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BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL

Independent Hearing Commissioner(s)

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

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LEGAL SUBMISSIONS ON BEHALF OF GEOFFERY AND JOHANNA WHYTE

27 MARCH 2025

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1. INTRODUCTION

1.1 These legal submissions are provided on behalf of Geoffery and Johanna Whyte (the "**Whytes**"), in their capacity as trustees of the G&J Whyte Trust, and submitters on the subject application for retrospective resource consent for the construction of a new dwelling, associated fencing and retaining walls.

1.2 The Whytes are opposed to the proposed retrospective consent in its current form. The applicants' position appears to be that they can infringe the standards of the New Plymouth Proposed District Plan (Appeals Version) ("**PDP**"); refuse to provide any mitigation to avoid, remedy or mitigate the effect of those infringements; and expect resource consent on the basis that to do otherwise would be too costly. That is not a defensible position.

1.3 The applicants' position is reinforced by the apparent focus of their evidence, particularly that of Mr Doy and others, on the Whytes themselves. Rather than address the effects of their development, the applicants' witnesses have been drawn into irrelevancies, and have extended beyond their roles as independent expert witnesses by commenting on the Whytes' property. Other witnesses have referred in their evidence to landscaping elements which are entirely absent from the proposal. Their failure to provide them confirms they are acting as advocates, not expert witnesses.

1.4 The proposal involves a visually dominant, enclosing structure which extends along almost the entirety of the common boundary between the two properties. It includes a number of large windows which will provide direct opportunities for direct overlooking into the Whytes' habitable spaces, including the rear outdoor living space. Absent changes to the design or appropriate mitigation, the proposal will result in unacceptable visual amenity and privacy effects on the Whytes, in a manner which fails to comply with the relevant objectives and policies of the PDP.

1.5 Fundamentally, the proposal reads (both in relation to the infringements of the PDP, and as the sum of its constituent parts) as an inappropriate design response to the planned built character of the Medium Density Residential Zone ("**MRZ**"). It receives no credit for existing in its current state. It should not receive consent.

2. STRUCTURE OF SUBMISSIONS

2.1 These submissions follow the below structure:

(a) A brief introduction to the legal framework, and the key legal principles engaged by the retrospective application.

(b) The issues raised by the evidence.

(c) A brief introduction to the submitters' case.

(d) A response to the section 42A report, and the applicants' evidence.

(e) An outline of the witnesses you will hear from.

3. LEGAL FRAMEWORK

3.1 As with any application for resource consent, you are required to have regard to the matters in s 104 of the RMA, subject to Part 2. The requirement to have regard to the matters in s 104(1)(a)-(c) of the RMA means that genuine attention and thought must be given to each of them.[1]

Principles applying to retrospective applications for consent

3.2 While there is nothing inherently wrong with the grant of a retrospective resource consent,[2] there is nothing inherently right about it either. 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.[3]

3.3 On an application for retrospective consent, there should be no presumption that what exists should remain, simply because it would be difficult or expensive to remove it.[4] That said, the fact that an application seeks retrospective consent "makes no difference to the level of detailed assessment required".[5] As the Court in *Strata Title* held:

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1 *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481 (HC) at 487.

2 *Strata Title Admin Body Corporate 176156 v Auckland Council* [2015] NZEnvC 125, citing *Colonial Homes Ltd v Queenstown Lakes District Council* PT W104/95, *Workman v Whangarei District Council* A137/1998, and *NZ Kennel Club Inc v Papakura District Council* W100/2005.

3 *Strata Title*, above n 2.

4 *NZ Kennel Club*, above n 2.

5 *Strata Title*, above n 2 citing *Maskill & Maskill Contracting Ltd v Palmerston North District Council* W037/2006.

> The application must be considered as a greenfields proposal, which stands or falls on the merits when assessed against the relevant statutory and planning provisions.

