BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL APPOINTED INDEPENDENT HEARINGS COMMISSIONER MARK ST. CLAIR

IN THE MATTER	of the Resource Management Act 1991 ("RMA")
AND	
IN THE MATTER	of an application under section 88 of the Act by **ROBE & ROCHE INVESTMENTS LIMITED** to the **NEW PLYMOUTH DISTRICT COUNCIL** for a subdivision to create 113 residential lots and additional road and recreational reserves at 56 Pohutukawa Place, Bell Block. (SUB21/47803)

OUTLINE OF SUBMISSIONS OF COUNSEL FOR THE APPLICANT ROBE & ROCHE INVESTMENTS LIMITED

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MAY IT PLEASE THE INDEPENDENT HEARINGS COMMISSIONER

Introduction

1. Zoned residential since at least 1980, the site has sat as undeveloped residential land in the district for over 40 years[1]. The applicant aims to unlock the land for greenfields residential development; to provide quality, well designed, cost effective and affordable housing for the people in the community[2]. Ensuring that there is sufficient housing capacity in New Plymouth district to accommodate demand is crucial – the proposal will make an important contribution to meeting that demand – enabling sufficient development capacity – which is critically important to the district (and wider Taranaki region)[3].

2. The positive effects of the proposal for the Bell Block area, New Plymouth district and Taranaki region will, it is submitted, be significantly enhancing; and, will provide for people's social, cultural and economic wellbeing and health and safety - while potential (mitigated) adverse effects will be minimal.

Issues and Effects

3. The critical issues requiring determination in this case are, whether or not granting consent to the proposed (discretionary) activity will promote the sustainable management of natural and physical resources - the purpose of the Resource Management Act 1991 ("RMA"); and, whether or not granting consent will be consistent with the relevant provisions under the relevant statutory instruments[4] - fairly appraised, and read as a whole.

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[1] EIC Kath Hooper paras 8.1-8.3
[2] EIC Ben Hawke para 5.5
[3] EIC Lawrence McIlrath paras 5.1, 5.7, 6.4
[4] Falling for consideration under s. 104(1)(b) RMA

4. It is respectfully submitted that the result of this case should be one that the Commissioner believes best achieves the purpose of the RMA: the sustainable management of natural and physical resources as defined in s. 5(2) RMA; and, as enshrined in the relevant statutory instruments.

5. In my submission the proposal will clearly promote the sustainable management of natural and physical resources in a way (or at a rate) which will enable the social, economic, and cultural wellbeing and health and safety of people and communities of New Plymouth district, Taranaki region (and New Zealand generally) to be provided for.

6. A further critical issue is, (of course in every case), after mitigation of adverse effects – are the adverse effects so significant that the necessary consents should be declined? Clearly not, in my respectful submission; the proposal will appropriately avoid, remedy or mitigate any adverse effects of activities on the environment (and achieve all the relevant caveats in s. 5(2)(a)-(c)).

7. Adverse effects must be considered by the consent authority having regard to their mitigated version, taking into account proposed conditions of consent[5].

8. The finer detail of those mitigation measures, and proposed conditions of consent (mitigating the effects of the proposed activity), are addressed in evidence to be called for the applicant.

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[5] *Guardians of Paku Bay Association Inc v Waikato Regional Council [2012] 1 NZLR 271 (HC)*, at [129]

Evidence, Issues and Effects Addressed

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

(a) ***Ben Hawke – (director of) the Applicant.***

Mr Hawke and his family are well respected local builders and developers, having been based in Taranaki for almost 30 years[6]. He is the Managing Director of Ko Design and GJ Gardner Taranaki. GJ Gardner has a strong reputation in the local community, with a proud history of local community involvement. Having been involved in several very successful local residential land developments, GJ Gardner has enabled people to live in warm, dry, healthy homes at an affordable price.[7] Mr Hawke aims to do that again through this subdivision.

He has been concerned that GJ Gardner has struggled to find suitable and sufficient land for housing construction to meet local demand, since about 2018. The proposed site is one of the last large tracts of residentially zoned land in the district suitable for housing development – which can be achieved at scale – which makes development significantly more efficient – and assists to provide housing for people and communities at more affordable prices[8] – which, in my respectful submission, is a critical issue in this country today.

As the largest provider in the district's residential construction sector – Mr Hawke is also gravely concerned that without suitable land to build on – he cannot sustain his business and staff (and support other local trades and businesses that rely on GJ Gardner Taranaki) – and has

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[6] EIC Ben Hawke para 1.2
[7] EIC Ben Hawke para 1.3
[8] EIC Ben Hawke paras 5.1-5.7

already had to downscale his team. The proposed development will provide some much needed future certainty in this context.[9]

Mr Hawke has responsibly engaged a high calibre team of independent expert consultants to assist him with the consent application now before you – and has responsibly taken onboard all of their expert advice in planning the subdivision and development.

He notes that development of the site will not be an overnight job and will take some years[10] - and, in my submission, that is highly relevant to your consideration of the potential adverse transportation effects that have been raised in this case by a number of submitters – and ties in with the conclusions of Messers Skerrett and Georgeson (in the context of their Joint Witness Statement Transport, 7 March 2025 ("JWS Transport")) – that additional traffic from the proposed subdivision will be introduced to the network over a period of years; such that the effects of the additional traffic will be temporary and minor in the short to medium term.[11]

In my submission, Mr Hawke's consultation with mana whenua as discussed in his evidence[12], and in the evidence of others[13], has been highly commendable – and a meaningful relationship has been established between the parties which will continue into the future.

Under s. 36A RMA there is no legal duty to consult any party re an application for consent – however it is widely accepted that it is best practice to consult in certain circumstances; particularly involving mana whenua/tangata whenua, as in this case.

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[9] EIC Ben Hawke para 5.9
[10] EIC Ben Hawke paras 6.1-6.4
[11] JWS Transport paras 6.14, 9.7, 10.3(b)
[12] EIC Ben Hawke paras 7.1-7.6
[13] See for example EIC Ben Lawn paras 8.35-8.44, 12.1(c); EIC Kath Hooper paras 9.1-9.6, 17.2(a)

The leading case on what is required in law (including under s 8 RMA) for an appropriate consultation process is the Court of Appeal's decision in *Wellington International Airport Limited v Air New Zealand*[14].

In that case the Court of Appeal held (at pg's 683-684) that the word "consultation" did not require that there be agreement between the parties consulting one another - nor did it necessarily involve negotiations towards an agreement - although this might occur - particularly as the tendency in consultation was at least to seek consensus. It clearly required more than mere prior notification.

If a party having a power to make a decision after consultation - held meetings with the parties it was required to consult - provided those parties with relevant information and with such further information as they requested - entered the meetings with an open mind - took due notice of what was said - and waited until they had had their say before making a decision - then the decision was properly described as having been made after consultation.

Clearly on the totality of the applicant's evidence in this case – Mr Hawke (as applicant) has conducted appropriate consultation with mana whenua/tangata whenua over a lengthy period of time – and has made genuine decisions in good faith to offer adequate, appropriate, fair and reasonable mitigation, in respect of those matters consulted on, in the circumstances of this case.

Guided by his expert consultants – Mr Hawke has ensured that all submissions have been appropriately and responsibly responded to – and he is in general agreement with the recommendations and consent

[14] *[1993] 1 NZLR 671 (CA)*; adopted in RMA cases, for example, in *Ngati Kahu Tauranga v District Council [1994] NZRMA 481 (PT)*

conditions provided in Mr Whittaker's Officer's Report (subject to the expert evidence called for the applicant).

If consent is granted (and in my respectful submission, in the circumstances of this case, it surely must be) – Mr Hawke aims to develop the site for the future prosperity of New Plymouth – sustainably and in partnership with tangata whenua – to construct quality new housing for the people and communities of Taranaki – and to support the on-going viability of all those that his business supports in New Plymouth and beyond – being not only his staff and families – but a large number of other trades businesses, and their families, and the wider community.[15]

(b) ***Lawrence McIlrath – Economist/Market Analyst, (director) Market Economics Ltd.***

As noted in Mr Hawke's evidence – Mr McIlrath was engaged as an independent expert consultant to prepare an economic report in respect of the proposed development.[16] That report was produced by Mr McIlrath on 2 May 2024, and is included as Appendix 1 to his evidence. His evidence helpfully summarises all of the key findings in that comprehensive report.

