

# Decision following the hearing of an application for resource consent under the Resource Management Act 1991

## Proposal

To construct 72 residential apartments and associated vehicular access, parking and landscape arrangements, non-compliances with residential noise levels and an associated unit title subdivision.

This resource consent is **REFUSED**. The reasons are set out below:

<b>Application number:</b>	BUN60397498
<b>Site address:</b>	96 Beach Haven Road and 13 Cresta Avenue, Beach Haven
<b>Applicant:</b>	Beach Haven Road Apartments Limited
<b>Hearing commenced:</b>	4 and 5 July 2023, 9:30am
<b>Hearing panel:</b>	Richard Blakey (Chairperson) Lisa Mein Vaughan Smith
<b>Appearances:</b>	<p><u>For the Applicant:</u> Beach Haven Road Apartments Limited represented by: Jeremy Brabant, Legal Leon Da-Silva, Corporate Rachel Morgan, Planning Hannah Pettengell, Planning Justin Newcombe, Landscape Design Kevin Brewer, Urban Design &amp; Architectural Kyle Meffan, Geotechnical Sally Peake, Landscape Michael Williams, Civil Engineering Mike Nixon, Transport Fadia Sami, Acoustic</p> <p><u>For the Kaipātiki Local Board:</u> John Gillon, Chairperson Erica Hanna, Member</p> <p><u>For the Submitters:</u> Crispin Robertson Charles Ronald Grinter Airedale Property Trust, represented by Rachel Beer Cherylee Anne Lonsdale, accompanied by: John Hudson, expert witness</p>

	<p><u>For the Council:</u>  Erik Oosthuizen, Team Leader  Mark Ross, Planner  Michelle Chan, Urban Designer  Gabrielle Howdle, Landscape Architect  Gil Salvador, Development Engineer</p> <p>Patrice Baillargeon, Senior Hearings Advisor</p>
<b>Hearing adjourned</b>	5 July 2023
<b>Commissioners' site visit</b>	28 June 2023
<b>Hearing Closed:</b>	11 August 2023

### Introduction

1. This decision is made on behalf of the Auckland Council (**the Council**) by Independent Hearing Commissioners Richard Blakey (Chairperson), Lisa Mein and Vaughan Smith, appointed and acting under delegated authority under ss.34 and 34A of the Resource Management Act 1991 (**the RMA**).
2. This decision contains the findings from our deliberations on the application for resource consent made by Beach Haven Road Apartments Limited (**BHRAL** or **Applicant**) and has been prepared in accordance with s.113 of the RMA.
3. The application was publicly notified on 14 December 2022 at the Applicant's request. Notice of the application was also served on 12 December 2022 to surrounding landowners and the Kaipātiki Local Board.
4. When the submission period ended on 3 February 2023, a total of 185 submissions had been received. 16 of these submissions were in support, 167 were in opposition and two were neutral.

### Summary of proposal and activity status

5. The application as originally lodged was for the construction of 81 residential apartments/units within four apartment buildings and associated vehicular access, parking and landscape arrangements, non-compliances with residential noise levels and an associated unit title subdivision.
6. The particulars of the proposal (as notified) were described in the planning evidence for the Applicant as follows:<sup>1</sup>
  - (a) *Construction of four three-storey buildings that will contain a total of 81 residential units featuring a mix of studio, one and two bedroom units. In total, there will be 18 studio units, 39 one-bedroom units and 24 two-bedroom units across seven unit typologies. Each unit has an open plan kitchen, dining and living area directly accessible to the outdoor areas. The*

<sup>1</sup> EV12, at [5.2]

*ground floor units have private outdoor patio areas and the aboveground units are provided with balconies achieving minimum 5m<sup>2</sup> area.*

