is no proposal to tint the glass black,
- 43.5 parties who did not provide written approval cannot be said to object to the proposal. That evidence is incorrect as a matter of law. The submission process gave parties that opportunity, and the Commissioner is only able to consider submissions received, not submissions that could have been received, although it is acknowledged that the effects can still be considered,
- 43.6 some members of the Body Corporate have provided written approval to the application,
- 43.7 privacy is not a relevant matter of discretion for this activity,
- 43.8 the Molesworth Street viewshaft does not apply to the application,
- 43.9 structural improvements to the building are required irrespective of the proposed addition,
- 43.10 the photographs and images provided by Mr Jackson lack the necessary assessment details as to methodology and time and date to be assessed. That is important when comparing to the quality of the applicant's assessment, where that necessary detail is presented, and
- 43.11 the viewpoints analysed were selected by the applicant's experts in consultation with, and peer reviewed by, the Council.

SUBMISSIONS

- 44 Fifteen submissions were received in respect of this application; 14 in opposition to the application and 1 that was neutral. The submitters own neighbouring properties. In summary, the concerns raised in submissions and the primary response by the applicant are:

44.1 Height - the height exceeds the maximum building height, and the development should stay within the 10m limit, some noting it is over the limit already. Reasonable compliance with the current rules of the Plan should be followed.

44.1.1 In response, it is submitted that the 10m height limit referred to by submitters is the *permitted* height limit. Compliance with that limit results in no need for consent, however exceedance of that limit is not prohibited. Having a restricted discretionary status in the Plan for exceedance of the height limit shows that exceedances are anticipated by the Plan. Applicants are entitled to seek consent accordingly.

44.2 Shading - all submitters submitted on the adverse shading effects, some noting inaccurate shading diagrams.

44.2.1 In response, it is submitted that the applicant has provided comprehensive shading diagrams and assessment which illustrate that the effects from shading are minor. As noted above, the development is set back from street frontages to mitigate effects, a matter not regulated by the Plan.

44.3 Amenity values - the proposed height would harm the amenity enjoyed by nearby residents such as sun, privacy, view shafts and shading.

44.3.1 In response, it is submitted that the relevant matter of discretion is limited to consideration of visual amenity and character effects arising from the additional height. At the site, discretion is not retained over matters such as sunlight envelopes and privacy where they are in other zones.

44.3.2 In addition, as set out above, the applicant has carefully designed the building to mitigate the actual and potential effects associated with the increased height. This includes achieving building density through vertical development, as opposed to reliance on site coverage, setting of the bulk away from the eastern and western boundaries and behind the existing GQ building, a stepped back top level, intentional use of glazing to provide a degree of transparency and a neutral palette of colours to be more recessive.

44.4 Landscape character - submitters have raised concern that the proposed development is not aesthetically pleasing and would become a dominant feature, and therefore change the landscape character.

44.4.1 In response, it is submitted that this is not a relevant matter of discretion. Consideration of landscape effects for this application are limited to those set out above, which are impacts on outstanding and regionally significant landscapes from the additional height and effects arising from the reduction in tree planting along the road frontage.

44.5 Views - submitters have raised concerns that views will significantly change as the development would obscure the current uninterrupted ocean and horizon views. The additional height would intrude and block the viewshafts from their properties and cause loss of views towards Sugar Loaf Islands, Paritutu, and Kararoa Park.

44.5.1 In response, it is submitted that that 'views', other than in respect of identified viewshafts, are not a relevant matter of discretion in the Plan. There is no right to protect a view. Effects on visual

amenity from the additional height have been addressed above.

44.6 Parking - some submitters have raised concerns that parking in the area is already congested and increased activity from the proposal increases pressure on parking.

44.6.1 In response, the evidence from the applicant and the Council is that the effects are minor and the network and surround area can accommodate any effects arising from the 3 carpark shortfall.

44.7 Adequacy of the AEE, plans and diagrams - submitters noted concerns over the accuracy and reliability of shading diagrams and the level of assessment of environmental effects.

44.7.1 In response, it is submitted that the material provided by the applicant was accepted by the Council as complete. The AEE needs to be read in conjunction with the further information provided by the applicant in response to requests for further information from the Council. The Commissioner has more than adequate information on which to make this decision.

45 Concerns raised through submissions as to rules in the Residential Environment Area, property values, landscape character (beyond outstanding and regionally significant landscapes and the road frontage), coastal viewshafts, sky views, the character of the building, precedent which may be set or the existing precedent to decline this size building, community and cultural effects, noise and privacy are not relevant matters over which the Council has retained its discretion in the Plan. They are not effects that can be considered by the Commissioner in this case.

