BEFORE INDEPENDENT HEARINGS COMMISSIONER McKAY APPOINTED BY NEW PLYMOUTH DISTRICT COUNCIL

UNDER	the Resource Management Act 1991 ("**RMA**")
IN THE MATTER	of an application under section 88 of the Act by **BRYAN & KIM ROACH & SOUTH TARANAKI TRUSTEES LTD** to the **NEW PLYMOUTH DISTRICT COUNCIL** for a land use consent to construct a dwelling and asssociated retaining and fencing at 24/26 Woolcombe Terrace, New Plymouth. (LUC24/48512)

OUTLINE OF SUBMISSIONS ON BEHALF OF THE APPLICANT BRYAN & KIM ROACH & SOUTH TARANAKI TRUSTEES LTD (ROACH)

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INTRODUCTION AND BACKGROUND

1. The Roach's have been put through the wringer by their neighbours, the Whytes. This has been despite the Roach's doing their level best to meet all permitted standards under the relevant planning instruments, so as to avoid the potential for the Whytes to interfere with the development of their family home. They truly hoped, and endeavoured, to take the path of least resistance.[1]

2. Regrettably, and very unfortunately, their previous surveyor made a small mistake that meant that the house that they had very carefully instructed to be designed to comply with the then Operative District Plan (ODP) permitted standards[2] was constructed from the wrong ground level. The resulting breaches of the ODP would have been so minimal, however, that they could have been considered *de minimis* and ignored in my respectful submission.

3. The *de minimis* nature of the breaches of the ODP permitted standards is shown as follows (red shading):[3]

4. There could be no reasonable, or credible, complaint about these infringements, or any serious suggestion that, if consent had to have been

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1 Bryan Roach EIC, paras 32-50; Kyle Arnold EIC, para 4.4
2 Kyle Arnold EIC, paras 5.25- 5.27
3 Kyle Arnold EIC, para 5.27.

obtained under the PDP at the start of the process, the Whytes would have been notified of that application (and Mr & Mrs Roach would have made certain that the design avoided notification of the Whytes, for the reasons canvassed in Mr Roach's evidence (in chief)).[4]

5. However, and again, regrettably, construction of the Roach's family home was unable to be completed, including because of covid and delays in materials being available before the Proposed District Plan (PDP) took relevant effect (ie decisions were released). It is arguable, given the significant amount of work that had been completed (in reliance on ODP permitted activity status) by that point that the building had been lawfully "established" and therefore, aside from the *de minimis* breaches identified above, had existing use rights under s10(a)(i) of the RMA. However, the Roach's had agreed at mediation with the Whytes (following a challenge by the Whytes to the Roach's boundary wall) to seek retrospective consent for their family home under the PDP provisions. At that time, the survey "mistake" and its consequences were not well understood.

6. The expert reports in support of the retrospective consent application considered any effects on the Whytes to be less than minor, and that limited notification of them was not required. While the decision to limited notify the Whytes was nonetheless made (and perhaps that was preferable to them judicially reviewing a non-notified grant of consent), all of the Roach's evidence, which is exceedingly thorough, continues to support a finding that the effect on the Whytes is less than minor – or *de minimis*. This is in the context where the High Court has said, in respect of that standard: [5]

> "Less than minor" means an effect insignificant in the "overall context" and so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons.

7. Most recently (again, in the High Court), less than minor has been described by Wilkinson-Smith J in *Auckland International Airport Ltd v Auckland Council [2024] NZRMA 484 at [100]* as requiring:

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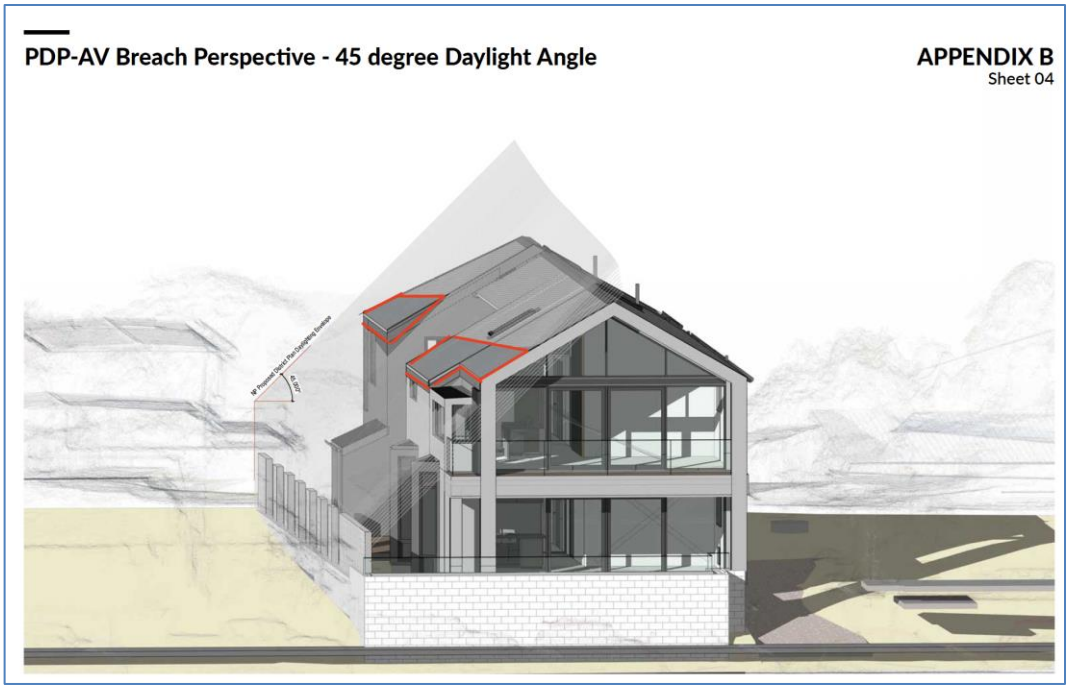
4 Ibid, footnote 1 above

5 As stated in *Lysaght v Whakatane District Council* [2021] NZHC 68 Whata J at [4].

> … a finding that the effects would be *de minimis* and could be safely disregarded as irrelevant and unimportant.