Importantly, Mr McIlrath records that New Plymouth is the main economic center in the Taranaki region – and that both New Plymouth and the region are growing – the population is expanding – which means that it is crucial to ensure there is sufficient housing capacity to accommodate demand – because the housing market has a direct influence on economic performance.[17]

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[15] EIC Ben Hawke paras 8.1-11.5
[16] EIC Ben Hawke para 5.7
[17] EIC Lawrence McIlrath para 5.1

Moreover, Bell Block (within which the proposed site is situated) is an important part of New Plymouth's urban economy – accommodating approximately 10% of the district's households. It is also an important destination for housing investment, and enjoys locational advantages for the reasons set out in Mr McIlrath's evidence.[18]

Mr McIlrath finds that the proposal will deliver additional residential development capacity in response to the district's growth – will make an important contribution to meeting demand – will provide housing choice and differentiation – and deliver economic benefits. The proposal is also consistent with residential development patterns in the surrounding environment – and will enhance urban form efficiently, and consistently, within the existing dwelling market context.[19]

New Plymouth's housing environment and context is considered within the context of his expertise – and he discusses how the proposed development is consistent in that context, and will assist to respond to the anticipated growth.[20]

Section 8 of Mr McIlrath's evidence sets out a significant array of potential effects of the proposal – all of which, in my respectful submission, are clearly beneficial and positive.

When considering the proposed subdivision activity, it is appropriate to evaluate all matters which relate to effects - including positive effects - and any benefits from the activity[21].

In *Elderslie Park*[22], the High Court, inter alia, noted (at pg's 444-445) that to ignore real benefits that an activity for which consent is sought

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[18] EIC Lawrence McIlrath paras 5.2-5.5
[19] EIC Lawrence McIlrath paras 5.7-5.8
[20] EIC Lawrence McIlrath paras 7.1-7.16

would bring, necessarily produces an artificial unbalanced picture of the real effect of the activity.

It is appropriate to evaluate all matters which relate to the effect - that includes counter balancing benefits and possible conditions. This approach also accords with the broad definition of "effect" in s 3 of the RMA – which includes any positive or adverse effect; and, of course, also considers the word "environment" as defined in s 2 RMA – which includes, inter alia, the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of the definition of environment, which are affected by those matters.

Touching on the Council Officer's Report, Mr McIlrath further highlights the positive benefits and effects that will flow from the proposal if consent is granted – and discusses several advantages of the proposed location and the significance of that in the context of this case – and summarises his conclusions.[23]

There can be little doubt on Mr McIlrath's evidence, that the proposal is of significant positive effect in the circumstances of this case - in my respectful submission.

(c) ***Ivan Bruce – Archaeologist.***

Mr. Bruce undertook the Archaeological Assessment November 2021 (filed with the application/AEE at around that same time), and attached to his evidence as an Appendix for ease of reference. He is very familiar with the archaeological landscape, records and sites in Taranaki – and with the site and immediate surrounding environment -

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[21] *Elderslie Park Ltd v Timaru District Council [1995] NZRMA 433 (HC)*

[22] Supra

[23] EIC Lawrence McIlrath paras 9.1-10.4

having been involved in archaeology in this region for many years – and having had direct involvement with, for example, the adjacent Summerset development (as touched on in his evidence).

He is not aware of any current historic accounts etc or archaeological sites within the area of the proposed subdivision – and found no surface evidence of archaeological sites during his pedestrian survey. However, he is aware that there is considerable historic record pertaining to the immediate vicinity (as highlighted in his November 2021 assessment) – and that there have been a considerable number of archaeological sites recorded over the past 20 years in the immediate surrounds.[24]

In his expert opinion practical options for archaeological site identification are limited to the recovery of archaeological evidence following the top soil removal phase of development – and site preservation will generally be by record – noting that preservation by archaeological record has been the main mechanism for recording previously unrecorded archaeological sites discovered in the area over the last 20 years.[25]

His recommendation is that the applicant applies to complete earthworks under authority granted by Heritage New Zealand Pouhere Taonga ("HNZPT") – which is a conservative approach in this view, for the reasons he elaborates on in his evidence.[26]

Mr Bruce has responded to the submissions within the context of his expertise - and importantly notes that he is in agreement with the recommendation of Mr McCurdy, Geometria - that all earthworks

[24] EIC Ivan Bruce para 5.1(a),(b)
[25] EIC Ivan Bruce para 5.1(c),(d)
[26] EIC Ivan Bruce para 5.1(e)

within the proposed site are undertaken under an archaeological authority – and that this be secured by way of a consent condition.[27]

Helpfully, Mr Bruce comments on the Council Officer's Report and proposed consent conditions and concludes that - provided his recommendations are followed – the applicant will have made all reasonable efforts to provide for the protection of historic heritage from inappropriate subdivision, use and development in the context of s 6(f) RMA – and the relevant PDP provisions.[28]

As I have noted, Mr Hawke (for the applicant) has advised that he is supportive of all of his expert consultants' advice and recommendations in respect of consent conditions in this case.[29]

(d) ***Willie Shaw – Ecologist, (director) Wildlands Consultants Ltd***

Mr. Shaw is a highly experienced leading ecologist, as set out in his evidence, who has undertaken ecological surveys and assessments in Taranaki since the late 1990's.[30]

Mr Shaw was responsibly engaged by Mr Hawke to provide expert advice not long after submissions on the publicly notified application were received – and Mr Shaw produced his "Wildlands Assessment of Potential Ecological Effects" report in October 2024 (reviewed and approved for release on 11 October 2024) – also to assist the applicant with the Taranaki Regional Council ("TRC") consents process (which has now concluded). A full copy of Mr Shaw's Wildlands Ecological Report is attached to his evidence at Appendix 1.

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[27] EIC Ivan Bruce section 8 and paras 8.2(k) – (n)
[28] EIC Ivan Bruce paras 8.3-9.1
[29] EIC Ben Hawke paras 9.1-10.1

Mr Shaw's evidence confirms his detailed assessments and conclusions that –

- potential adverse ecological effects of developing the site will be less than minor;
- there won't be any adverse effects on wetlands, i.e. the Waipu Lagoons, for the reasons canvassed in his evidence – and appropriate riparian buffers will be established;
- while largely a TRC issue – there won't be adverse effects on wetland hydrology or water quality – as appropriate amounts of water will still travel into the wetlands - and will be appropriately treated in swales and rain gardens to a high standard; and
- some positive ecological effects will be generated.[31]

Mr Shaw also notes that there are some recommendations in his Wildlands Ecology Report that need to be implemented – such as ensuring that potential for weeds to spread from residential properties, including from the dumping of garden waste, are dealt with – and he notes various measures proposed to address such issues.[32]

Mr Shaw has genuinely considered and responded to submissions which raised particular matters within his expertise – and comprehensively responds to all such submissions in section 9 of his evidence. Some of those matters are also touched on in section 10 of Mr Shaw's evidence – and while he agrees in principle with the concerns raised in the submissions from the Department of Conservation, Forest and Bird, and Fish and Game in respect of domestic and feral cats – he shares similar concerns to Mr Whittaker in respect of a consent condition prohibiting same. However, he does

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[30] EIC Willie Shaw paras 1.1-2.8
[31] EIC Willie Shaw paras 7.2, 12.1
[32] EIC Willie Shaw para 7.2, paras 9.1-11.2

have recommendations that, in his view, will effectively address those concerns – which are set out in sections 9 to 11 of Mr Shaw's evidence[33] (and some of which are further discussed later in these legal submissions).

