

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

**IN THE MATTER**

of the Resource  
Management Act  
1991

**AND**

**IN THE MATTER**

of an application  
under section 88  
of the Act by K  
Kearns for  
consent to  
subdivide 249C  
Tukapa Street,  
New Plymouth

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**OUTLINE OF SUBMISSIONS OF COUNSEL**  
**FOR THE APPLICANT K.E. KEARNS**

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CONNECT LEGAL TARANAKI  
LAWYERS  
Private Bag 2031  
DX NX10021  
NEW PLYMOUTH  
Telephone No. 06 769 8080  
Fax No. 06 757 9852  
Lawyer acting: SWA Grieve  
Email: [scottg@connectlegal.co.nz](mailto:scottg@connectlegal.co.nz)

## **MAY IT PLEASE THE INDEPENDENT HEARINGS COMMISSIONER**

### **Introduction**

1. The proposed development will provide for people's social and economic wellbeing and health and safety by providing new freehold land for dwelling in an attractive living environment.
2. Positive effects that will flow from the proposal are numerous, while adverse effects will be minimal.

### **Issues and Effects**

3. The critical issues requiring determination in this case are - whether or not granting consent to the proposed (discretionary) activity will promote the sustainable management of natural and physical resources - the purpose of the Resource Management Act 1991 ("RMA"); and - whether or not granting consent will be consistent with the relevant provisions under the relevant statutory instruments<sup>1</sup>.
4. It is respectfully submitted that the result of this case should be one that the Commissioner believes best achieves the purpose of the RMA: the sustainable management of natural and physical resources as defined in s. 5(2) RMA.
5. Surrounding neighbours deemed potentially affected by the proposal, have given written approval to the application (in terms of s. 104(3)(a)(ii) RMA) - one submission was lodged in

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<sup>1</sup> Falling for consideration under s. 104(1)(b) RMA

opposition to the application following public notification which raises issues regarding the Right of Way<sup>2</sup> (ROW).

6. It is submitted that when considering the issues in this case it is important to take account of the following:

- That buildings and a second dwelling could be erected as of right on the subject property;
- The buildings and dwelling already existing on site - and established ROW - that are part of the existing environment;
- The written approvals obtained;
- The mitigation measures proposed; and
- The numerous positive effects that will likely flow from the proposal if consent is granted – as are comprehensively canvassed particularly in Ms McLay's evidence<sup>3</sup>.

#### **Mitigation Measures Proposed**

7. The Court whenever it considers adverse effects, does so having regard to their mitigated version: KPF Investments Limited v Marlborough District Council<sup>4</sup>.

8. As a general summary, the mitigation measures proposed include:

- ROW and/or infrastructure upgrades to facilitate the subdivision (which will also likely improve current operational arrangements as observed by Mr Balchin)<sup>5</sup>;

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<sup>2</sup> See discussion re same in Evidence Louise McLay, para 109; Evidence Andy Skerrett, paras 4.1-4.5; Officer's Report, paras 29, 44-49

<sup>3</sup> At para 56

9. It is submitted that these measures will appropriately avoid, remedy or mitigate any adverse effects of the activities on the environment; ultimately promoting sustainable management.
10. The finer detail of those mitigation measures is discussed in evidence presented for the Applicant (and the Officer's Report); based on that evidence the adverse effects will be no more (or less) than minor.
11. Further, it is respectfully submitted that, in this case, further mitigation measures are not required to avoid, remedy or mitigate potential adverse effects on residential character and amenity values for the reasons set out in Ms. McLay's evidence<sup>6</sup>, and the Officer's Report<sup>7</sup>.

### **Evidence**

12. The Applicant will call evidence from the following witnesses:

### ***Lay Witnesses***

- (a) Kelsey Kearns – the Applicant.

Ms. Kearns' evidence covers the proposed development and background leading to it; positive social (and economic) benefits for people and communities of New Plymouth and attempted consultation with submitters.

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<sup>4</sup>[2014] NZEnvC 152, at [18]

<sup>5</sup> Officer's Report, para 42

<sup>6</sup> Evidence Louise McLay, paras 105-108

<sup>7</sup> Officer's Report, para 33

In her view the proposal - *"will be positive for the area, is consistent with district council direction and can occur without negatively affecting my neighbours"*<sup>8</sup>.

In my respectful submission she is correct for all of the reasons provided in the evidence for the Applicant, the Officer's Report (and these legal submissions).

### **Expert Witnesses**

- (b) Andy Skerrett – Traffic Engineer, AMTANZ Limited.

Mr. Skerrett's evidence details reasons why the proposed development can appropriately manage traffic effects (including on the ROW) in a way that would not generate any significant adverse effects on the submitters' property or ROW - or on the environment generally<sup>9</sup>.