8. The experts for the Roach's all find effects on the Whytes to be "less than minor" in this sense. This takes into account the permitted baseline of a building that complies entirely with the permitted MRZ standards, the most relevant being MRZ-S3. This is illustrated by the following drawing (the red outlined areas emphasising the extent of the breach of the MRZ-S3 standard):[6]



9. But given that the application was limited notified on the Whytes, there is no requirement that the consent authority finds effects to be less than minor in order for it to grant consent. Minor (or even more than minor) effects can be authorised in the particular circumstances of a proposal – it has long been said, and is trite law, that the RMA is not a no effects statute. It is noted that the expert evidence for the Whytes from a landscape perspective puts some effects (privacy dominance and sense of enclosure/overlooking[7]) at "low-moderate adverse". This equates to minor – at most – in RMA terms.[8] While the applicant seeks for the Commissioner to find in favour of

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6 Daniel McEwan EIC, Appendix B Sheet 04, emphasis added.
7 Emma McRae EIC at [15.3].
8 Emma McRae EIC p35.

its witnesses (less than minor/ de minimis) on the evidence before you, at worst the effects will be minor (only). This is important, as the submitter's landscape architect is proposing significant mitigation[9] to address a limited number of effects that she identifies as minor. It is important to understand that "minor" means:[10]

> … "petty", "comparatively unimportant", "relatively small or unimportant . . . of little significance or consequence"

Or, its put another way in *Hinsen* (referred to below in paragraph 34 of my submissions) at para [120] where Judge Sheppard notes, "The word "minor" means lesser or comparatively small in size or importance" [following *Elderslie Park Timaru DC* [1995] NZRMA433.

10. So, the submitter's planner says that minor effects such as these are "not acceptable".[11]

11. This is quite extraordinary. The submitter's witnesses appear to be saying that an activity with minor (only) adverse effects should be declined, or mitigated so that the effects reduce to less than minor. There is an unreality to this, as consents are granted all the time with minor, or even more than minor effects. The standard "no more than minor" is one of the gateway tests for non-complying activities, which, if that gateway is passed, are often granted consent (and sometimes even granted consent if that gateway is not passed, but the policy gateway passed).

12. Accordingly, even if the consent authority finds effects to be minor (at worst), that is no impediment to the grant of consent. The proposal is supported by the relevant objectives, policies, and other rules of the Plan (eg MRZ-S4),[12] which also provide the "frame" against which the effects of the proposal are to be assessed.

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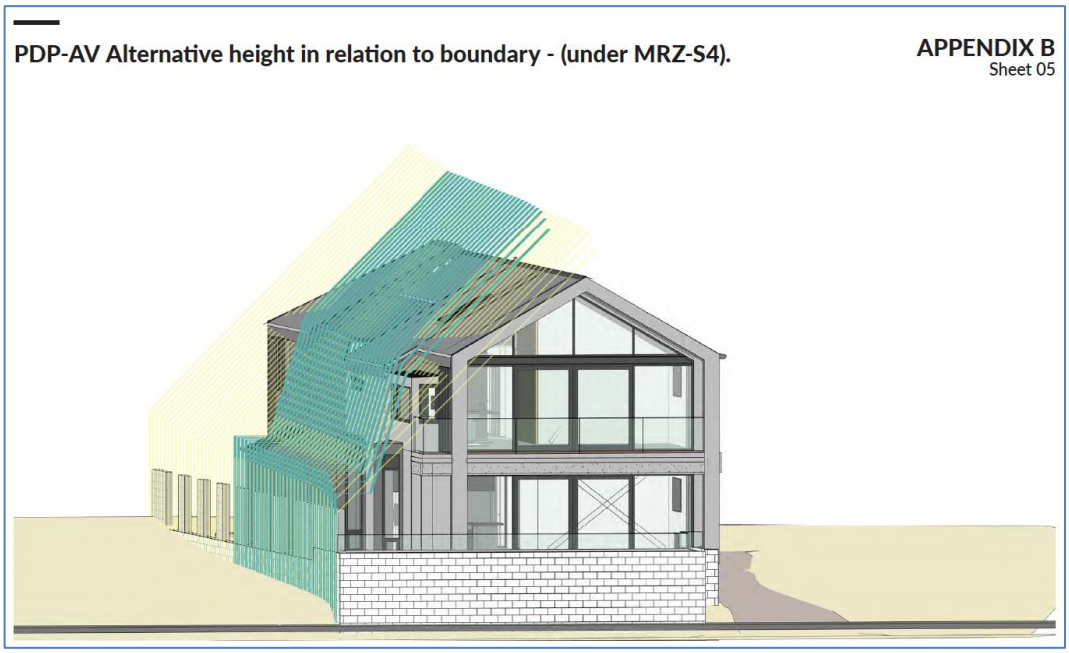
9 Emma McRae EIC at 15.4.

10 *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72, at [62]. While this was a notification case, the approach to minor in that context has been used in the context of non-complying activities, and elsewhere.

11 Kathryn Hooper EIC at 65(b), 79, and 85.

12 It is hard to see how an activity with minor effects only can be inconsistent with the relevant objectives and policies, or otherwise be "not acceptable", as Ms Hooper seems to suggest: Kathryn Hooper EIC at 65(b), 79, and 85.

13. MRZ-S4, for example, provides an "alternative" height to boundary pathway for consent, if the permitted standard cannot be met. While this requires a restricted discretionary consent to be obtained, the standard sets various "expectations" as to what might – subject to the restricted discretionary assessment – reasonably be anticipated in the zone in terms of built form. The remaining "exceedance" of that expectation is illustrated in the below diagram:[13]



14. The applicant and their experts have been very careful in their evidence to distinguish between undertaking a comparison against what is permitted (MRZ-S3), and the expectations or anticipated outcomes set through the discretionary pathway (MRZ-S4). In respect of the latter, to use an example, privacy is one of the matters reserved for discretion. A proposal could be very poorly designed so as to have living and other spaces with large windows looking directly into a neighbouring property's living or bedroom areas. It is for that reason no doubt that discretion has been retained in such matters.

15. But that is far from the reality here. The Roach's proposal has been well designed, with every attempt made to minimise privacy impacts (for

[13] Daniel McEwan EIC, Appendix B Sheet 05.

example) on the Whytes. The Roach's do not want to be looking into their neighbours property any more than fleetingly. Their home has been deliberately designed with this in mind.[14]

16. Accordingly, it is respectfully submitted that it is entirely inconceivable that breaches of the PDP permitted building standards, with effects that are less than minor (on the applicant's evidence), or minor (on the submitter's evidence), could warrant the decline of consent. Nor can the effects of the breaches warrant additional conditions beyond what has already been offered in respect of the louvres. However, the applicant wishes to see this matter put to bed, and is prepared to commit, through conditions, to the following additional mitigation works:

    a. Additional louvres on the east-facing 'bay window';

    b. A pergola structure to screen the eastern-facing deck of the applicant's dwelling that will be planted with Tecomanthe speciosa (or suitable similar climber (which will avoid undue leaf-fall)), and which will address the overlooking and privacy concerns raised by Ms McRae (and will avoid suggested planter-boxes).

17. The windows are already tinted[15], and so there is nothing more that can be, or that warrants being, done from that regard in my respectful submission. It may be that this is not evident from outside, but it is readily apparent from the inside.