Provided that Mr Shaw's recommendations (in both his Wildlands Ecological Report and his evidence) are adopted – then Mr Shaw is of the view that: actual and potential adverse ecological effects in this case will have been addressed – submitters' issues within the context of his expertise will have also been addressed – matters arising (within the context of his expertise) in the Officer's Report and consent conditions will have also been addressed – and, consequently, potential adverse ecological effects will be less than minor.[34]

Mr Hawke's evidence confirms that he endorses the recommendations of all the expert consultants that he has engaged in this case, including Mr Shaw.[35]

(e) ***Luke Bunn – Senior Civil Engineer, (director) Red Jacket Ltd – stormwater management, reticulated water, sanitary sewer, earthworks.***

Mr Bunn's evidence confirms matters in respect of, and provides further detail on, the stormwater management design[36], reticulated water design[37], sanitary sewer design[38] and earthworks design[39] in respect of the proposal.

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[33] EIC Willie Shaw paras 9.2-11.2
[34] EIC Wilie Shaw paras 7.1-12.1
[35] EIC Ben Hawke paras 9.1, 10.1
[36] EIC Luke Bunn paras 6.1-6.7
[37] EIC Luke Bunn paras 7.1-7.4
[38] EIC Luke Bunn paras 8.1-8.6
[39] EIC Luke Bunn paras 9.1-9.3

A lot of the hard work that he did over the last couple of years, assisted with the TRC granting its consents on 25 March 2025.[40]

Mr Bunn also comments on matters particular to his expertise raised in submissions[41] - and in the Officer's Report and consent conditions[42].

Quite a few of the consent conditions require amendment in his view – and it is acknowledged that those were a draft tabled by Mr Whittaker – nevertheless, Mr Hawke is guided by Mr Bunn's evidence and expertise in this context[43].

Subject to resolving those consent condition issues – Mr Bunn is essentially in agreement with the Officer's Report (in the context of his expertise) – and finds that there are no engineering related issues in respect of the proposal that impede the grant of consent[44].

In reaching that conclusion Mr Bunn notes that the proposed development has negligible effect on the hydraulic function of the Waipu Lagoons; the reticulated water network shall extend from Parklands Avenue connecting through to Pohutukawa Place – providing the required level of service and protection for the proposed development; the proposed sewer main renewal (being driven by the Council) will provide sufficient capacity to accommodate the existing catchment and the proposed development; and, cut and fill earthworks have been designed to follow the natural contours of the land (utilising existing overland flow paths and natural stormwater discharge locations). Secondary overland flow paths are provided by the

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[40] See EIC Ben Lawn Appendix E for a full copy of those consents
[41] EIC Luke Bunn para 10.1
[42] EIC Luke Bunn paras 11.1-11.11
[43] EIC Luke Bunn para 11.2-12.1; EIC Ben Hawke para 10.1
[44] EIC Luke Bunn para 12.1

proposed carriageways – providing the proposed development with an adequate level of flooding protection.[45]

Mr Whittaker notes that there has been an ongoing and dedicated review and assessment of the subdivision design and location, and design of infrastructure, which will be constructed to service the subdivision and future residents – including the stormwater system and discharge (to be vested in the Council). Further, Mr Whittaker notes that Council's development engineers have provided engineering conditions for the design and approval of the final engineering design – and are satisfied that these will appropriately ensure the safe, efficient and ongoing capacity of services and infrastructure design.[46]

As noted earlier, Mr Bunn highlights the amendments to consent conditions which he considers are required in the circumstances of this case.[47]

(f) ***Kristel Franklin – Senior Engineering Geologist, Red Jacket Ltd – geotechnical considerations.***

Ms. Franklin confirms that she completed a natural hazards assessment in terms of suitability of the existing site for residential development. She found risk levels to be acceptable – and in her expert opinion the proposed subdivision is suitable for residential development in the context of her expertise (i.e. geotechnical matters)[48].

Section 6 of her evidence sets out the geotechnical review that she undertook. That also included assessing the relevant matters under s

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[45] EIC Luke Bunn para 5.2
[46] Officer's Report section 6.6, paras 118-120
[47] EIC Luke Bunn paras 11.2-11.11

106 RMA[49] - which applies in the circumstances of this case, as is also correctly noted by Mr Whittaker[50].

Ms Franklin's evidence comprehensively considers the relevant natural hazards she assessed; being earthquakes, erosion and sedimentation, subsidence, land slippage and falling debris; (and she notes the reason why her evidence does not cover inundation).[51]

She concludes that all the natural hazards assessed had acceptable risk levels; provided normal good practice design and development controls for hilltop properties are implemented. The proposal is suitable in terms of geotechnical matters. She further notes that each new allotment in the development should be supported by a site specific geotechnical investigation in the context of building foundations, excavation and filling earthworks and retaining walls – and is generally in agreement with the Officer's Report and consent conditions within the context of her expertise (subject to appropriate conditions and her comments in respect of same)[52]

Mr Whittaker notes that the Council's engineering assessment essentially reached the same conclusions as Ms Franklin.[53]

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[48] EIC Kristel Franklin paras 5.1, 5.2
[49] EIC Kristel Franklin para 6.4
[50] Officer's Report para 74
[51] EIC Kristel Franklin paras 6.5-6.11
[52] EIC Kristel Franklin paras 6.12-8.1
[53] Officer's Report para 119

(g) ***Christopher Miller – Senior Civil Engineer, (director) Red Jacket Ltd – roading design network.***

Mr. Millers's evidence analyses the suitability of the proposed roading network, and connectivity to the surrounding Bell Block suburb and future development.[54]

He confirms the road network design required to service the proposed subdivision, and helpfully provides a breakdown detailing the proposed roading standards and classifications[55].

Notably, the preliminary road network design and layout integrates well with the surrounding environment (and is in keeping with it), and has the additional benefits set out in paragraph's 6.6 to 6.8 of Mr Miller's evidence – such as improved connectivity and future bus routes.[56]

Mr Miller responds to submissions relevant within the context of his expertise, and also comments on the Officer's Report and consent conditions in that context. He concludes that there are no engineering related issues in respect of the proposal that are an impediment to the granting of consent within the context of his expertise. The proposed roading network has been designed in general accordance with the relevant roading standards, will be suitable to service the proposed lot layout, and will improve connectivity to the surrounding environment.[57]

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[54] EIC Chris Miller para 5.1
[55] EIC Chris Miller paras 6.1-6.5
[56] EIC Chris Miller paras 6.6-6.8
[57] EIC Chris Miller paras 5.2-9.1

(h) ***Mark Georgeson – Engineer/Transport Engineering Specialist, Stantec – transportation effects.***

Following public notification of the application and the receipt of submissions – as Mr Whittaker notes – a number of submissions were received raising concerns about additional traffic generation and potential adverse traffic effects.[58]

Shortly after receiving those submissions, Mr Hawke engaged the expert services of Mr Georgeson (on recommendation from Ms Hooper and counsel) – who has a wealth of experience and, in my submission, is a well regarded, highly respected, expert in his chosen discipline.

Mr Georgeson's involvement in respect of the application is set out in paragraph 3.2 the JWS – and he worked on the JWS Transport with another of this country's highly regarded and respected leading experts in this field (in my experience) – Mr Skerrett.

In my respectful submission, those who submitted about potential adverse transportation effects – and the Commissioner when it comes to making your decision – can be rest assured that the conclusions reached by Messer's Skerrett and Georgeson - as set out in section 10 of the JWS Transport - are highly credible and robust.

Behind the scenes, Mr Georgeson has also helpfully effectively peer reviewed Mr Miller's expert evidence called for the applicant in the context of his expertise and experience.

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[58] Officer's Report section 3.3, para 6.3.3

It is respectfully submitted on the totality of that evidence that the Commissioner can confidently conclude that transportation issues are no impediment to the granting of consent in the facts and circumstances of this case.

(i) ***Ben Lawn – RMA Planner, McKinlay Surveyors.***

Mr Lawn did not prepare the application; but has assisted Mr Hawke with it since February 2022 after it was lodged with the Council on 26 May 2021.[59]

He provides expert evidence about the proposal, the site and surrounding environment, a statutory assessment, an assessment of environmental effects, assesses the application against the relevant planning documents, the Officer's Report and proposed consent conditions, and sustainable management under Part 2 RMA.