3.4 The existence of the building provides one advantage, in that the adverse effects of the proposal can be assessed against what is currently located on the site, rather than against a hypothetical or potential scenario. You, as the Commissioner, are not required to cover your eyes and imagine what the building "could" look like, and are entitled to rely on your own senses. The same applies to the expert witnesses who have been engaged to provide an assessment of the visual effects of the proposal, and the lay witnesses' evidence.

3.5 Counsel for the applicants places weight on the decision of the Environment Court in *Hinsen v Queenstown Lakes District Council*,[6] in seeking to distinguish the present circumstances from those in *Strata Title*. With respect, the decision does not stand for the propositions put forward, particularly when read in its entirety.

3.6 The Court's reference to the "three benefits" was in the context of a submission by the applicants that the fact that the dwelling had been constructed "*cannot count against the applicants, and that the correct approach is to assume that the dwelling does not exist, and consider the matter as if the consent application had been made for a proposed dwelling*" (at [16]). The "three benefits" were the Court's response to that submission. The Court then concluded:

> [33] We do not understand why the Court should give consideration to the effect on the Lyneses of having to make changes to their dwelling. They were given notice that resource consent was required. They chose to proceed to build the house without having first obtained that consent. The cost to them of the changes they have since made to reduce the extent of non-compliance is the expectable consequence of their choice to proceed without the requisite consent.
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> [34] In short, we hold that the Lyneses should not be placed in the position they would have been in had they proceeded differently. Their application should be considered on the basis of what they have done – not so as to penalise them, but so the application is considered on the basis of reality, not artificiality.

3.7 When read in in its entirety, the decision is on all fours with *Strata Title.*

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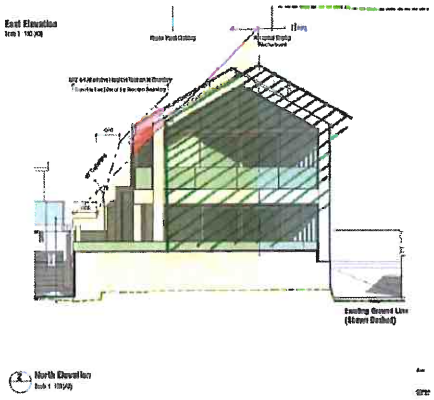
6 *Hinsen v Queenstown-Lakes District Council* [2004] NZRMA 115 (EnvC).

The permitted baseline

3.8 The expert witnesses for the submitters accept that there is a permitted baseline which applies to the development of a dwelling on this site. The effects of the proposed development can and should be assessed against a non-fanciful[7] alternative and fully compliant development which, for present purposes, would include compliance with the standard daylight angle under MRZ-S3 along the entirety of the common boundary.[8]

3.9 Where the experts differ is in relation to what the "non-fanciful" alternative is. This is best demonstrated by Ms McRae's Figure 10, which shows the angle adopted by the applicants, and in my submission, the more realistic alternative adopted by the submitters' expert witnesses, reproduced below.

3.10 To achieve an 11 m height, a permitted building would need to be substantially set back from the side boundary, as shown below:



3.11 With respect to the applicants' witnesses, and their counsel, the permitted baseline scenario they adopt includes a fanciful roofline; and would face difficulties in confirming compliance with all other standards of the PDP – particularly, the building coverage rule (as the current design occupies 49.7% of the site).

Relevance of past conduct

3.12 There is, I submit, another matter which is relevant to your consideration – namely, the continued disregard the applicants and their consultants have

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7 *Smith Chilcott Ltd v Auckland City Council* [2001] NZRMA 503; [2001] 3 NZLR 473 (CA) at [26].

8 As compliance with MRZ-S4 (the alternative daylight angle) still requires resource consent as a restricted discretionary activity under MRZ-R33, and cannot therefore occur as of right.

shown towards the requirements of the PDP. This includes the original construction of the dwelling and block wall in a manner which conflicted with the requirements of the PDP; as well as the further construction of the front wall and glass balustrades, for which consent was only sought after the current application had been made. In my submission, that demonstrates a disregard for the rules of the PDP.