18. It may be, and I respectfully invite the Commissioner to ask the applicant's expert witnesses, that these measures are enough to move their opinion from low-moderate to low, which would essentially resolve the contest between the witnesses and enable the Commissioner to grant consent without concern.

19. Even if the submitter's witnesses do not change their position, the Roach's are hopeful that some common sense will finally prevail, and that you, as

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14 See for example Kyle Arnold EIC, paras 4.10-4.13

15 Kyle Arnold EIC para 4.11

consent authority, will grant consent, with clear findings as to the inconsequential effects arising in the facts and circumstances of this case. Both parties can then move on with their lives.

Structure of these submissions

20. The Commissioner is experienced, and it seems unnecessary to set out all aspects of the decision-making framework that it needs to apply. That is also consistent with the Applicant's view that, properly understood against the provisions of the PDP, the application is actually a straightforward one with less than minor effects.

21. The following matters are addressed as being the likely key matters in contention:

    a. Retrospective consenting;

    b. Activity status and focal points for consideration;

    c. Application of the permitted baseline;

    d. Part 2 RMA;

    e. Evidence, including the submitters' evidence.

22. In respect of the latter matter, the evidence should speak largely for itself and extensive quotation and cross referencing is not undertaken.

23. Matters arising or coming into greater focus at the hearing, including as raised by the submitter, can be addressed in reply.

RETROSPECTIVE CONSENTING

24. The RMA does not deal with retrospective consenting, except in very limited circumstances. For example, s355A specifically confirms that an application for consent can be made for an unlawful reclamation, as if the reclaimed land were still in the coastal marine area. Section 330A also requires consent to be sought for emergency works undertaken under s330 where the effects are continuing.

25. In respect of the latter, the Environment Court has said, when considering a discretionary application to retrospectively authorise a replacement bridge by KiwiRail, that had been washed away in a flood, at [7]-[8]:[16]

> Although it is not necessary for us to form a final view, we must say on a tentative basis that we can consider that the role of the consent authority and the court in respect of this type of retrospective consent must, of its nature, be significantly more limited than a general consent. The infrastructure is necessary. It must be in the position and on a very similar alignment to the pre-existing Railway.
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> In such circumstances, it is unlikely that consent would be refused, except in the most extreme situation. The question for this court and the Council in considering such a retrospective consent is:
>
> (1) whether or not the design and installation used is one that is appropriate in the circumstances; and
>
> (2) what conditions of consent might properly be imposed to ensure that the effects of the activity are adequately remedied, avoided or mitigated.

26. This application is obviously made in different circumstances, but the reality is that the Roach's home is built, and any replacement (should it ever come to that, which is considered an entirely fanciful, and unjustified, proposition) would be built in a similar location and with similar design and features. It would either be strictly complying, so as to avoid any consenting issues (and which would still enable 11m in height), or seek to take greater, or full, advantage of the alternative MRZ-S4 pathway, with even greater (but anticipated) effects resulting.

27. This is the inescapable context. In this context, it is submitted that the consent authority can appropriately focus on similar questions, ie:

    a. Whether or not the design and construction of the building is one that is generally appropriate in the circumstances (including against the permitted baseline, as well as all relevant objectives and policies); and

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16 *Harris v Bay of Plenty Regional Council* EnvC W72/2008.

b. What conditions of consent might properly be imposed (if any) to ensure that the effects of the building are adequately remedied, avoided or mitigated. In terms of what conditions might be "proper", as discussed below, this requires consideration of proportionality.

28. It is accepted that this approach does not align with the summaries of the principles relating to retrospective consents as stated in cases such as *Strata Title Admin Body Corporate 176156 v Auckland Council* [2015] EnvC 125 at [35]-[37] (citations omitted):

> The case law establishes that there is nothing inherently wrong with retrospective consent, but it is equally clear that if an existing activity does not have the necessary consent, it should not be given any de facto advantage because of that fact. We agree with the Court's view expressed in the *NZ Kennel Club* case that:
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> > … 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.
>
> The fact that this is an application for retrospective resource consents makes no difference to the level of detailed assessment required. The application must be considered as a greenfields proposal, which stands or falls on its merits when assessed against the relevant statutory and planning provisions.

29. The context of *Strata Title* was that the applicant there sought consent to use a building comprising fourteen (14) units in the Business 5 zone for residential purposes, in what had originally been consented for use as commercial offices. Although residential use had occurred for some 14 years, the building could still be converted back to office use.

30. Context is, clearly, always everything.[17]

31. For example, in, *Colonial Homes Ltd v Queenstown-Lakes District Council W 104/95* at para 2, pg. 1, the Planning Tribunal, stated:

> ... we make clear that the consent parts of the Act are not to be used as the punitive arm. If a Council in any particular instance considers there has been a breach of

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17 *McGuire v Hastings District Council* [2002] 2 NZLR 557 at [9], citing Lord Steyn in *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433, p447.

> the RM Act or of the terms of its Plan, then it should use the prosecution or enforcement sections, not punish the applicant by refusal of resource consent.

32. In that case, the applicant sought retrospective resource consent to build two townhouses which breached the sideyard rules in the district plan by providing for a side-yard of 1.5 metres instead of the required 2.5 metres. A neighbour complained that the encroachment adversely affected the amenity values of his property.

33. In considering the valuers' evidence, the Tribunal held that it was unable to decide between the opinions of the two valuers but found that there would be some effect on the neighbour's property and that a figure of $11,700 (plus or minus 10 per cent) would probably be a reasonable estimate of loss. On this basis the Tribunal found that the effect on the neighbour's property was ***not*** minor (ie the effect was more than minor). Ultimately, the Tribunal made an order by consent between the parties, requiring the applicant to pay $10,000 to the neighbour for the effects caused by the encroachment. Significantly, in the present case, the effects caused by the exceedances are either less than minor/de minimis (on the applicant's evidence) or minor (on the submitter's evidence). There is no basis on which you can find that the effects are more than minor in my respectful submission, (or inconsistent with the relevant provisions of all of relevant planning provisions).

34. In terms of the approach to retrospective consenting, in the later case of *Hinsen v Queenstown-Lakes District Council [2004] NZRMA 115*, the Environment Court recognised the ability to take into account prior conduct in three ways, stating at [27]-[29];

> The first benefit is similar to that identified by Fisher J in *Suncern*, that is, to encourage observance of the Act and provide an incentive to developers to comply with it by obtaining resource consent prior to commencing work.
>
> The second benefit arises from the Lyneses' contention that the Court should consider the situation that existed when the consent application should have been made, when the pre-existing Skinner house was still in place. To consider the application on that assumption would involve artificiality, not reality, and without

> measured drawings of the Skinner house as it existed then, the evidence available now is not satisfactory for making findings. The Court has a more satisfactory basis for making findings by considering the application by reference to the present reality.
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> The third benefit may be confined to cases of buildings that extend beyond the permitted bulk and location controls. On a prospective application, a consent authority may be free to judge what alteration to the plans may appropriately avoid, remedy or mitigate the adverse environmental effects of the non-compliant elements of the building. But **where a building has already been largely erected, that freedom is constrained by consideration of the proportionality of the adjustments that might otherwise have been appropriate** (emphasis added).

