

**BEFORE HEARING COMMISSIONERS
IN NEW PLYMOUTH**

UNDER THE

Resource Management Act 1991

IN THE MATTER OF

an application under s88 of the Act by Te
Atiawa Iwi Holdings Ltd to undertake an
eight-townhouse development at 51
Barrett Street, New Plymouth for Land Use
Resource consent application
LUC22/48356

BETWEEN

**TE ĀTIAWA IWI HOLDINGS LIMITED
PARTNERSHIP**

Applicant

AND

NEW PLYMOUTH DISTRICT COUNCIL

Consent authority

**LEGAL SUBMISSIONS ON BEHALF OF
TE ĀTIAWA IWI HOLDINGS LIMITED PARTNERSHIP**

15 August 2023



M M E Wikaira
P 027 646 7797
E maia@whaialegal.co.nz
A PO Box 1197, Christchurch 8140
www.whaialegal.co.nz

SUMMARY POSITION

1. This is a restricted discretionary application for consent by Te Ātiawa Iwi Holdings Limited Partnership (**Te Ātiawa Holdings**) to undertake an eight-townhouse development at 51 Barrett Street, New Plymouth.
2. Counsel submits that the application for consent can be granted. The factors favouring grant of consent are:
 - (a) The proposal is consistent with the NPS-UD 2020.
 - (b) The proposal is less imposing than that which would be allowed under a PDP permitted baseline model, and what is anticipated and provided for by the PDP.¹
 - (c) Both the Council Officer and Ms Buttimore conclude that the effects on the submitter property (including privacy loss, outlook, and building dominance are anticipated by the PDP, and that traffic, streetscape, earthworks and construction effects) are acceptable or “no more than minor”.
 - (d) Residual submitter concerns are appropriately avoided, remedied or mitigated by proposed conditions of consent.
 - (e) The proposal will have a range of positive effects, including the construction and development of a high-quality medium density development for whānau housing, consistent with the social, cultural, environmental and economic revitalisation of Te

¹ The permitted baseline, recognised in section 104(2) RMA, directs that, 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.

Ātiawa, and enabled by land received through Treaty settlement.

- (f) The proposal aligns with the Tai Whenua, Tai Tangata, Tai Ao Iwi Environmental Management Plan.
 - (g) The proposal is consistent with sections 6(e), 7(a) and 8 of the RMA.
3. These brief submissions introduce those persons providing evidence for Te Ātiawa Holdings; clarify the legal position with respect to the New Plymouth District Plan and activity status of the application; and provide some perspective regarding the application (or otherwise) of Rule MRZ-R32.

TE ĀTIAWA HOLDINGS' EVIDENCE

4. Tē Ātiawa will present the following evidence today:
- (a) Dion Tuuta – Corporate and Cultural;
 - (b) Milla Saris – Architecture;
 - (c) Brad Dobson – Landscape;
 - (d) Laura Buttimore – Planning.
5. With leave of the Commissioner, the Traffic evidence of Andrew Skerrett is being taken as read.

NEW PLYMOUTH DISTRICT PLAN CONTEXT

6. The planning context to this matter involves two relevant plans. The Operative New Plymouth District Plan (**ODP**) and the Proposed New Plymouth District Plan (**PDP**).
7. Section 104(1)(b)(vi) requires a decision maker to have regard to any relevant provisions of “a plan or proposed plan”. The RMA does not distinguish between the weight to be accorded to an operative plan and to a proposed plan. However, the Courts have confirmed that the requirements of section 104 for

having regard to various matters allow decision makers to exercise discretion in the particular case. Each case should be decided individually according to its own circumstances.²

8. Further, the Environment Court has indicated that, where there has been a significant shift in council policy and the new provisions are in accordance with RMA Part 2, it may be appropriate to give more weight to the proposed plan.³
9. Counsel submits that more weight should be given to the PDP for the reasons identified above, and because the PDP provisions relevant to this application are eligible for notification as 'operative'.
10. While a proposed plan will only be 'operative' when publicly notified as operative under Clause 20 of RMA Schedule 1 (which counsel understands has not yet occurred), a proposed plan will be eligible for such notification when it has gone through the full plan preparation process including:
 - (a) public notification of the proposed plan;
 - (b) submissions and further submissions;
 - (c) a council decision; and
 - (d) resolution of appeals to the Environment Court, where any appeals are filed.
11. The Decisions Version of the PDP was notified on 13 May 2023 and the appeal period closed on 26 June 2023.