In his view, granting consent is consistent with the relevant objectives and policies of the District Plan (both operative and proposed) and Taranaki Regional Policy Statement and all relevant planning documents generally. He is in agreement with Ms Hooper's analysis and conclusions in that regard[60].

The assessment of effects – supported by expert evidence – demonstrates that potential adverse effects can be appropriately avoided, remedied or mitigated – with all potential adverse effects at most minor, and of a temporary nature. He further notes that the subdivision development will provide positive benefits and effects –

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[59] EIC Ben Lawn para 2.1
[60] EIC Ben Lawn paras 9.10, 12.1

and, based on his detailed assessment, is of the view that consent can be granted subject to appropriate conditions.[61]

Mr Lawn is generally in agreement with Mr Whittaker in respect of most matters. However, paragraphs 7.6 – 7.14 record his disagreement and views on requirements for land use consent for earthworks (discussed in section 2.6 of the Officer's Report). Mr Lawn provides a further assessment of the earthworks objectives and policies in that context, in paragraphs 9.2 – 9.8 of his evidence, and finds that the application is, once again, consistent with those.

Mr Lawn notes that the application was lodged under a process in 2021 that did not require a separate land use consent and/or the Form 9 box to be ticked when applying for subdivision consents (which at that time included earthworks as a permitted activity)[62]. At no point did the Council ever issue an RFI, or discuss the particular requirements it had in respect of Form 9, in this context - between May 2021 - up until literally a few weeks ago.[63]

Alteration of Form 9 does not change the scale or intensity of the initial application – there is no reason for a person to now submit on the application that did not already; – a pragmatic approach to these issues should be taken – and Mr Lawn has provided an updated Form 9 in Appendix C of his evidence (if required).[64]

In my respectful submission the evidence of Mr Zieltjes is also on point in this context, where at paragraphs 11-13 he states[65]:

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[61] EIC Ben Lawn para 12.1
[62] EIC Ben Lawn para 7.7–7.8
[63] EIC Ben Lawn para 7.9
[64] EIC Ben Lawn paras 7.13-7.14
[65] EIC Sean Zieltjes paras 11-13

> "Irrespective of the need for additional land use consent the management of the actual and potential adverse effects of earthworks falls within the scope of a subdivision consent, and in my view conditions of consent directly addressing the management of earthworks can be imposed if the Commissioner is of a mind to grant the application.
>
> I agree with Mr Lawn that the engagement process and the most recent assessment of effects have considered the earthworks required to construct the subdivision. This includes impacts on historic heritage values, Waipu and landform.
>
> In this instance I consider it necessary that the subdivision consent includes conditions that manage earthworks given the sensitivity of the receiving environment; and ensure integration between the construction of the subdivision and development of individual lots."

I agree with Mr Zieltjes that the issue, in my submission, comes down to the "scope" of an application – considered below.

Legal Framework re Scope of an Application

A starting point is *Arapata Trust Ltd v Auckland Council*[66], which held that a resource consent is properly understood as authorising an activity, rather than as authorising a breach of a particular rule.

The circumstances in *Arapata* were somewhat different, as it concerned the question of whether the holder of a *current but unimplemented* land use resource consent requires any further resource consent for the already consented use of land - when a new or changed plan provision comes into effect?

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[66] *[2016] NZENVC 236*

In that context the Court stated, however, at [35] (emphasis added):

> On first glance, it appears from this statement as if the resource consent is limited to those listed contraventions of certain rules. In my opinion that is not the correct way in which to interpret and understand a resource consent **and the form of the document is not determinative of its substantive effect**. The relevant statutory provisions, as discussed above, do not support such an approach. In reality, those listed rules which are contravened by the proposal do not, by themselves, describe the use of the land. The listed rules are the reasons why resource consent was required, but the reasons for the decision address "the proposed development" in its entirety and the conditions attached to the resource consent (which form part of it) relate to the whole of the works. The use of land is described in the proposal, including the plans and drawings accompanying the application and which are incorporated into the resource consent by general condition ...

And, at [37]-[38] (emphasis added):

> The Council's position, if accepted, would effectively mean that a resource consent only authorises, for the purposes of s 9(3)(a), those contraventions of district rules that might be specifically provided for in the terms of the consent. That approach to the interpretation of s 9(3) would mean that a person undertaking an activity pursuant to a resource consent in such terms would require a further resource consent should there be any change to any relevant rule applicable to that activity at any time in the future. **In the event of any change to the operative plan or any review of it by a proposed plan, every holder of a resource consent would need to determine whether any new or changed rule affected their use of land and, if it did, apply for a further resource consent so that the use of land (in terms of its**

> **contraventions of rules) would still be expressly allowed under the new or changed rule**.
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> That outcome would impose a significant on-going compliance burden on every person in the district using land pursuant to a resource consent. It would put all such persons in significantly worse position than any person continuing to use land in a similar way but as an existing use under s 10 of the Act and protected by s [10] A person whose use of land could occur under existing use rights would not be affected by any new or changed rule because s 10 of the Act specifically allows lawfully established uses to continue regardless of any such rule. There does not appear to be any reason why such a significant difference in the operation or effect of s 9(3) should exist between the exception for land uses which are the subject of a resource consent under s 9(3)(a) and the exception for those which are subject to existing use rights under s 9(3)(b).

In my respectful submission, logic would suggest that if the above approach is to be taken to a consent application that has been *granted*, then a similar approach should be taken to a consent application that is still in train; or there is even more logic to doing so. This is because if the activity for which consent is being sought is now subject to any new or changed rule - its effects can be assessed against the matters arising in any such new or changed rule.

The issue of assessing relevant effects of the activity by reference to relevant rules – in substance where there was cross-over in rules - was stressed by the High Court in *McMillan v Queenstown Lakes District Council*[67]. Responding to an argument that *Arapata* resolved the matter, the Court went on to state at [105]:

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[67] *[2019] NZRMA 256*

> It is not necessary for me to resolve that issue. Mr Ferguson and Ms Leith appear to agree that, from a policy perspective, this rule breach was probably addressed as part of the Council's consideration of breaches of other transport rules. Access, cross-over, and manoeuvring effects were assessed in the AEE and by the Council's traffic consultant when the non-complying proposed driveway for the site was considered. As Mr Ferguson acknowledged, these transportation rules, including vehicle crossing, length, and reverse manoeuvring, which were addressed in the consent application, overlap with the onsite queuing rule.

It is submitted that this would again suggest – that, provided all currently applicable relevant rules (and the effects to which they relate) are assessed at the time an application is considered and determined - then there is no error of law - or need for further consent applications to be made - with the potential for notification - inefficiency of process - and potential lack of integrated decision-making.

"Scope" is also about consents being clear in their construction. For example the Court of Appeal in *Gillies Waiheke Ltd v Auckland City Council*[68] posed the objective question[69] as "*what, if anything, were there by way of limitations or conditions on the consent as granted, when viewed from [the] perspective*" of "*the reasonable observer*" - faced with information pertaining to the consent and accompanying conditions. The issue was the fact that a figure stated on a plan for earthworks volumes did not include additional necessary earthworks, particularly for the driveway. The Court of Appeal agreed that on an ordinary everyday reading, the word "proposed" in relation to the volume of earthworks depicted on the plan was of great significance.

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[68] *CA284/03, 8 March 2004*

[69] At [23]-[24]

The Court of Appeal further observed (at [25]) that if the word does not mean what it apparently says, then:

> A reader would have to work out that the designation at the bottom left of the plan referred to the shaded areas, and then go across to the right-hand side and the 765 m3 limitation, and then to apprehend that there are other earthworks (unspecified by volume) which had to be undertaken for the construction of the driveway and other measures of that character.

The Court concluded by noting that, "*a condition to a resource consent is no place for some sort of puzzle, and it seems most unlikely other persons would read it in that way*"[70].