35. In *Hinsen*, the applicant had been told they needed consent, and proceeded anyway. It was only the threat of prosecution that turned them to seeking retrospective consent. There is no such conduct here. The Roach's suffered from a genuine, and minor, mistake on behalf of one of their former expert consultants. There was nothing deliberate here. This is important context.

36. In respect of the second matter identified by the Court in *Hinsen*, that does not apply here, although the reference to "*reality*" is also apposite here. The reality is that there are very minor, non-deliberate, non-compliances, with less than minor effects. They would be hard for an ordinary person to discern.

37. The third matter, is very relevant here. The Roach's have already built their family home, and so the consideration of what may be done to avoid, remedy or mitigate the non-compliance elements is "*constrained by consideration of the proportionality of the adjustments that might otherwise have been appropriate*"[18].

38. In the simplest of terms, the cost, time, and effort of making any "*adjustments*" to bring the building into full compliance would be out of all proportion to the less than minor (or even minor) effects caused by the non-

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18 *Hinsen*, supra

compliant elements. This means that most of the mitigation options identified by Ms McRae are disproportionate. In fact, they have an air of unreality about them, and it is surprising that she has suggested them in light of her findings of minor (only) adverse effects. For example, at her paragraph [15.4], the redesign of the building's eastern façade (bullet point 1) and the reduction in height/ angle of the roof plane (bullet point 2), and a change in the materials of the boundary fence (bullet point 5), are all completely out of all proportion to the effects caused, even on her own evidence. With respect, putting these forward as options, undermines her credibility and objectivity. I also note that Ms Hooper repeats all of Ms McRae's options, without critically analysing them or making any recommendation as to which might be appropriate in the circumstances. Usually an expert would assess the mitigation options proposed and make recommendations as to what they would support in the circumstances.

39. Finally, in terms of proportionality, and the need to "intervene" through additional conditions, there is also some analogy to be drawn with the enforcement cases.

40. For example, the Environment Court in *Hill Park Residents Association Inc v Auckland Regional Council EnvC A30/2003* noted at [121] that the "*effects are certainly not de minimus*", when granting enforcement orders to remove a noise barrier; the inference being that if the effects had been *de minimus*, then the enforcement orders would not have been granted. Put simply, if this was an enforcement case, then it is unlikely that any orders would be made, other than perhaps in respect of the louvres, and **possibly** (my emphasis) the additional mitigation now offered (which should be noted, was not considered necessary by Messer's McEwan and Bain in the circumstances of this case in any event in this context)[19].

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19 Daniel McEwan EIC, paras 11.1, 12.1(d); Richard Bain, EIC para 11.1.

ACTIVITY STATUS AND KEY PDP PROVISIONS

Discretionary status

41. It is accepted that the activity overall is discretionary, as Coastal Environment Rule CE-R5 requires a discretionary consent to be obtained for all buildings where any of the underlying zone rules and standards are not met.

42. Accordingly, all relevant matters can be taken into account.

43. Of course, the individual rules that trigger restricted discretionary consent requirements, and the matters they restrict discretion to and / or the assessment matters they provide, are mandatory relevant considerations, despite the overall discretionary status. In the same way, all relevant objectives and policies should be considered.

44. The applicant's evidence addresses all of these matters, comprehensively (as does the Officer's Report).

45. However, it is anticipated that the key rules for consideration will be MRZ-S3, and MRZ-S4 and its counterpart rule MRZ-R33.

MRZ-S3

46. MRZ-S3 requires buildings to not project beyond a 45-degree recession plane measured from a point 3m vertically above ground level, and the effects of those small parts of the building that do not meet this standard. A critical issue will be - whether this permitted standard should be applied as a "permitted baseline" in the context of this application. This is addressed below. At this point it is appropriate to note that all witnesses, including the officer and those for the submitter, apply the permitted baseline.

47. The matters reserved for discretion if standard MRZ-S3 is not met are (emphasis added):

    1. Effect on the streetscape and planned character of the area.

2. The extent to which topography, site orientation and planting can mitigate the effects of the height of the building or structure.

3. **Effect on amenity values of nearby residential properties, including privacy, shading and sense of enclosure**.

48. Taking the permitted standard as a baseline, all effects on amenity values of the Whytes, including privacy, shading and sense of enclosure, are all considered to be less than minor.

MRZ-S4 and MRZ-R33

49. MRZ-S4 provides an alternative height in relation to boundary standard for buildings within 20m of the site frontage.[20]

50. The applicant says that this rule applies to the front 20m portion of a building, even if the building extends further into the site beyond the 20m. In contrast, the Whytes appear to consider the rule to only apply if the entirety of the building is contained within the 20 m of the site frontage. That is considered an untenable interpretation, and, as Mr Lawn explains, is inconsistent with the history and purpose behind the rule; and how this rule has been applied in other recent cases by the Council[21]. If the consent authority is concerned about this point of interpretation, this can be addressed further in reply. That said, it may not be necessary for the Commissioner to resolve this matter, as the key witnesses have assessed matters in both scenarios (ie with the rule applying, and without it), and it does not make any difference to their conclusions. For the applicant's relevant experts effects remain less than minor; and for the submitter's experts, effects remain minor, even if the alternative height in relation to boundary rule is not applied.

51. Whether or not MRZ-S4 strictly applies, the extent to which the standards set by MRZ-S4 can be considered to be an indicator of anticipated built form

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20 The standard requires that buildings will: not exceed a height of 3.6m measured vertically above ground level at side boundaries and thereafter; must be set back one metre and then 0.3m for every additional metre in height (73.3 degrees) up to 6.9m and then one metre for every additional metre in height (45 degrees)

21 Ben Lawn, EIC paras 8.15-8.24

is relevant,– given that a restricted discretionary consent is still required under MRZ-R33.

52. The matters reserved for discretion under MRZ-S4 are:

1. Sunlight access:

a. Whether sunlight access to the outdoor living space of an existing residential unit on a neighbouring site satisfies the following criterion: Four hours of sunlight is retained between the hours of 9am to 4pm during the Equinox (22 September):

i. over 75% of the existing outdoor living space where the area of the space is greater than the minimum required by MRZ-S6; or

ii. over 100% of existing outdoor living space where the area of this space is equal to or less than the minimum required by MRZ-S6.

b. In circumstances where sunlight access to the outdoor living space of an existing residential unit on a neighbouring site is less than the outcome referenced in (a):

i. The extent to which there is any reduction in sunlight access as a consequence of the proposed development, beyond that enabled through compliance with MRZ-S3 Height in relation to boundary control; and

ii. The extent to which the building affects the area and duration of sunlight access to the outdoor living space of an existing dwelling on a neighbouring site, taking into account site orientation, topography, vegetation and existing or consented development.