46 In support of their submission, Colin and Margaret Comber have filed pre-circulated evidence ahead of the hearing. The evidence relates to concerns with effects on their residence at 122A St Aubyn Street as well as matters relating to statutory planning. Colin Comber has experience in town planning, but the evidence is not provided as independent expert evidence.

47 The criticism in that evidence that the applicant has had no regard to effects on its neighbours is strongly refuted. The applicant has made significant modifications to the proposal to minimise effects on neighbours, including modifying the design from that originally submitted in January 2020 to:

47.1 Drop the lounge back from the north (behind the Comber building line) to increase the sense of privacy on that balcony/lounge.

47.2 Eliminated the overhang towards the Comber home. As such the applicant's public rooms are a further metre from that property, for that property's specific benefit.

47.3 Reduced the height to the north of the development, again to specifically benefit the Comber property.

48 In contrast to what is raised by that evidence, a permitted baseline consideration is not limited to consideration of the highest and best use or most probable future use of the site. As set out above, in respect of the permitted baseline, what is required is consideration of what could be built on the site as of right, provided it is non-fanciful and credible. How the applicant chooses to develop its site, including in respect of future use of 1 Dawson Street, is entirely the applicant's call, subject to obtaining any required environmental approvals. Speculation from a submitter in this regard is not relevant.

CONCLUSIONS

49 For the reasons set out above, and in the application and AEE, the applicant's evidence and the Council's section 42A report, the land use consent as sought should be granted.

50 Subject to any questions from the Commissioner, the expert witnesses for the applicant will now be called.

Date: 22 September 2021



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S F Quinn
Counsel for the applicant

Appendix 1: Matters of Discretion in the Plan

BUS 13

- 1 The extent to which the extra height of the proposed building will:²¹
 - 1.1 adversely affect the character and visual amenity of the surrounding area;
 - 1.2 have an overbearing effect on sites within the Residential Environment Area;
 - 1.3 adversely affect outstanding and regionally significant landscapes;
 - 1.4 intrude into and/or block an urban viewshaft; and
 - 1.5 adversely affect the natural character of the coastal environment or priority waterbodies.
- 2 The extent to which site layout, separation distances, topography, planting or setbacks can mitigate the adverse effects of extra height.

BUS 19

- 3 Landscaping of road boundaries:²²
 - 3.1 The adverse effects of reduced, alternative or no planting on the streetscape of the area.

²¹ Matters 1 and 4.

²² Matters 1 to 4.

- 3.2 Any adverse visual effects on the New Plymouth entrance corridors.
- 3.3 Alternative methods used to soften the appearance of the Building from the road and enhance the streetscape.
- 3.4 The extent to which existing topography, planting and site design can mitigate the adverse visual effects resulting from reduced, alternative or no planting.

BUS 87, 88 and 91

- 4 Traffic and Transport:²³
 - 4.1 The types of vehicles serving the site, their intensity, the time of day the site is frequented and the likely anticipated vehicle generation.
 - 4.2 Whether parking provided on a separate site is compatible with the surrounding land uses.
 - 4.3 Whether it can be demonstrated that a less than normal incidence of traffic generation and associated parking, loading or standing spaces will be required by the proposal.
 - 4.4 Whether it is physically practicable to provide the required parking, loading, standing, queuing, and/or manoeuvring spaces in the site in terms of existing location of the buildings, defined retain frontage, and access to the road, or topography.

²³ Matters 7 to 16.

- 4.5 Whether the parking, loading, standing, queueing and/or manoeuvring spaces will be required for use outside of peak traffic, cyclist or pedestrian flows.
- 4.6 Whether the design, grade or formation of the alternative construction of parking, loading or standing space, or driveway will assist in managing any actual or potential adverse effects that arise.
- 4.7 The adverse effects of using parking, loading or standing spaces for manoeuvring and/or queueing space.
- 4.8 Whether a significant adverse visual or nuisance effect on the character and amenity of the surrounding area will occur as a result of not providing the required parking, loading, standing, queueing and/or manoeuvring space or access in the required manner.
- 4.9 The adverse effects on the safety of people, both on and off the site, due to not providing the required parking, loading, standing, queueing or manoeuvring space, vehicle access point or driveway and/or inappropriate design or construction of these.
- 4.10 The extent to which the safety and efficiency of the road transportation network would be adversely affected by parking, loading, manoeuvring and/or queueing vehicles due to inappropriate design or construction.

OL 63 and 71:

- 5 Effects on viewshafts:
 - 5.1 The extent of intrusion of the additional height of the structure into the viewshaft, and the elements of the view affected.

- 5.2 The extent to which the core of the view is impinged upon by the additional height of the structure.
- 5.3 Whether the structure results in the removal of existing intrusions or increases the quality of the view.
- 5.4 Whether the additional height of the structure will frame the view.
- 5.5 The proximity of the structure to the inside edge of the viewshaft.