The point being that, in this (56 Pohutukawa Place) case before you, there was a clear 'Red Jacket Earthworks Plan' dated 25 May 2021 – contained in the 'Red Jacket Engineering Report' dated May 2021 - provided as part of the application; and referred to in evidence called for the applicant in this case[71]. That plan shows the locations and extent of the cut and fill required at the time, as well as the total volumes.

The historical cut and fill occurring on the site was also identified[72] - relative to what is shown on the earthworks plan in respect of the subdivision.

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[70] Ibid

[71] See for example EIC Ben Lawn paras 2.4(i), (l); EIC Luke Bunn, paras 2.2(i), (l)

[72] See 26 May 2021 AEE, Scheme Plan: Site Disturbance 1973-2021, dated 9 May 2021

In addition, the AEE identified an earthworks rule as a trigger for consent:

> SASM-R8 Earthworks on or within 50m of a scheduled site or area of significance to Māori[73].

The AEE also went on to identify where earthworks are permitted under the then ODP rules, at Table 1, pg 20 in respect of Rules RES 45, 47 and 48.

It was also noted in the AEE in terms of SUB-P8 (emphasis added) that:

> The subdivision layout **seeks to minimise disturbance of the existing landform**, with existing contour taken into consideration when designing the road layout and overland secondary flow paths. **Earthworks associated with formation of building platforms at the time of building has been taken into consideration with no significant differences in level anticipated due to the flat/rolling contour of the site and lot size allowing for transition between adjoining lots**.[74]

Notably, this passage from the AEE specifically and expressly allows for relevant earthworks – for formation of building platform activities – required to construct houses on all of the residential lots applied for – and expressly and implicitly applies for consent to authorise such activities. It is important to remember that this proposed residential subdivision is occurring on land that has been deemed suitable for residential use for almost 45 years now – in the context of the scope of

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[73] See AEE para 7.1, pg 12; and EIC Ben Lawn para 7.7

[74] See AEE, pg 30

the application for consent. Context is everything: *McGuire v Hastings District Council*[75].

And, in respect of the then proposed rule – the AEE included Rule SASM-R8; at Table 2, pg 32 – with a relatively lengthy discussion in respect of same.

Since under the (then) relevant ODP the above earthworks were permitted components of the activity (and the PDP rules had no legal effect still at that point[76]) consent could not be granted for them. As stated by the Court of Appeal in *Cable Bay Wine Ltd v Auckland Council* at [16], emphasis added[77]:

> [W]e agree with [the High Court Judge's] assessment that the judgment in *Zindia* does not imply that where resource consent is granted for a proposal which includes both permitted activities and those that require a resource consent, the consent grants consent for the permitted activities. We regard the case as contemplating that **all activities proposed in an application will be assessed holistically, to assess the effects of granting consent to the proposal**. But the consent granted to the whole does not mean that those elements that are permitted activities are also granted consent.

As indicated above, the effects of earthworks were identified as part of the AEE and were assessed – even though they were permitted.

Other than the "form", there can be no doubt about this in my submission.

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[75] *[2002] 2 NZLR 577 (PC),* at pg 589
[76] EIC Ben Lawn para 7.7
[77] *[2022] NZCA 189*

Form 9

In *Aotearoa Water Action Inc v Canterbury Regional Council*[78], Churchman J had to determine a declaration seeking that the grant of water permits were for general "industrial use" (as that was how they have been later summarised in the Council's record of what the consents were for). However, the applications had defined the purpose of the water take in more specific terms, one being for use in the operation of a wool scour, the other for a meat processing plant. In that context, Churchman J found it necessary to look to the individual applications *and supporting documents* to ascertain the purpose specified in the information, as a resource consent cannot be wider than the application itself[79].

Justice Doogue in *Marlborough District Council v Zindia Ltd*[80], at [98] supported this, stating (emphasis added):

> *Aotearoa Water Action Inc v Canterbury Regional Council* is therefore clear that while a resource consent cannot be wider than the application itself, ***the purpose of an application can inform its scope*** **(and therefore the scope of the resulting consent)**.

Based on the analysis of the AEE (an important "supporting document" for an application) - and the evident "purpose of the application" (ie to include earthworks) - that should be the end of the matter. Anyone reading the AEE would have clearly understood that the application was intended to include earthworks in my submission.

It is almost, in practice, inconceivable for any major subdivision to exclude earthworks. How can roads be created to vest, which

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[78] *(2018) 20 ELRNZ 793*

[79] See *Aotearoa Water Action* supra, at [47]-[52], [129], [132]

[80] *[2019] NZHC 2765*

Councils almost always require to be constructed before s224(c) certification is given? How can "in-ground" infrastructure be provided, grading for overland flow paths and the like, if earthworks do not form an integral part of a subdivision consent? Certainly, in my experience, most Councils routinely put the earthworks conditions as part of the subdivision consent or section of a combined subdivision and land use consent. As noted earlier, when the application was filed (in May 2021) it was common practice then for subdivision consents to include earthworks, (as did the application).

Form 9 was filled out as the Commissioner will be aware.

The Commissioner will also be aware that only the "Subdivision resource consent" box was ticked, with the "land use resource consent" box left blank. But, to reiterate, as Mr Lawn notes in his evidence (as canvassed earlier above) – the Council's practice at the time the subdivision consent was lodged – was effectively, just to require applicants to tick the subdivision box.

Further, there is authority that a consent stated as being for one type of consent can actually include another type of consent.

In the recent Environment Court case of *Abrahamson v Canterbury Regional Council*[81], Judge Steven observed at [115-117] (emphasis added) that:

> At this juncture, it is relevant to refer back to *Hastings*, where the statutory distinction between the various resource consents was noted with reference to observations made in *Meadow 3 Ltd v van Brandenburg and QLDC* that:
>
> … It is typical in comprehensive developments for there to be the need for more than one type of resource consent. In this case there plainly had to be at least a land use consent and a subdivision consent.

[81] *[2023] NZEnvC 255*

> **The RMA creates a separate regime for land use consents and subdivision consents, subject to the qualification that there can be a degree of overlap**.
>
> A land use consent is a consent to depart from s9. All uses of land are permitted unless a rule in a plan or a proposed plan states otherwise.
>
> A subdivision consent permits a departure from s11. The reverse presumption applies. With limited exception (some matters are specifically excluded from s11), no survey plan may deposit under the Land Transfer Act without following the s11, survey plan, s223, s224 deposited plan process.
>
> **That distinction underpins the Environment Court's observations in *Hastings* that if a subdivision consent does authorise construction of a house, "it will actually be both a subdivision and a land use consent".**[82]
>
> **In this case, the** CPW **discharge permit is actually both a discharge permit and a land use consent**, although only in relation to the associated properties. **That reflects the basis on which the application was originally made**.

The point being, as noted, that a consent stated as being for one type of consent can actually also include another type of consent – when considering the basis on which the application was originally made.

So, this comes back to what activities the application for (subdivision) consent sought covers. The rule triggers that appear to be at issue are:

(a) Rule SASM-R17 (Earthworks within the extent of a scheduled site or area of significance to Māori, or within 50m of the extent of a mapped SASM);

(b) EW-R13 (General earthworks). Note – this rule is still under appeal to the Environment Court and is currently unresolved.[83] So it is not yet treated as operative under s 86F(1)(b) RMA. In

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[82] See: *Hastings District Council [2013] NZEnvC 102*, at [10]

[83] EIC Ben Lawn, Table 2, pg 13

> my submission, therefore, there is a question for the Commissioner as to what weight, if any, this rule can be given in the circumstances of this case. Further, I note during discussions with Ms Hooper and Mr Lawn on 10 April and 11 April 2025 – that because of the overly restrictive nature of this rule (triggered by restrictive Earthworks Effects Standards) – the Council is planning to do a Plan Change/Variation of this rule once it becomes operative – to address that overly restrictive nature. I respectively invite the Commissioner to discuss these matters further with Mr Lawn and Ms Hooper (and of course the other planning witnesses in this case); (and, Mr Bunn in terms of practical implications from an engineering perspective; if the Commissioner wishes to do so).