2. Attractiveness and safety of the street: The extent to which those parts of the buildings located closest to the front boundary achieve attractive and safe streets by:

a. providing doors, windows and balconies facing the street;

b. maximising front yard landscaping;

c. providing safe pedestrian access to buildings from the street; and

d. minimising the visual dominance of garage doors as viewed from the street.

3. Overlooking and privacy: The extent to which direct overlooking of a neighbour's habitable room windows and outdoor living space is minimised to maintain a reasonable standard of privacy, including through the design and location of habitable room windows, balconies or terraces, setbacks, or screening.

53. The matters identified in the first item (1) are met; and, given the phrasing "*whether*", those matters having been met, there is no further discretion to exercise.

54. The matters identified in (2) are not, it is understood, contentious to any real degree - but the applicant has comprehensively addressed these matters in evidence. No further modifications or conditions are required to address any effects falling within this matter of discretion.

55. The matters in (3) really are the crux of the issue. It should be noted, using the MRZ-S4/MRZ-R33 pathway, that matter of discretion (3) is reserved to ***overlooking*** and ***privacy*** only (with shading dealt with under item (1)). There is no general discretion reserved in respect of "amenity values", or dominance, or enclosure. In respect of the matters that are reserved for discretion under (3), the applicant's evidence is that design more than achieves the standard required, ie "*a reasonable standard of privacy*". Total or even almost complete privacy is not required, and nor can that be a legitimate expectation in this Medium Density Residential Zone.

56. Whilst the overall activity status as discretionary technically opens up an avenue for consideration of matters beyond those reserved for discretion in MRZ-R33, care needs to be taken before doing so. The trigger for full discretionary status is CE-R5, and the exercise of that discretion to consider matters should be focused on the relevant objectives and policies that this rule implements, being:

CE-O1: The natural character, landscape, historic, cultural and ecological values of the coastal environment are recognised and preserved, and where appropriate enhanced and restored.

CE-O2: Activities in the coastal environment enable people and communities to provide for their social, economic and cultural wellbeing and their health and safety, while ensuring adverse effects of activities on natural processes and the values of the coastal environment are avoided, remedied or mitigated.

CE-O3: Tangata whenua values, mātauranga and tikanga and their ability to practice kaitiakitanga are recognised and reflected in resource management processes concerning the coastal environment.

CE-O4: The risks to people and property from coastal hazards and climate change are avoided, remedied or mitigated.

CE-P2: Protect natural character in the coastal environment by ensuring:

1. adverse effects on the natural characteristics, processes and values which contribute to Areas of Outstanding Natural Character are avoided;

2. significant adverse effects on the natural characteristics, processes and values which contribute to other coastal natural character are avoided; and

3. other adverse effects on the natural characteristics, processes and values which contribute to coastal natural character are avoided, remedied or mitigated.

CE-P4: Manage the scale, location and design of activities within the coastal environment that have the potential to adversely affect coastal natural character, landscape, amenity, historic, cultural and ecological values, indigenous vegetation and habitats of indigenous fauna or that have the potential to increase or be vulnerable to coastal hazards, including:

1. building activities;

2. multi-unit development;

3. industrial activities;

4. network utilities;

5. earthworks; and

6. subdivision.

57. None of these objectives and policies focus on interface issues between neighbours, and should not be used to inject such matters over and above the matters identified and reserved for discretion in the specific rules dealing with those matters (as canvassed above).

Summary in respect of key rules

58. In short:

    a. breaches of MRZ-S3 require consideration of amenity on neighbours, including privacy, shading and sense of enclosure; while

    b. assessment under MRZ-S4 as most relevant, in the circumstances of this case, relates to overlooking and privacy.

59. There may be little difference in practice in the current circumstances, as the submitters' expert witnesses agree that shading (which is met under MRZ-S4) is not an issue. Ms McRae, who Ms Hooper relies on, identifies "'sense of enclosure' and privacy and overlooking"[22] as the matters at issue, with her finding effects on those matters to be minor (only) in RMA terms. (Whereas the applicant's evidence is that the effects on those matters is less than minor/de minimis.)

60. On this basis, while the Commissioner will need to be satisfied as to shading and any other matters, the focus may appropriately be on the contested items of 'sense of enclosure', privacy and overlooking.

Permitted baseline

61. Section 104(2) provides for a codification of the "permitted baseline":

> When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

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22 Emma MacRae EIC, para 15.3.

62. All of the experts, including the officer and submitter's experts, agree that it is appropriate to apply the permitted baseline here. The submitter's experts accept that this resolves the shading issue. Accordingly, there may be little need to traverse the concept and application of the permitted baseline in detail. The below follows for completeness, together with some discussion as to Ms Hooper's overlay of "credibility"[23] and how Ms Hooper has applied that, ironically, in an artificial fashion.

63. The concept of a permitted baseline had its genesis in case law. The Court of Appeal in *Hawthorn*[24] went to some lengths to distinguish between the "permitted baseline" and the "existing environment", stating at [65]-[66]:

> It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at para [29]:
>
> > Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and [104D] assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.
>
> Where it applies, therefore, the "permitted baseline" analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

64. As the authorities had developed, the application of the permitted baseline (to a non-fanciful activity) became mandatory.

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23 Kathryn Hooper EIC [55]-[62].

24 *Queenstown Lakes District Council v Hawthorn Estate Ltd CA [2006] 424.*

65. Section 104(2) was introduced to provide consent authorities with a discretion as to whether or not to apply a permitted baseline. As recorded by the High Court in *Rodney District Council v Eyres Eco-Park Ltd* [2007] NZRMA 1 at [29], the select committee reporting back on the relevant amendment bill explained the reason for introducing this discretion as follows:

> As currently interpreted, this concept means that councils *must* disregard any adverse effects that are the same as those of activities already permitted. The bill formally introduces the permitted baseline, but clarifies that councils *may*, rather than *must*, take into account the adverse effects of activities on the environment if a plan permits an activity with that effect. We recommend removing reference to proposed plans, to clarify it is only effects occurring as of right that are part of the permitted baseline.
>
> The proposed discretionary wording has been promoted because it:
>
> - Allows for the effects of permitted activities to be considered where appropriate on a case by case basis, but does not require priority to be given to this concept over and above consideration of all effects and the plan as a whole
>
> - Delivers increased flexibility to councils, allowing them to take into account the effects of other permitted activities where they are appropriate, without unnecessarily restricting their discretion or weakening the intent of their plans; accordingly, it avoids the potential for plans to develop in an ad hoc and unmanaged way
>
> - Allows consideration of the effects as a whole and therefore a more informed judgment as to what effects are to count as adverse, rather than the current formulaic approach.
>
> … A mandatory permitted baseline does not offer a balanced approach to considering consent applications. It may also prevent the consent authority from taking into account some of the matters stated in Part II of the Act.