In his expert opinion, the proposal (and likely consequential increase in traffic movements) will not materially change the level of risk on the ROW – nor affect the safety and efficiency of the local roading network; the traffic effects of the proposal are less than minor<sup>10</sup>.

- (c) Louise McLay – Independent Planning Consultant, Landpro Limited.

Ms. McLay has reviewed the Application (and all relevant materials); and provides expert evidence about the proposal, the site and receiving and surrounding environment and key

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<sup>8</sup> Evidence Kelsey Kearns, para 23

<sup>9</sup> Evidence Andy Skerrett, paras 3.3-7.2

conclusions from, and updates in respect of, the AEE; planning issues; relevant regulatory framework; effects and submissions; consent conditions, and sustainable management under Part 2 RMA.

Ms. McLay is generally in agreement with Mr Balchin's views in the Officer's Report. Overall, both conclude that granting consent is not contrary to, and is generally consistent with, the relevant objectives and policies of the relevant statutory instruments and will promote the purpose of the RMA<sup>11</sup>.

## **Law**

### ***Section 104(1) and Part 2 RMA***

13. Section 104(1) identifies the matters to which the consent authority must have regard, subject to Part 2;

#### **[104 Consideration of applications**

- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to -
  - (a) any actual and potential effects on the environment of allowing the activity; and
  - [(b) any relevant provisions of-
    - (i) a national environmental standard:
    - (ii) other regulations:
    - (iii) a national policy statement:
    - (iv) a New Zealand coastal policy statement:
    - (v) a regional policy statement or proposed regional policy statement:
    - (vii) a plan or proposed plan; and]]

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<sup>10</sup> Ibid

<sup>11</sup> Evidence Louise McLay, paras 71-99; Officer's Report, paras 54-74

- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

## **Part 2 RMA**

14. "Subject to Part 2" – has been considered by the Court of Appeal in RJ Davidson Family Trust v Marlborough District Council<sup>12</sup>. In short, the Court held that a consent authority may generally have regard to the provisions of Part 2 (depending on the circumstances of each case). In the present case - it is particularly appropriate to do so due to the Proposed District Plan (relevant in this case).
15. That is because the Proposed District Plan is still in the relatively early stages of its statutory process - it has been notified, submissions and further submissions received – few decisions have yet been made and some hearings have not yet been held, nor any Environment Court appeals and/or determinations<sup>13</sup>. Therefore, the Proposed Plan has not necessarily, as yet, been finalised in a manner that appropriately reflects the provisions of Part 2 RMA – therefore the Consent Authority will be required to give emphasis to Part 2 in this case. Mr Balchin and Ms McLay agree<sup>14</sup>.
16. Section 5 RMA is paramount:
  - 5 Purpose**
    - (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

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<sup>12</sup> [2018] NZCA 316

<sup>13</sup> The weight to be given to a proposed plan depends on what stage the relevant provision has reached, the weight generally being greater as a proposed plan moves through the notification hearing process.

<sup>14</sup> Officer's Report, para 67; Evidence Louise McLay paras 93-99

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

17. The method of applying s. 5 still involves the well-known overall broad judgement set out in North Shore City Council v Auckland Regional Council<sup>15</sup> – as noted in: KPF Investments<sup>16</sup>.

18. Application of that method in this case requires an overall broad judgement of whether the infill subdivision, development, and use of the site for new residential dwelling will promote the sustainable management of natural and physical resources; recognising that the RMA has a single purpose.

19. Such a judgement allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome<sup>17</sup> – provided it is recognised that the weight to be given to the relevant considerations must be carefully allocated by reference to the strong directions in ss. 6 to 8, and to any particularisation of those in the statutory instruments from national policy statements down to district plans: KPF Investments<sup>18</sup>.

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<sup>15</sup>[1997] NZRMA 59 (EnvC)

<sup>16</sup>Supra, at paragraph [202]

<sup>17</sup>North Shore City Council, supra, at page 94

<sup>18</sup>Supra, at paragraph [202]



20. In my submission, the proposal will clearly contribute in a positive way to the social, cultural, and economic wellbeing of people and the communities of New Plymouth in terms of section 5(2) of the RMA; and is suitable for consent on the conditions proposed. In particular, it is submitted that ss 5(2)(a) to (c) are met.
21. The relevant ss. 6 - 8 considerations in this case are set out in the Officer's Report<sup>19</sup>, and Ms McLay's evidence<sup>20</sup>.
22. It is submitted that the proposal has particular regard to ss 7 (b), (c), (f) and (g).
23. Amenity values can be assessed by the consent authority/Environment Court (in terms of assessing effects on the environment) - which must apply the law objectively in performing these functions: Gisborne District Council v Eldamos Investments Ltd<sup>21</sup>.