It is now understood that in the structure of the PDP, these are now categorised as land use rules.

Earlier I identified that PDP rule "SASM-R8 Earthworks on or within 50m of a scheduled site or area of significance to Māori" had been considered in the AEE; that corresponds with what is now Rule SASM-R17 - so that clearly demonstrates that the substance of the matters (or activities, ie earthworks within 50m of a mapped SASM) under Rule SASM-R17 - were part of the application and were assessed as part of the application.

So that leaves EW-R13, which if not met, requires consent as a restricted discretionary activity, with discretion limited to the following:

1. The extent to which the land disturbance or earthworks will compromise archaeological sites, sites and areas of significance to Māori or historic heritage and whether any adverse effects can be appropriately remedied or mitigated.
2. Whether the cut face and any retaining structures can be concealed behind development or effectively landscaped.
3. The potential to create new or exacerbate existing natural hazards, impact natural drainage patterns, redirect overland flow paths or flood flows or create instability, erosion or scarring.
4. Whether the earthworks are of a type, scale and form that is appropriate for the location and character of the zone, including the effects on visual amenity, and impacts on existing natural landforms and features.
5. Management of visual amenity effects through landscape treatment, site reinstatement and screening.
6. The management of the effects of dust, stormwater, sediment, noise and vibration.
7. The control of vehicle movements to and from the site to manage effects on traffic safety and amenity.
8. The effects of non-compliance with any Earthworks Effects Standards and any relevant matters of discretion in the infringed effects standards.
9. The matters in EW-P3 to EW-P6

These are all matters that appear to have been covered through the process to date.

The physical earthworks works, and intended approach of undertaking them, are all capable of being addressed through conditions in the usual way.

Forward progress

In my submission:

(a) There is no jurisdictional basis to refuse to deal with the "new" PDP land use triggers for consent now, and insist they be addressed through a separate, later process.

(b) The activity has not changed in scope in any disentitling way, noting the best summary as to scope being the following by Wild J in *Atkins & Ors v Napier City Council & Anor*[84]:

> I consider the test, as developed by the Environment Court and Court of Appeal through a series of cases, is whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:
>
> - The scale or intensity of the proposed activity, or
> - The altered character or effects/impacts of the proposal.

(c) The scope and the activities for which consent is sought have not changed the way Wild J has summarised; Mr Lawn agrees.[85]

(d) What has changed is that the Council has added some new rules relating to earthworks and changed the way it has characterised them as being land use activities, not (just) subdivision activities.

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[84] *(HC) CIV 2008-441-000564 [18 December 2008],* at [20]
[85] EIC Ben Lawn, para 7.13

(e) If such changes would not invalidate a consent that has been granted (or require extra consents to later be granted), then it cannot logically follow that an application for activities that have not yet been granted must seek separate consents.

(f) All issues and activities are on the table and can be dealt with substantively in these proceedings; if need be by a formal addendum to Form 9 (as included in Mr Lawn's evidence at Appendix C) - or simply as a matter of consideration and assessment at this hearing (as pragmatically suggested by Messers Lawn and Zieltjes). It is not as if a new activity has suddenly been included that (say) significantly increased the scale or intensity. A couple of new rules have taken effect, which, in my submission, have effectively been addressed in the application and further evidence.

(g) It would, therefore, be unlawful, and unreasonable, for the Council to proceed in any other way. It would certainly be an unnecessary triumph of form (literally) over substance, as well as being totally inefficient and ineffective in my respectful submission.

(j) *Kathryn Hooper – RMA Planner, (director) Landpro Ltd* – peer review.

Ms. Hooper peer reviewed Mr Lawn's evidence and provides important evidence in this case from a strategic planning perspective, considering the activity against the higher order planning documents relevant in this case.[86]

[86] EIC Kath Hooper para 4.1

Section 8 of her evidence helpfully sets out the history of the zoning of subject site – which has been zoned residential for approximately 45 years. The proposed development is clearly contemplated in that context.[87]

Ms Hooper has been part of the consultation at critical times between the applicant and mana whenua/tangata whenua – and is of the opinion that the proposal now presented by the applicant is consistent with ss 6(e), 7(a), and 8 RMA; and is consistent with the policies of the NPS-FM 2020 in that context; and with the relevant policies of the Taranaki Regional Policy Statement (RPS); and is consistent with the Strategic Objectives in the PDP in this context.[88]

In her view, the significant effort that has gone into consultation from both the applicant and Puketapu Hapu to share their respective information and perspectives, has enabled understanding of the connectivity of the land to the waterways from a cultural, physical and ecological perspective.[89]

Appropriate, integrated, measures to avoid remedy and mitigate potential adverse effects have been developed in a holistic manner – (meaning that the revised application is consistent with ss 6(e), 7(a) and 8 RMA, the NPS-FM, the RPS and the Strategic Objectives in the PDP, in her opinion).[90]

It is also Ms Hoopers expert opinion that, the proposal will have far reaching positive economic effects for New Plymouth district and Taranaki region (particularly in light of Mr McIlrath's evidence).[91]

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[87] EIC Kath Hooper para 8.3
[88] EIC Kath Hooper para 9.3
[89] EIC Kath Hooper para 9.4
[90] EIC Kath Hooper paras 9.3-9.6
[91] EIC Kath Hooper paras 10.1-10.9

Critically, in the context of the NPS-UD - and analysing the relevant objectives and policies in respect of same – and taking into account Mr McIlrath's evidence – and Mr Lawn's prior submissions on the NPDC Future Development Strategy (and most recent Housing and Business Capacity Assessment) – she finds that the proposal is consistent with all of the relevant objectives and policies and, moreover, the proposed site and development is significant – and is relied upon - to meet housing demand in the New Plymouth district under the NPS-UD for the comprehensive reasons she canvasses.[92]

Ms Hooper also finds the proposal consistent with the RPS (noting that it needs to be updated to reflect the policies in the NPS-UD) – and also with the Strategic Objectives relating to urban development under the PDP.[93]

Noting that NPS-FM matters are now dealt with under the recently granted TRC consents (and that the proposed activities were consistent with those documents and the Regional Plans at the relevant time) – Ms Hooper also observes that many of the submissions in opposition to the application have now been dealt with under those TRC consents (and/or in evidence now before the Commissioner) – and of course that the overwhelming number of the submissions that were in support of proposal reflect the issues that she has covered under the NPS-UD – and the positive economic benefits of the development.[94]

Ms Hooper is generally in agreement with Mr Whittaker in terms of his assessment of the higher level planning documents under the Officer's

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[92] EIC Kath Hooper para 5.2(c), paras 11.1-11.17
[93] EIC Kath Hooper paras 12.1-13.7
[94] EIC Kath Hooper paras 14.1-15.3

Report (that she refers to in her evidence) – and concludes that the proposed subdivision is clearly consistent with all of the relevant statutory instruments in this case, and with the purpose of the RMA.[95]

Law

10. In this case, s 104(1) identifies the matters to which the consent authority must have regard, subject to Part 2:

> **[104 Consideration of applications**
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and [and section 77M], have regard to -
> (a) any actual and potential effects on the environment of allowing the activity; and….
> [[(b) any relevant provisions of-
> (i) a national environmental standard:
> (ii) other regulations:
> (iii) a national policy statement:
> (iv) a New Zealand coastal policy statement:
> (v) a regional policy statement or proposed regional policy statement:
> (vii) a plan or proposed plan; and]]
> (b) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

11. The Supreme Court has recently confirmed that the approach to sustainable resource management requires a "structured analysis" – recognising that a weighing exercise is required in respect of judgements to be made (rejecting the long followed "overall judgement" approach).[96]

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[95] EIC Kath Hooper paras 17.1-17.2

[96] *Royal Forest and Bird Protection Society of New Zealand v New Zealand Transport Agency, [2024] NZSC 26* at [195] – [226]

Part 2 RMA

12. It is now well settled since the Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council*[97] that Part 2 remains relevant and directly "accessible" in the resource consent context. The longstanding observation of the Environment Court in *Shirley* also remains relevant:[98]

> 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?