3.13 The Courts have taken three different approaches to considering prior conduct in determining an application for resource consent:

(a) They make use of evidence as to prior non-compliances in the exercise of its discretion (now, under s 104B of the RMA).[9]

(b) They consider past non-compliant conduct as a relevant "other matter" (now under s 104(1)(c) of the RMA).[10]

(c) In earlier cases, prior conduct has been held to amount to creating an adverse social effect on the environment, that can be anticipated to occur as a result of the consent sought.[11]

3.14 Previous cases have also confirmed that past conduct can be considered relevant when assessing the adequacy of conditions.[12] Those decisions do not refer to the binding authority in *Suncern*, and so to the extent they comment on the relevance of past conduct more generally, should be treated with care.[13] However, they do reflect a concern that the Court, when setting conditions, should have reasonable confidence that those conditions can and will be complied with.[14]

3.15 While it is clear that declining consent cannot be used as a penalty for past unauthorised construction, it remains open to you as the Commissioner to take that conduct into account when considering the exercise of your discretion. Any such consideration can and should only be peripheral to the main issues

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9 *Hinsen,* above n 6. See also *New Zealand Suncern Construction Ltd v Auckland City Council* (1997) 3 ELRNZ 230 (HC).

10 *Suncern*, above n 9.

11 *Ruru v Gisborne District Council* PT W100/93.

12 *Playground Events Ltd v Waikato Regional Council* [2011] NZEnvC 149; *Walker v Manukau City Council* EnvC Auckland C213/99.

13 Counsel notes that, to the extent that *Playground* relies on *Hinsen* for the proposition that past conduct does not provide a legitimate excuse for refusing consent, *Hinsen* does not stand for the propositions cited. There was no commentary to that effect.

14 *Runciman Rural Protection Society Inc v Franklin District Council* [2006] NZRMA 278 (HC) at [54].

in the proceeding – namely whether the effects are acceptable and meet the direction in the objectives and policies of the PDP.

Proper approach to interpretation of planning documents

3.16 Finally, under this heading, I address the proper approach to the interpretation of planning documents – as there is a live issue, and a difference in opinion between the expert witnesses (including Mr Robinson), as to the proper approach to the application of MRZ-S3 and MRZ-S4 (and their associated rules), depending on what is meant by the term "*buildings*".

3.17 The accepted approach to the interpretation of planning documents is to begin with the ordinary or plain meaning of a rule (or definition).[15] However, it is not appropriate to undertake that exercise in a vacuum. Regard must be had to the immediate context (in this case, the objectives and policies of the MRZ), and where any obscurity or ambiguity arises, it may be necessary to refer to other sections of the PDP.

3.18 When considering what a "plain" or "ordinary" meaning constitutes, previous High Court authority has confirmed that it is "what would an ordinary, reasonable member of the public examining the plan, have taken from" the planning document.[16]

3.19 I respectfully submit that the approach adopted by Ms Hooper reflects a fair and rational interpretation of the standard, which is informed by a plain meaning approach. On that approach, a building does not comply with the alternative daylight angle standard (MRZ-S4) if it is not wholly contained within the first 20 m of the site. The standard does not refer to a "part of a building", as other standards do. If it were intended to apply to parts of buildings, it would have. To the extent that there is any incongruity between the exclusions to MRZ-S3 and MRZ-S4, that should not be resolved by reading in the words "part of" into MRZ-S4.

3.20 It is not the role of the Commissioner on a resource consent hearing to usurp the policy-making function, which rightly belongs to the Council through a Schedule 1 process.[17] While gaps in a legislative instrument can be filled, that is only to make the instrument work as intended, and cannot extend to, or amount to, a rewriting of that particular instrument.

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15 *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) at [35].

16 *Powell v Dunedin City Council* [2004] NZRMA 49 (HC) [35].

17 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 537 per Cooke P.

Bundling

3.21 This application is appropriately assessed as a discretionary activity on a bundled basis. As Judge Kirkpatrick noted in *Protect Aotea*,[18] bundling is a rule of practice rather than a statutory requirement. While the practice is well-established, it cannot override the statutory provisions of ss 9 (for permitted activities), s 104A (for controlled activities) and s 104C (for restricted discretionary activities).