66. The High Court in *Eyres Eco-Park* further went on to state at [38]:[25]

> … Section 104(2) does not distinguish between fanciful and non-fanciful permitted activities but that distinction will no doubt have a bearing on the ultimate exercise of the discretion in a given case.

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25 *Supra*

67. The High Court has further clarified the approach to be taken, stating in *Papakura District Council v Heather Ballantyne*:[26]

> Tested against five questions recently identified by the Environment Court in *Lyttleton Harbour Landscape Protection Assn Inc v Christchurch City Council* (CA 55/06, 11 May 2006), para [21], as ways to decide whether s 104(2) ought to be invoked, the District Council argues indeed, the Court's decision to exercise the discretion cannot be justified. Those questions are these:
>
> - Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effect can conceivably be drawn?
> - Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked?
> - If parties consider that application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effect, and if not, where do the merits lie over the area of disagreement?
> - Is the evidence regarding the proposal, and regarding any hypothetical (non-fanciful) development under a relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?
> - Is a permitted activity within which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not to be invoked?
> - Might application of the baseline have the effect of overriding Part II of the RMA?
>
> The Environment Court in that case did not suggest, however, that these questions constitute a threshold to be passed before section 104(2) can be invoked; let alone a fivefold test. They are questions drawn from the cases as instances of the ways in which the issue can arise. **They go to the single question whether it is possible and sensible to embark on a comparison, or whether that would be a notional, even fanciful, exercise. Seen in that way, they have real usefulness**. ...

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26 *Papakura District Council v Heather Ballantyne* CIV 2006-404-3269 26 April, 20 December 2007 Keane J [at 85], [86].

Further – to put it another way – the permitted baseline is concerned with *what is possible* – rather than what is *most likely* to occur in practice *Green Bay East Residents Society Inc v AKL Council CIV-2024-404-2326 [2025] NZHC 644 at para [36], and also noted discussions in paras [30] – [35]* (referring to, and tabling and discussing, the recent decision of Blanchard J).

68. In considering whether the use of a permitted baseline (being the building envelope created by MRZ-S3) is appropriate, the following factors are relevant:

a. The PDP is a recently adopted planning instrument that has established permitted activity standards specific to the MRZ, which the Overview of the zone explains as follows:

> The purpose of the Medium Density Residential Zone is to provide areas for medium density residential development up to three storeys in height with a mixture of detached, semi-detached and terraced housing and low-rise apartments. …
>
> The zone is generally characterised by a mix of uses, including existing suburban scale residential housing (stand-alone houses) and townhouses/flats. However, it is expected that the character and scale of buildings in this zone will transition over time as the number of medium density residential developments increases (i.e. multi-unit, semi-detached and terraced houses). …
>
> …
>
> To provide for residential intensification, diversity in housing choice and affordable housing options, the Medium Density Residential Zone provides for the most infill development potential in the District. The amount of development that can be undertaken as a permitted activity, and the Effects Standards for such development, are the key differences with the Low Density Residential and the General Residential zones.

b. The proposal is for the very type of activity anticipated in the zone (and in fact falls well below the full anticipated permitted building envelope which allows 11m in total height, subject to the MRZ-S3 setback, and other standards, almost all of which the proposal

complies with, the exception being the fence height in the front yard, MRZ-S10).

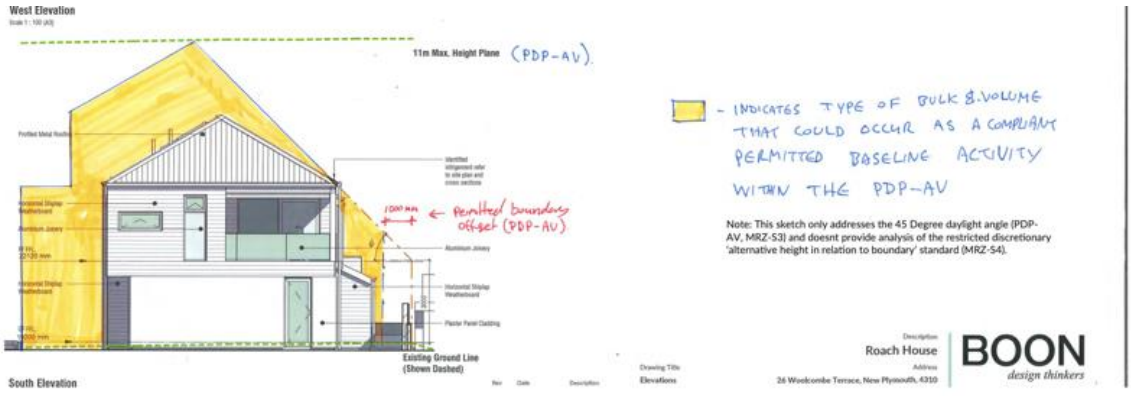
c. The exceedance of the MRZ-S3 setback is minimal, and the applicant's evidence is that the effects of that exceedance are less than minor.

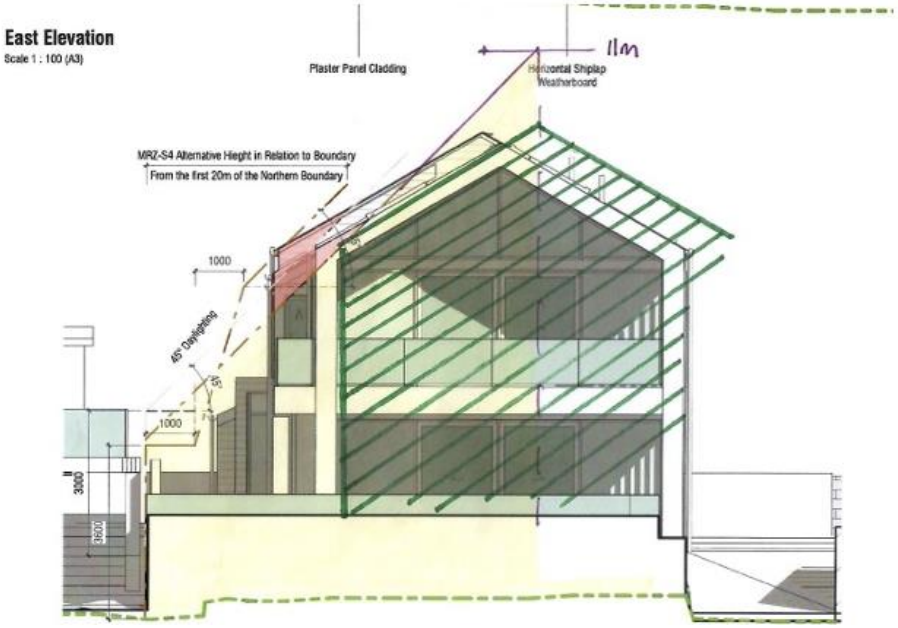
d. A fully complying building could have been designed and built, and so the comparison is not a fanciful one (i.e. – it is possible in the context of *Green Bay East Residents* (High Court) as above). (The only reason a complying building wasn't constructed is that the applicant got caught between the ODP and PDP transition, and its team were labouring under an unknown and unforeseen survey mistake as to the relevant ground level to be using.)

e. Allowing the proposal will not undermine Part 2 of the RMA. Part 2 matters are addressed below.