13. The purpose of the RMA is set out in s 5:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

14. In my submission, the proposal will clearly contribute in a positive way to the social, cultural, and economic wellbeing of people and the communities of Bell Block, New Plymouth and Taranaki generally in terms of section 5(2) of the RMA; and is suitable for consent on

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[97] *[2018] NZCA 316*

[98] *Shirley Primary School & Anor v Christchurch City Council [1999] NZRMA 66 (EnvC),* pg. 67,(2); pg. 99,(115).

appropriate conditions. In particular, it is submitted that the caveats in ss 5(2)(a) to (c) are met.

15. 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.

16. In this case, the relevant PDP provisions are recent, generally coherent and are unlikely to add much to consideration of a usual consent application such as this.

17. Notwithstanding the above, for completeness, in the context of the ODP, and, moreover, the PDP, and Part 2 enshrined therein - it is submitted that the proposal recognises and provides for the nationally important matters in ss 6(a), (d), (e) and (f); and, has particular regard to ss 7(a), (aa), (b), (c), (d), (f), and (g).

18. In terms of ss 7(b), (c), (f) and (g) - the proposal will maintain and enhance amenity values, and the quality of the environment, in the context of the relevant zoning - and will integrate well with the surrounding environment - and provide an appropriate and sound use for a finite resource.

19. Amenity values can be assessed by the consent authority (in terms of assessing effects on the environment) - which must apply the law objectively in performing these functions: *Gisborne District Council v Eldamos Investments Ltd*[99].

20. The relationship of Māori (with ancestral lands, water etc), kaitiakitanga and the principles of the Treaty of Waitangi/Te Tiriti o Waitangi[100] are

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[99] *HC GIS CIV-2005-485-001241 [26 October 2005]*, Harrison J, at [42]
[100] Under ss. 6(e), 7(a) and 8 RMA

strong directions to be borne in mind at every stage of the planning process: *McGuire*.[101]

21. In terms of ss. 6(e), 7(a) and 8 - the applicant, has placed appropriate emphasis on gaining an understanding of Māori cultural values, and being guided by them. The applicant has undertaken appropriate consultation with mana whenua/tangata whenua (being "major stakeholders"[102]), whose participation in the proceedings have been properly enabled, and whose views have been (and will be) appropriately taken into account.

Section 104(1)(a) RMA

22. Section 104(1)(a) requires the consideration of any actual and potential effects on the environment of allowing the site to be developed and used as proposed.

23. As canvassed earlier in these submissions, actual and potential positive effects must be considered; as well as actual and potential adverse effects.

Adverse Effects

24. These have already been comprehensively addressed in the application, evidence for the applicant, Officer's Report and earlier in these submissions.

25. Having regard to their mitigated version - it is respectfully submitted that, on the totality of the evidence in this case - potential adverse effects are not of such significance to warrant declining consent in this

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[101] Supra, at pg 594

[102] EIC Ben Hawke para 7.6

case (subject to the implementation of appropriate conditions). The proposal fits well within the surrounding environment – sits well, with the relevant statutory considerations – and has many positive attributes which significantly outweigh any potential (mitigated) adverse effects; on the evidence, facts and circumstances of this case.

Positive Effects

26. On the evidence, it is submitted that the positive effects of the proposal are considerable, both district wide and regionally. The proposal will provide a variety of positive benefits and effects for people and communities. In particular, for example, (but not necessarily limited to)[103]:

- new quality homes for local people, with lot sizes which are generous and ideal for families[104];
- opportunities for employment, support of the trade sector, support of local businesses and keeping local expertise in New Plymouth[105];
- additional residential lots supporting housing supply, and providing housing choice and differentiation (in terms of typology), with locational advantages and price advantages – facilitating economic benefits and development opportunities[106];
- positive contributions to sustainable urban form in Bell Block, and at a broader district wide scale, also contributing to centre vitality – and supporting the district's growth, and assisting to meet short term housing demand - as well as medium to long term demand[107];

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[103] See also, for example, Submissions in Support of application; and Officer's Report para 122
[104] EIC Ben Hawke para 8.5
[105] Ibid
[106] EIC Lawrence McIlrath para's 5.7, 8.17, 9.2
[107] EIC Lawrence McIlrath para's 8.12, 8.13, 8.15, 9.2, 10.1-10.4

- will deliver economic benefits for the district and region generally[108];
- appropriate recognition and protection of cultural values and sites[109];
- a relatively small area of grazed degraded wetland at the 'head' of the western lagoon complex (where stock currently have access to wetland vegetation and a wet area) – and a small area of the 'head' of the eastern lagoon complex will be retired and planted with eco-sourced ecologically-appropriate indigenous species[110];
- a 20 metre wide riparian buffer to be established and maintained including additional fencing and indigenous planting, using ecologically-appropriate eco-sourced species, matched to local soil conditions, to protect wetland margins; which will also improve habitat for indigenous plants and fauna[111];
- measures to address the potential for weeds to spread and ongoing related monitoring and maintenance[112];
- measures to control pest animals that are predators of indigenous birds and game birds[113];
- roading layout which is in keeping with the surrounding environment; and, with added benefits such as roading alignments with targeted operating speeds, efficient traffic movements, purposeful parking layouts, and improved connectivity for roading, pedestrians, cyclists, alternative modes of transport and future bus routes[114]; and,

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[108] EIC Lawrence McIlrath, generally
[109] EIC Ivan Bruce para 8.4
[110] EIC Willie Shaw para 7.2(g)
[111] EIC Willie Shaw para 7.2(g)
[112] EIC Willie Shaw para 7.2(g)
[113] EIC Willie Shaw para 7.2(g)
[114] EIC Chris Miller para 6.6

- road network design to suit efficient lot layout to benefit cultural, commercial and aesthetic aspects – while working in with the natural contours of the land[115];
- creation of new reserve areas which will enhance social values by providing public access to the Waipu Lagoons and their amenity values and surrounding area[116];
- assisting to address the district's and country's housing shortage and shortage of good quality sections to build on[117];
- good connections to active transport modes (the coastal walkway), shops and local amenities[118] (which will benefit people living in the newly built houses in the proposed subdivision in terms of close proximity to those shops and amenities);
- wide reaching positive effects on the economy (in terms of employment opportunities, work for trades people and service providers, assisting to keep people in New Plymouth (in terms of increased opportunities for employment etc)) and good for local businesses in general.[119]

27. The numerous significant positive effects of the proposal are thoroughly canvassed in the Officer's Report and all of the evidence for the applicant.

28. In my submission, on the facts and circumstances of this case, there can be no doubt whatsoever that the subdivision development will be appreciably positive for the people and communities of New Plymouth district (and beyond).

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[115] EIC Chris Miller para 6.8
[116] EIC Ben Lawn paras 8.69, 12.1(d)
[117] EIC Kath Hooper para 5.2(a)
[118] EIC Kath Hooper para 15.2(b)
[119] EIC Kath Hooper para 15.2(e) – (i)

Sections 104(1)(b) & (c) RMA

29. All the relevant provisions applicable under s. 104(1)(b) and (c) have been (predominantly) thoroughly canvassed in this case by the Officer, Mr. Lawn and Ms Hooper. They are in agreement that the proposal is not contrary to, and is consistent with, those provisions in my submission[120]; as is Mr Zieltjes.[121]

30. The proposal adequately serves the higher order and regional policy frameworks and specific ODP and PDP objectives and policies; the proposal is, therefore, entirely appropriate in this context.

31. 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*[122] referring to the Court of Appeal's well known decision in *Dye v Auckland Regional Council*[123]. 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 Whittaker, Mr Lawn, Ms Hooper and Mr Zieltjes have all correctly applied that approach; and, have undertaken a "structured analysis" in respect of same.