3.22 The question to be determined is whether the effects of exercising the two (or more) consents would overlap or have consequential or flow-on effects, or whether they are distinct – particularly where the scope of the consent authority's discretionary judgment in respect of one of the consents required is relatively restricted or confined.[19] Where activities which are permitted or to be assessed as restricted discretionary "**may only be exercised**" if associated discretionary or non-complying consents are also granted on appropriate terms and conditions, then the Court held that the practical effect of those limits may be reduced or even non-existent (my emphasis).[20]

3.23 Here, the failure to comply with relevant standards for a building within the Coastal Environment engages a discretionary activity rule. While, in respect of each of those standards, consent is required as a restricted discretionary activity, they cannot occur without the overarching discretionary consent required. The simple point is that all effects of the proposed development, and all relevant objectives and policies, are "on the table", and it would be impractical to try and "slice and dice" those effects or plan provisions by reference to the particular matters of discretion applying to infringement of standards.[21]

4. THE ISSUES

4.1 The issues raised by this application that you will need to consider in the exercise of your discretion under s 104B of the RMA are relatively confined. They include:

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18 *Protect Aotea Inc v Auckland Council* [2021] NZEnvC 140 at [18].

19 *Southpark Corporation ltd v Auckland City Council* [2001] NZRMA 350 (EnvC) at [15], cited with approval in *Protect Aotea*, above n 18 at [32].

20 *Protect Aotea*, above n 18 at [42].

21 And, in any event, the objectives and policies of the PDP remain relevant considerations under s 104(1)(b), even for restricted discretionary activities: *Edens v Thames-Coromandel District Council* [2020] NZEnvC 13.

(a) The weight to be given to the existing nature of the structure, or the reasons for the infringement. On this point, the law is clear – they are to be given no weight; and the innocence or otherwise of the breach is neither here nor there.

(b) The assessment of effects from the proposed development on the owners and occupiers of 28 Woolcombe Terrace, particularly in relation to visual dominance, overlooking and loss of privacy, and sense of enclosure.

(c) The proper application of the MRZ rules, objectives and policies to those effects, including which of the relevant standards apply to the development.

(d) What more is necessary to appropriately avoid, remedy or mitigate adverse effects of the proposed development.

5. THE SUBMITTERS' CASE

5.1 Mr Whyte will speak to the submitters' position on this application shortly, and I will leave him to set that out for you.

5.2 However, in my submission, the combined force of the submitters' own views as to their residential amenity, which are to be given due weight alongside expert opinion on those matters,[22] and the expert evidence for the submitters establishes a clear case for requiring something more of the applicants.

5.3 On that point, and in my submission, it is highly relevant that you have heard from witnesses earlier today who have either not furnished the Council with the necessary information to consider the effects within their areas of expertise, or who have deliberately withheld such information (presumably, on instructions from their clients). The extent to which any witness may have been seen to act as an advocate, rather than an independent expert witness, is relevant to the weight you may choose to give to that witness' evidence, or your reasons for preferring the evidence of one witness over another.

5.4 In my submission, the expert evidence provided by Ms Hooper and Ms McRae for the submitters provides a balanced, fair assessment of the relevant adverse effects against the objectives and policies of the MRZ. Unlike some of the witnesses for the applicants, who at times offer a multitude of opinions on

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22 *Meridian Energy Ltd v Hurunui District Council* [2013] NZEnvC 59.

matters which stray well outside their areas of expertise, both Ms Hooper and Ms McRae have remained firmly within their lanes.

5.5 They have also undertaken a proper assessment of the proposal against the planned built character of the zone. They have not assumed speculative permitted baselines to guide their assessment. They have also ensured an assessment against both potential scenarios (MRZ-S3 and/or a combination of MRZ-S3 and MRZ-S4), and, in the case of the latter, have had proper regard to the matters of discretion which are engaged by MRZ-R33.