69. For all these reasons it is considered appropriate to apply the baseline created by MRZ-S3, and exclude the effects of those parts of the building that comply with that standard from the analysis. On that basis (and even without considering MRZ-S4 and MRZ-R33) the adverse effects of the exceedances are less than minor.

70. In terms of visualising what the permitted baseline is, there are two comparisons in evidence. That provided by Mr Lawn/ Mr McEwan, and that provided by Ms Hooper/Ms McRae, which each follow:





71. Ms McRae and Ms Hooper appear to take the view that a "credible" baseline is that determined simply by shifting the current as built dwelling to the west. This is the basis for their then determining that the permitted baseline would reduce enclosure, overlooking and privacy effects.

72. With respect, that is simplistic and not itself credible. Rather it is contrived. If someone were designing a building to work within the permitted baseline, they would extend the building on the ground floor to be closer to the boundary to utilise the space – which would then bring 'enclosure' if not privacy issues back in. Mr Arnold has developed a sketch of what a credible baseline development might look like. This will be provided in supplementary evidence at the hearing.

73. On this basis, the application of the permitted baseline as applied by the applicant's expert witnesses is considered to be more appropriate than the contrived baseline as applied by the submitter's expert witnesses. Unfortunately, this undermines the opinions of the submitters' witnesses, and the assistance they can give the Commissioner.

74. Even with their contrived baseline, however, the submitter's expert witnesses consider the enclosure, overlooking and privacy effects to be minor only. If they had applied the permitted baseline correctly, it would be

hard to see how they would not have arrived at less than minor, as the applicant's witnesses have done.

75. As with the additional mitigation offered now by the applicant, I respectfully invite the Commissioner to ask the submitter's experts whether, if they applied the same baseline as the applicant's witnesses, their opinion would change.

Objective assessment

76. It must also be remembered that the amenity values at issue here must be assessed objectively: *Gisborne District Council v Eldamos Investments Ltd*.[27] The Whytes may genuinely consider the effects on them to be significant, and may say so at the hearing, but what is required is an objective assessment, based on the best evidence before you.

This is a point reiterated by, for example, Judge Harland at para [55] in *Strata Title* (referred to in para (28) of my submissions above) where it states:

> *"We accept that an assessment of amenity values for the residents must start with considering their views about the amenity they feel they enjoy – But these views must be tempered objectively".*

PART 2

77. It is now well settled since the Court of Appeal decision in *RJ Davidson* that Part 2 remains relevant and directly "accessible" in in the resource consent context.[28] The longstanding observation of the Environment Court in *Shirley* also remains relevant:[29]

> The purpose of the Act meant that in every appeal about the grant of a resource consent there is only one ultimate question to be answered, that was, will the purpose of the Act be fulfilled?

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27 HC GIS CIV-2005-485-001241 [26 October 2005], Harrison J, at paragraph [42]
28 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.
29 *Shirley Primary School & Anor v Christchurch City Council* [1999] NZRMA 66 (EnvC), pg. 67,(2); pg. 99,(115).

78. It is accepted, however, that Part 2 may add little to the evaluative exercise where planning documents have been competently prepared in a manner that appropriately reflects the provisions of Part 2.

79. Here, the relevant PDP provisions are recent, generally coherent and are unlikely to add much to consideration of a *usual* consent application. However, the circumstances here involve a retrospective consent. Dovetailing into the discussion above on the authorities relating to retrospective consents, and the authority confirming that proportionality is a relevant consideration, it may be helpful to consider Part 2, particularly s7(b) which requires particular regard to be had to the efficient use of physical resources. The Roach's family home is a physical resource. While the decline of consent would not automatically mean its removal, or the removal of the non-complying components, that is a logical consequential argument (subject to the outcome of any appeals).

80. Positive effects are also a Part 2 consideration, in terms of providing for the Roach's, and their extended family (and future generations) social and economic well-being; and generally as a positive effect under s104(1)(a). Granting consent will finally put an end to the worries that the Roachs have been suffering under – for years now – about whether their carefully designed family home can be enjoyed without challenge.

EVIDENCE

81. Evidence is to be called for the applicant from the following witnesses:

    a. **Bryan Roach, the applicant**. Mr Roach will confirm how he and his wife, Kim, always intended to develop a complying family home, to avoid any stress from having to engage with the Whytes. He will explain how they have done everything than can reasonably do to respond to issues that have arisen responsibly, including acceptance of proposed condition 2, subject to some minor modifications to ensure flexibility in installation and allowance for maintenance, and final construction of the louvres.

b. **Kyle Arnold – project architect, Boon**. Mr Arnold will confirm that his brief was to meet the permitted requirements of the plan at the time (the then ODP), so as to avoid the need for any consents and any neighbour approvals or notification. He will explain the efforts even once construction had commenced to ensure compliance, with removal of the steel frames and re-setting of the concrete slab. He explains the survey "genuine set out error"[30] which was subsequently discovered; but, despite this, how the Roach's "multi-generational" home is in context and "a welcomed addition to Woolcombe Terrace"[31].

c. **Jono Murdoch, architect**. Mr Murdoch has undertaken modelling for shading effects. He explains the scenarios used, including an assessment of the extent of non-compliance against what would otherwise have been permitted in terms of the design constructed. He says, in that regard, that the effects will be less than minor. He also compares what has been built against a fully complying permitted building, and says that the effects of the as built are all within the permitted baseline. He also assesses the alternative height to boundary rule, and says that the as-built would comply. In other words, there are less than minor (or no) effects of the as-built.

d. **Daniel McEwan, landscape architect.** Mr McEwan assesses visual and amenity impacts. He concludes in all respects - that the effects are "less than minor"[32], and that the constructed building is consistent with the existing architectural vernacular and the intentions for the Medium Density Residential Zone under the PDP-AV.

e. **Richard Bain, Bluemarble, landscape architect – peer review**. Mr Bain peer reviewed Mr McEwan's evidence. He confirms that the effects are "low" in landscape terms[33], which in this case equate to