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[120] Officer's Report, paras 171, 177, 182, 190; EIC Ben Lawn paras 9.1-9.10, 12.1; EIC Kath Hooper paras 9.3, 9.6, 11.4-14.3, 17.1; EIC Sean Zieltjes paras 27-45

[121] EIC Sean Zieltjes, para 45

[122] Supra, para [73]; see also *Royal Forest and Bird Protection Society of New Zealand Inc*, supra at [79]

[123] *[2002] 1 NZLR 337 (CA)* at [25]

Other Legal Issues

Property Values

32. I agree with the Officer's view that the submitters' contended property devaluation effects are irrelevant[124]. The Environment Court has generally held in a number of decisions now that land/property values are not an effect for the purposes of the assessment under s. 104 RMA; the physical effects on the environment are of more importance to the case – and the Court confines itself to considering the direct effects on the environment (rather than speculative effects, such as property devaluation which can be caused by many different things locally and/or globally).

33. In *Tram Lease Limited v CJM Investments Limited*[125], the Environment Court noted that the principles are not complicated or controversial and summarised them as follows (citations omitted):

> The starting point is that effects on property values are generally not a relevant consideration, and that diminution of property values will generally simply be found to be a measure of adverse effects on amenity vales and the like: ***Foot v Wellington City Council***.
>
> Similarly in ***Bunnik v Waikato District Council***, the Court held that if property values are reduced as a result of activities on an adjoining property, then any devaluation experienced would no doubt reflect the effects of that activity on the environment. The Court held that it was preferable to consider those effects directly rather than the market's response, because the market can be an imperfect measure of environmental effects.
>
> In ***Hudson v New Plymouth District Council***, the Court held that people concerned about property values diminishing were inclined to approach the matter from a rather subjective viewpoint. The Court held that such people

[124] Officer's Report, para 128

> become used to a certain environment, and might consider that property values would drop after physical changes occurred, however a purchaser who had not seen what was there before, would take the situation as he/she/it found it at the time of purchase, and might not be greatly influenced by matters of moment to the present owner or occupier.
>
> We agree with those findings in those cases and the reasoning behind them.

Consent Conditions

34. In the context of these submissions on this point, the applicant has made a number of suggested amendments to the consent conditions provided as a draft in the Officer's Report which are, it is submitted, reasonable and appropriate on the basis recommended; for the reasons canvassed in the applicants expert witnesses' evidence.

35. The power to impose conditions on a planning consent is not unlimited. In *Housing New Zealand Limited v Waitakere City Council*[126] the Court of Appeal held[127] that the test applied in the House of Lords decision in *Newbury District Council v Secretary of State for the Environment*[128] should be applied by New Zealand Courts in relation to the provisions of the RMA.

36. That test, in relation to the validity of resource consent conditions at law, is as follows:

- The condition must be for a resource management purpose, and not for an ulterior one;

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[125] *[2015] NZEnvC 139,* at [56]-[60]
[126] *[2001] NZRMA 202 (CA).*
[127] At [14] and [18].
[128] *[1980] 1 All ER 731.*

- The condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached;
- The condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.

37. Applying the Newbury test in *Cookie Munchers Charitable Trust v Christchurch City Council*[129] the Environment Court expanded on that in terms of "appropriateness" under s. 108 RMA[130]; and recorded[131] that an appeal to the Environment Court against conditions of consent may frequently involve a two-stage process:

- Firstly, an inquiry as to whether or not the conditions in question satisfy the Newbury tests. If they do not, they are not valid conditions and simply cannot be imposed;
- If the Court considers that the conditions meet the Newbury tests it must still determine whether or not they are the most appropriate conditions to achieve the purpose of the RMA; and that the "appropriateness" test is a different test to those identified in Newbury.

38. The Court further observed[132] that whether or not a condition is "appropriate" must be determined (inter alia) having regard to Part 2 RMA; more particularly, whether or not imposition of the condition is appropriate in light of the purpose of the RMA, namely promotion of the sustainable management of natural and physical resources. The conditions must be considered on their merits[133].

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[129] *NZEnvC W090/2008.*
[130] At [23]-[34].
[131] At [33].
[132] At [31].
[133] At [34].

39. Considered on the merits, I agree with the Officer's issues and reservations regarding consent conditions that restrict or ban domestic pets from a suburban area, for the reasons he states in the Officer's Report[134]. It is submitted that conditions imposed in respect of same would be both unreasonable and inappropriate for those reasons. Particularly when considering that where a local authority imposes conditions - it assumes public responsibility for ensuring they are strictly adhered to - and the public is entitled to hold the authority responsible in that respect.[135]

40. For those reasons, in my submission, such conditions would be unreasonable in that no reasonable planning authority duly appreciating its statutory duties could approve it; and would be inappropriate in the context of achieving the purpose of the RMA.

41. However, Mr Shaw's evidence considers that it would be prudent to limit the number of domestic cats that can be held, say to three, per property – which would enable the implementation of enforcement action by the Council if a property owner was to harbour/house a number of domestic cats[136]. As noted in Mr Hawke's evidence (and earlier in these submissions), he accepts Mr Shaw's expert advice[137].

Submissions and Conclusions

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

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[134] Officer's Report, paras 109-111

[135] *Woodland Farms v Otamatea County A065/85 (PT)*; *MWD v Rangiora District A008/86 (PT);* as cited in Brookers Resource Management, Thompson Reuters, at para A108.15(1)

[136] EIC Willie Shaw para 10.8

[137] EIC Ben Hawke para 10.1

43. The applicant has put forward a firm proposal for developing and efficiently using, maintaining and enhancing, the natural and physical resources of the site (and surrounding environment) in a way which will enable people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety - without significant adverse impact on the environment.

44. Furthermore, the proposal achieves a high degree of certainty about the appearance, location and intensity of the future use and development of the site; and provides future certainty to the community about the appearance of the site, and its integration with the surrounding environment. The proposal respects and enhances the surrounding environment in my submission; and, sits well with the relevant statutory considerations.

45. Amenity values is invariably a central issue - which overlaps with the quality of the environment; and it is submitted that the applicant has sufficiently addressed the possible adverse effects, and ways to avoid, remedy or mitigate them, to the point where those effects are not an impediment to the granting of resource consent.

46. In terms of residential urban character, cultural values, heritage, landscape, and amenity values – it is submitted that - the proposal is appropriate development in this particular location - and will have minor, or less than minor, adverse effects on the environment.

47. Subdividing the land will also be an efficient use and development of the finite site resource; providing a safe, modern living environment for people; and employment for people; and with strategic proximity to major employment areas in New Plymouth[138].

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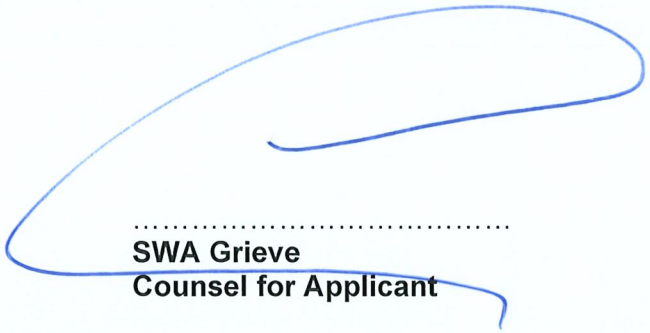
[138] EIC Lawrence McIlrath para 10.2

48. Clearly, in my respectful submission, the development will enable people in the community by providing access to high quality new housing, with new opportunities in terms of location, typologies and price points and associated social, cultural, and economic wellbeing. It will be "an attractive residential destination".[139]

49. The significant positive effects and benefits that the proposal will bring far outweigh the limited (mitigated version) adverse effects in the circumstances of this case.

50. 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); and any adverse effects that might occur can be adequately and appropriately mitigated.

51. Following a "structured analysis" – and considering and weighing all the relevant facts, circumstances and evidence in this case - it is respectfully submitted that the proposal meets "the one ultimate question to be answered"[140] - the purpose of the RMA will be fulfilled – as the proposal promotes the sustainable management of natural and physical resources; accordingly, the necessary consents should be granted.



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SWA Grieve
Counsel for Applicant

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[139] EIC, Lawrence McIlrath, para 10.2
[140] *Shirley*, supra