² *Hanton v Auckland City Council* [1994] A10/94. The weighting approach expressed in *Hanton* has been followed in a number of cases and approved by the High Court in *TV3 Network Services Ltd v Waikato DC* [1998] NZLR 360 and confirmed by the Court of Appeal in *Bayley v Manukau CC* [1999] 1 NZLR 56.

³ For example, in *Mapara Valley Preservation Society Inc v Taupo District Council EnvC* (A083/07) the Court placed substantial weight on recently notified plan changes relating to growth management and rural land use. See also *Auckland Regional Council v Waitakere Council* (A065/08).

12. Te Ātiawa Holdings has been informed by the Council that only one of the provisions the subject of this application has been appealed. Counsel has reviewed the appeal, which has been filed by the Department of Corrections, and submits that:

(a) The provision appealed is to MRZ-P2, the Decisions Version of which states:

Manage activities that are potentially compatible with the role, function and planned character of the Medium Density Residential Zone, and ensure it is appropriate to establish such activities in the Medium Density Residential Zone having regard to whether:

1. the purpose of the activity assists in enabling a range of housing choices in the district, services neighbourhood needs or enhances social connectivity;
2. the scale of the activity, site design and layout and built form is well-designed and integrates with the character of neighbouring residential properties and the streetscape;
3. the location of non-residential activities is close to and accessible to existing centres and not in isolated locations;
4. the activity has the potential to undermine the viability of a nearby centre; and
5. there is adequate existing or planned infrastructure to service the activity.

Potentially compatible activities include:

1. four or more residential units per site;
2. retirement villages;
3. childcare services;
4. community facilities;
5. visitor accommodation;
6. general retail activities;
7. supermarkets;
8. entertainment and hospitality activities;
9. business service activities;
10. sport and recreation activities; and
11. emergency services facilities.

(b) The relief sought by the appeal is to amend policy MRZ-P2 to list 'Community Correction Activities' as a potentially compatible activity. No other amendments are requested.

13. The scope of the appeal does not affect the balance of MRZ-P2 as it relates to this application.
14. It is therefore counsel's submission that the PDP provides the settled planning context for assessing the application.

RESTRICTED DISCRETIONARY ACTIVITY

15. The application is for a restricted discretionary activity under section 104C of the RMA.
16. As per RMA section 87A(3):
 - (a) the power to decline consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and
 - (b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

APPLICATION OF RULE MRZ-R32

17. Ms Buttimore and the Council Officer disagree as to the applicability of restricted discretionary rule MRZ-R32, and its associated assessment criteria:
 - (a) The Council Officer considers MRZ-R32 applicable as it relates to "building activities that do not comply with MRZ-S3, but comply with MRZ-S4", which is the result when assessing the application against each standard.⁴

⁴ The non-compliance with MRZ-S3 is that the development fails to meet the rule's 45° height in relation to boundary requirement on the properties to east of the site (47A & B Barrett Street). The breach is considered acceptable, but does not create an effect on the submitter in any event. The proposal complies with the height in relation boundary requirements on the boundary with 107 Morley Street: Council Officer Report, pages 7 and 35.

- (b) Ms Buttimore considers MRZ-R32 inapplicable on the basis that it is not triggered, because MRZ-S4 is not relevant to the proposal. This is because MRZ-S4 expressly states (in the standard itself and in the advisory note) that it “applies to development that is within the 20m of the road boundary”.
18. Counsel submits that whether rule MRZ-R32 applies is a red herring for the purpose of determining the consent application – the Council Officer’s assessment against the rule still results in a conclusion that effects are acceptable, and do not preclude the grant of consent.
19. However, Te Ātiawa Holdings is mindful that this is one of the first residential applications to apply the PDP since the Decisions’ Version was issued. To support plan integrity, Te Ātiawa Holdings sees value in the Commissioner determining whether Rule MRZ-32 does apply, or whether it is not triggered given Rule MRZ-S4 does not apply.

DATED this 15th day of August 2023



M M E Wikaira
Counsel for Te Ātiawa Iwi Holdings Limited
Partnership