5.6 The witnesses will discuss the effects, and their assessment of those effects, in more detail later in the submitters' presentation. However, for present purposes, it is worth noting that both witnesses identify a lack of appropriate mitigation for the adverse visual dominance, overlooking and privacy, and sense of enclosure effects generated by the proposed building, in a manner which does not result in suitable residential amenity for surrounding properties (MRZ-P8). The imperative to "*require*" development to achieve that outcome is a strong directive, as noted in the Supreme Court's decision in *Port Otago*.[23]

6. RESPONSE TO PRE-HEARING REPORT AND APPLICANTS' EVIDENCE

6.1 Before I hand over to Mr Whyte, I want to make a few brief comments in response to the pre-hearing report and the applicants' evidence.

The pre-hearing report

6.2 While his report is mercifully brief, I note that Mr Robinson did not have the benefit of any expert landscape and visual analysis to inform his assessment, beyond that which was provided with the application itself. The submitters have provided a counterpoint to the analysis provided by Mr McEwan and Mr Bain, which ought to give Mr Robinson pause for thought in relation to some of the conclusions he has reached to date.

6.3 At paragraph 33, Mr Robinson makes comments in relation to the effects on streetscape and the coastal environment, and notes that *"as no further submitter evidence has been presented regarding either matter",* he maintained the view set out in his notification report that effects are minor. As the Court in *New Zealand Heavy Haulage* states, streetscape values are those gained by an ordinary person with average knowledge of the areas in question,

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[23] *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205 at [69]: "*to recognise that something is required is to accept that it is mandatory*".

and not be experts.[24] It is also not incumbent upon a submitter to provide evidence at the time the submission is lodged – rather, the process provides the opportunity for that evidence to be provided later in time. You will hear from Mr Whyte as to his experience of the local streetscape, with its predominant one to two-storey character, sensitively designed to sit well within the surrounding coastal environment.

6.4 To the extent that Mr Robinson has made conclusions in relation to the degree of effects without any specialist input (for example, at paragraphs 40, 41, 46, and 51), in my submission they need to be treated with some care. That is not to suggest any lack of professionalism on the part of Mr Robinson, but simply to note that as a planner acting without expert input, his ability to comment on the degree of effect is somewhat limited.

6.5 In relation to Mr Robinson's discussion of potential mitigation options, the following points are relevant:

(a) Mr Robinson begins his assessment by considering the potential for boundary treatments and planting. These are secondary mitigation measures, which ignore the primary method of mitigating effects of building dominance by amending the design of the building itself.

(b) "*Requiring physical demolition*" is a necessary consequence of the retrospective nature of the application, if you find that the effects cannot be mitigated through other methods and would be unacceptable.

(c) Questions of cost and proportionality associated with physical demolition are relevant only where requiring a party to do so would effectively serve to penalise them for past non-compliance, rather than to mitigate an adverse effect.[25] There is no evidence before you as to the costs that would be involved in requiring greater compliance, which could only come from the applicants themselves. As noted above, the applicants do not receive any credit for the existing nature of the building, and no regard is to be had for the effect on them to make changes to their building.

(d) It is not the responsibility of the submitters to put forward mitigation measures, where none were offered by the applicants (prior to the filing of their legal submissions). The persuasive burden ultimately

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24 *New Zealand Heavy Haulage Association Inc v Auckland Council* [2013] NZEnvC 240 at [41].

25 *Hinsen*, above n 6 at [130].

rests with the applicants to satisfy you that what has been constructed (illegally) is an acceptable design response and that nothing further is required to mitigate effects.

(e) It is also noted that Mr Robinson's view on proportionality or plausibility (again, not words usually found in RMA assessment) is coloured by his own (non-expert) assessment of visual and landscape effects. The expert evidence for the submitters reaches a different, and in my opinion, orthodox conclusion – namely, that the adverse effects of the application have not been appropriately avoided, remedied or mitigated.

The applicants' evidence

6.6 The applicants' evidence is, in my submission, coloured by the inappropriate application of a fanciful permitted baseline scenario. On that point, the evidence of Ms McRae and Ms Hooper should be preferred.