30 Kyle Arnold, EIC, para 5.27.
31 Kyle Arnold EIC, para 8.3
32 Daniel McEwan, EIC, section 12
33 Richard Bain EIC, para 11.1.

those that are barely discernible with little change to the existing character, features or landscape quality.

f. **Alan Doy, Surveyor, McKinlay & Co surveyors**. Mr Doy is of the opinion that the Whyte's dwelling is itself non-compliant. While the Roach's do not wish to make much of this (at least not at this hearing), it illustrates how difficult it can be to be absolutely precise within any permitted envelope. In a resource context, that is why compliance is required to be "generally in accordance with", to allow some degree of tolerance.

g. **Ben Lawn, RMA Planner, McKinlay & Co surveyors**. Mr Lawn has carefully assessed the relevant PDP (and other relevant statutory) provisions, with particular attention on the rules that are breached, as well as the policies and objectives that they implement. He provides background to one of the rules that the Whytes take a different interpretation to. He has carefully considered all the applicant's evidence. He concludes that the adverse effects are all less than minor; and also acknowledges the positive effects[34] (which I note that neither the Officer's or Ms Hooper's evidence acknowledges, as is required under s.104(1)(a)).

82. The Commissioner will also hear from the submitter's experts, Ms McRae and Ms Hooper.

83. There is a contest of evidence in that, as previously stated, the submitter's experts consider the effects on enclosure, overlooking and privacy to be minor (Ms McRae) and "not acceptable" (Ms Hooper); while the applicant's experts consider the effects on those matters to be less than minor/de minimis. In resolving which experts to prefer, the Commissioner will need to assess the evidence according to the usual tests for probative value, such as relevance, coherence, consistency, balance, and insight. It is also essential that the experts approach their assessment with the correct framework or premise.

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[34] Ben Lawn EIC, paras 9.36, 14.1(c)

84. With respect to Ms McRae, and as noted above, the basis of her evidence appears to be fundamentally flawed as she relies on a "contrived baseline" for her assessment, ie a baseline of shifting the as-built house to the west so that it fits within the baseline; and then leaves the space between the Whytes and the Roachs more open and, therefore, less enclosed, with less overlooking and greater privacy. This is simply not a credible baseline scenario. As noted above, an owner would want to use their site efficiently, and so would logically bring the ground floor as close to the boundary as the permitted envelope would allow. The same goes for the second, if not third floor.

85. This is the true "credible" permitted baseline. If this baseline had been applied, then it is hard to see how any conclusion other than that reached by the applicant's experts could be reached, ie that the effects of the Roach's property on enclosure, overlooking and privacy are less than minor/ de minimis.

86. Ms Hooper relies on Ms McRae, and so her evidence is infected by any error in Ms McRae's evidence. It is also disappointing that Ms Hooper has accepted the concept that a "credible" permitted baseline is simply one that pushes the existing dwelling west, despite acknowledging that this would require rearrangement of site access.[35]

87. As noted above, it is also astounding that Ms Hooper has also provided an independent professional opinion that an activity with minor effects (only) is "not acceptable".[36] This is particularly the case when that extraordinary opinion has not been explained, beyond a conclusory argument (effectively the effects are minor and, therefore, are not acceptable).

88. It is also concerning that Ms Hooper has failed to acknowledge and consider, in forming her opinion, the positive effects of the proposal. This also suggests lack of balance.

CONCLUDING COMMENTS AND SUBMISSIONS

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35 Kathryn Hooper EIC at [57].

36 Kathryn Hooper EIC at 65(b), 79, and 85.

89. Each case must be considered and determined on its merits in light of the particular facts and circumstances.

90. Sadly, the Whytes have made a mountain out of a molehill in my respectful submission. There really is nothing to see here. It also seems that the Whytes' experts have struggled to make a compelling case. Most of the content of their statements of evidence are makeweight – or nitpicks at matters that make little or no difference.[37] The "best" that they (Ms McRae) can do in terms of identifying adverse effects is to identify adverse effects that are minor (only). Ms Hooper then says that these minor effects are "not acceptable", without any explanation as to why such low levels of effects make the proposal "not acceptable". After all, the Supreme Court in *King Salmon*[38] said that activities with minor (or transitory) adverse effects would not be prohibited by its strict approach to the implementation of avoid policies, at [145]. Ms Hooper also, as noted above, fails to consider the positive benefits of the proposal.

91. In contrast, the Roach's experts have been careful and considered, measured and thorough. Critically, they applied a credible, rather than contrived, baseline.

92. The Roach's have also offered additional mitigation, much of which they would have done anyway (which is not necessary to address effects, but some of which they were intending to do anyway, but didn't want to be conditioned to do so). This further pulls adverse effects deeper into the less than minor/ de minimis category.

93. For all the above reasons, the Roach's respectfully request that consent be granted, on the updated conditions proposed. It is submitted that their multi-generational family home respects and enhances the surrounding environment; fits within the context of the area; is an appropriate

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37 For example, Ms McRae EIC para [8.5] and Figure 3. The photo appears to show shadow from the fence, which is permitted; you can see the square top of the post further down the building line, and the light from the timber slats casting shadows on the driveway surface.

38 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38*

development in this particular location – with less than minor adverse effects – and conversely, positive effects.

94. Based on the whole of the evidence, and fairly appraising the relevant objectives and policies as a whole, the proposal is clearly consistent with the provisions of the relevant statutory instruments to be considered under s 104(1)(b). I note the concept of "*a fair appraisal of the objectives and policies read as a whole*" is not a new one as is noted in *RJ Davidson* (Justice Cooper supra my submission's above at para 77) at para [73] referring to the Court of Appeal's [2002] well known decision in *Dye v Auckland Regional Council* [Justice Tipping at para [25] Dye]. This is the approach consent authorities must use in assessing the merits of an application against the relevant statutory objectives and policies – and in my submission Mr Robinson and Mr Lawn have applied that approach. The submitter's evidence however, in my submission, takes a more narrow approach – targeted at heavily weighing on one side amenity objectives and polies. An example is paragraph (91) of Ms Hooper's evidence where she opines that the proposal is "contrary" to RPS Policy SUD Policy 1 … "*to promote sustainable development … encouraging high quality urban design, including the maintenance and enhancement of amenity values*". In my submission the proposal meets that Policy appraised fairly, read as a whole. It should be noted also in this context that "*contrary*" to that Policy (and the objectives and policies generally) means "*opposed in nature, repugnant or antagonistic to them*" - see for example Hinsen (supra my submissions above at para 34) at para [123], citing the well known High Court decision in *NZ Rail* v *Marlborough District Council* [1993] 2 NZLR 641; and any adverse effects that might occur can be adequately and appropriately mitigated.

95. 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

26 March 2025