#### **Section 104(1)(a) RMA**

24. Section 104(1)(a) requires the consideration of any actual and potential effects on the environment of allowing the site to be subdivided, developed and used for new residential dwelling.
25. Actual and potential beneficial positive effects must be considered, as well as actual and potential adverse effects.

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<sup>19</sup> At paras 71-73

<sup>20</sup> At paras 95-98

<sup>21</sup> HC GIS CIV-2005-485-001241 [26 October 2005], Harrison J, at paragraph [42]

### ***Adverse Effects***

26. These have already been comprehensively addressed in the Application, evidence for the Applicant, Officer's Report and earlier in these submissions. It is submitted that the expert witnesses for the Applicant, and Mr. Balchin, have all concluded that adverse effects are no more (or less) than minor (subject to the implementation of appropriate conditions).

### ***Positive Effects***

27. The numerous positive effects of the proposal are summarised in Ms. McLay's evidence<sup>22</sup> (and Officer's Report<sup>23</sup>) - and include, for example, the provision of additional housing land in an attractive and optimal environment for people to live in, ROW upgrades etc., and potential future employment for consultants, contractors, builders, and the like.
28. In my submission, on the facts and circumstances of this case, there can be little doubt that the proposal will be positive for people and communities of New Plymouth (and beyond).

### ***Section 104(1)(b) RMA***

29. All the relevant provisions applicable under s. 104(1)(b) have been thoroughly canvassed in this case by Ms. McLay and Mr. Balchin.

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<sup>22</sup> Evidence Louise McLay, para 56

<sup>23</sup> At paras 51, 52

30. Overall, they agree that the proposal is consistent with those provisions in my submission<sup>24</sup>.

***Section 104(2) RMA***

31. Under Section 104(2), when forming an opinion for the purposes of Section 104(1)(a), the consent authority may disregard an adverse effect of the activity on the environment if a plan permits an activity with that effect.
32. Ms McLay's evidence primarily provides the robust reasons why the permitted baseline is considered relevant in this case, in the context discussed in her evidence, in my submission<sup>25</sup>.
33. This is particularly relevant in respect of amenity effects (such as the intrusion of buildings into a vista) as the District Plan does permit houses and ancillary buildings, and other buildings/structures, within stated dimensions (and contemplates residential dwelling in this context).
34. So, there are permitted activities which could produce relevant comparable effects in those respects - and it is respectfully submitted that there is no good reason not to exercise your discretion to disregard those effects under section 104(2).

***Section 104(3) RMA***

35. Under Section 104(3)(a)(ii) the Application must be considered without regard to any effect on a person who has given written approval to it. Ms McLay's evidence records those persons who

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<sup>24</sup> Evidence Louise McLay, paras 71-92; Officer's Report, paras 54- 63

<sup>25</sup> Evidence Louise McLay, paras 57-59

have given written approval<sup>26</sup>. In my respectful submission – the concerns raised in the submission by the only relevant party that did not give written approval (Mr & Mrs Woods, 249B Tukapa Street) – have been addressed in this case - primarily in the evidence of Mr Skerrett (but also in the evidence of Ms McLay and the Officer's Report).

### **Consent Conditions**

36. The proposed consent conditions in the Officer's Report are generally acceptable; subject to the relatively minor matters discussed in the evidence of Ms McLay<sup>27</sup>.

### **Submissions and Conclusions**

37. Each case must be considered and determined on its merits in light of the particular facts and circumstances.
38. The Applicant has put forward a firm proposal for developing and efficiently using the natural and physical resources of the site in a way which will enable people and communities to provide for their general, social, economic, and cultural wellbeing and for their health and safety - without significant adverse impact on the surrounding environment.
39. Amenity values is a central issue which overlaps with the quality of the environment; and it is submitted that the Applicant has sufficiently addressed the possible adverse effects, and ways to avoid, remedy or mitigate them, to the

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<sup>26</sup> Evidence Louise McLay, para 61

<sup>27</sup> Evidence Louise McLay, paras 110-112

point where those effects are not an impediment to the granting of resource consent.

40. The infill subdivision and development will contribute to the housing supply needs of the New Plymouth District – and is directly in line with the National Policy Statement on Urban Development's objectives (and will assist the council, and this country, to meet those objectives).
41. The positive effects that the proposal will bring far outweigh the limited (mitigated version) adverse effects in the circumstances of this case in my respectful submission.
42. Based on the whole of the evidence, the proposal is clearly not contrary to, and is generally consistent with, the provisions of the relevant statutory instruments to be considered under Section 104(1)(b); and any adverse effects that might occur can be adequately and appropriately mitigated.
43. It is respectfully submitted that the proposal meets the purpose of the RMA – it promotes the sustainable management of natural and physical resources; and the necessary consent should be granted.



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SWA Grieve  
Counsel for Applicant