6.7 It is also concerning that the applicants' evidence reads as if it treats compliance with the alternative height-in-relation-to-boundary standard (MRZ-S4) as if it was a permitted activity. MRZ-R33 is clear on that point – every application which demonstrates compliance with MRZ-S4 (which the submitters deny) still requires consent as a restricted discretionary activity. There is no presumption that an application for a restricted discretionary activity will be approved; or that compliance with a standard *necessarily* reflects the planned built character of the MRZ. Any such application still requires a full assessment against the relevant matters of discretion and objectives and policies.

6.8 The applicants' evidence seeks to downplay the effects of the structure across the first 20 m of the site (on the basis of compliance with MRZ-S4), and focusses almost singularly on the more limited effects associated with the breach of the daylight angle standard (MRZ-S3) at the rear of the property.

6.9 The applicants' evidence is also affected by the extent to which the witnesses comment on matters which are extraneous to, or simply <u>irrelevant</u> to the present application. The paradigm example of this is the evidence of Mr Doy, which is objected to in the strongest possible terms. Not only is that evidence not accepted, it is wholly irrelevant to the matters at issue – and reflective of an approach which focusses on the man, not the ball. Similar comments in the evidence of other witnesses are also objected to.

7. CONCLUSION

7.1 I submit that the applicants' refusal to consider amendments to the proposed design, or to offer any form of secondary mitigation, leaves you in an invidious position. The (late) offer of a planted pergola and the installation of additional louvres to a single window do not, in the absence of further detail, go far enough.

7.2 If you consider that the effects of the proposed development are unacceptable without further mitigation which goes beyond what the applicants are proposed to offer, then the proper course of action would be to decline consent. To be clear, that does not mean that a building cannot be constructed on this site. It is abundantly clear that there is an envelope within which a building can be constructed on this site – just not this building. It is too physically and visually dominant, overbearing, and intrusive.

7.3 The consequences of declining consent in these circumstances, in terms of what *might* be required to comply with the requirements of the PDP and/or the Act, are not matters that you should consider. Those are consequences that the applicants have brought upon themselves, whether innocently or otherwise. To the extent that cost may be an issue for them, one imagines that would be a discussion for them to have with their respective contractors. As the Court in *Hinsen* noted, those who construct without consent may face having to make costly alterations.[26]

7.4 But it does not fall on the neighbours to simply accept that what is there must remain, because it would be too costly to do otherwise. As I noted earlier, the persuasive burden rests with the applicant. The submitters say that burden has not been discharged.

7.5 The submitters will call evidence from the following witnesses:

(a) **Geoff Whyte**, trustee and occupant of the neighbouring property at 28 Woolcombe Terrace. Mr Whyte will pick up where his affidavit in the enforcement proceedings left off, detailing his concerns with the proposal as-lodged, as well as detailing the many failures on the part of the applicant team (and NPDC) which have led to the situation we find ourselves in today.

(b) **Emma McRae**, a Principal Landscape Architect from Boffa Miskell, one of New Zealand's leading landscape architecture and urban

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[26] *Hinsen*, above n 6 at [131].

design consultancies. Ms McRae has undertaken her own assessment of the landscape and visual effects of the proposal, drawing on her experience in other matters, as well as her knowledge of the local area.

(c) **Kathryn Hooper**, a Director of Landpro Limited and an expert planner with decades of experience in the New Plymouth area. Ms Hooper has provided her own assessment of the proposal against the relevant objectives, policies, and matters of discretion,

7.6 Fundamentally, this is the wrong building in the wrong place. It does not achieve suitable residential amenity for surrounding policies, as it fails to appropriately minimise visual amenity effects on the neighbours at 28 Woolcombe Terrace. The proposal is inconsistent with the planned residential character of the MRZ, and results in inappropriate effects on the environment. The proper course of action, in those circumstances, is to decline consent.

Dated 27 March 2025

Aidan Cameron
Counsel for the submitters