- (b) The exterior cladding materials include a mix of light, dark and red projected and recessed brick cladding, concrete patios and metal balustrades for the outdoor patios/living spaces. The buildings will be constructed with a gable or mono-pitched roof design.*
  - (c) The existing vehicle crossing at Cresta Avenue will be decommissioned and replaced with a new 5.5m wide vehicle crossing that is the main vehicle access to the site (in the same location as existing). The existing vehicle crossing at Beach Haven Road will be decommissioned and replaced with a shared pedestrian footpath with a locked gate.*
  - (d) A total of 62 at-grade parking spaces are provided along the southern side of the Cresta Avenue accessway and eastern boundary adjacent to Buildings B to D. A total of 81 bike parking spaces are provided across two buildings (northern and southern bike/bin sheds) sited at the eastern boundary.*
  - (e) A comprehensive landscape strategy is proposed which includes hard and soft landscape treatments, including high-quality planting across the site, including grass, hedging, specimen trees and ground cover species. A communal area with grass, seating and planting to the west of Building C.*
  - (f) The proposal will provide connections and be adequately serviced by stormwater, water, wastewater and utility services.*
  - (g) ... the proposed earthworks and retaining wall design has been captured as part of the approved bulk earthworks consent (BUN60384512 and as updated through LUC60384512-A).*
7. The evidence further described the design changes related to the buildings, apartments, boundary fencing, access and rubbish arrangements that had occurred prior to the hearing. Further amendments made during both the hearing and post-hearing stages are described later in this decision.
8. The proposal requires resource consent under the Auckland Unitary Plan (Operative in Part) (**AUP(OP)**) for the following reasons:

Land use consent (s.9) – LUC60397499

*Noise and Vibration*

- (a) Noise associated with waste collection from the proposed residential activity that generates up to 57dB L<sub>Aeq</sub> between 7am to 10pm Monday to Saturday and 9am to 6pm on Sunday with respect to 120 Beach Haven Road, which does not comply with the 50dB L<sub>Aeq</sub> maximum permitted level set out in

Standard E25.6.2.(1), is a restricted discretionary activity under Activity Table E25.4.1(A2).<sup>2</sup>

#### *Transport*

- (b) The provision of parking spaces with gradients of 1:16, which is steeper than the minimum gradient of 1:20 as required by Standard E27.6.3.6.(3)(b), is a restricted discretionary activity under Rule E27.4.1(A2).
- (c) The construction and use of a vehicular accessway that will serve 62 parking spaces and that will have minimum width of 4.5m, which is less than the minimum requirement of 5.5m as set out in Table E27.6.4.3.2(T151), is a restricted discretionary activity under Rule E27.4.1(A2).

#### *Residential – Single House Zone*

- (d) The provision of 81 residential dwellings within the SHZ, being more than one dwelling per site, is a non-complying activity under Rule H3.4.1(A6).
- (e) The construction of new buildings to accommodate 81 residential dwellings within the SHZ, is a non-complying activity under Rule H3.4.1(A36) (as the development of new buildings has the same activity status as the land use activity).

#### Subdivision consent (s.11) – SUB60497550

- (f) The unit title subdivision of the residential development proposed by land use resource consent LUC60397499, is a controlled activity under Rule E38.4.1(A4).
9. Overall, the application requires assessment as a non-complying activity.
10. The proposal also originally included infringements of several standards of the Single House Zone (**SHZ**), being maximum height, height in relation to boundary and landscape area. The s.42A report included the following note in respect of such infringements as follows:<sup>3</sup>

*The applicant has applied for a number of development standards infringements as listed in section H3.6 Standards. However, these are not listed as standards to be complied with under H3.4.1(A6) or (A36) such that non-compliances with them are not reasons for consent. That notwithstanding, they are considered an appropriate benchmark against which to assess the bulk, scale, design, and location of the proposed development, particularly considering its non-complying activity status and*

<sup>2</sup> As set out in the Acoustic Fencing Assessment, prepared by Earcon Acoustics Limited, dated 4 July 2022, the provision of 1.4m high acoustic fencing will ensure compliance with the night-time noise maximum permitted level of 40dB LAeq is achieved with respect to 15 Cresta Avenue. As 1.8m high fencing is proposed, compliance with this maximum permitted noise level will be achieved. This assessment has been confirmed by Mr Bin Qiu, the Council's Senior Specialist, Contamination, Air and Noise.

<sup>3</sup> Agenda, at p.36

*the need to assess all likely adverse effects. The infringements that would otherwise result are listed in the submitted 'Updated Reasons for Consent' addendum, received via email from Hannah Pettengell of Barker & Associates Limited, and are detailed within the submitted architectural plans.*

11. Those matters were described in the Application material,<sup>4</sup> as subsequently amended on 29 March 2023. The planning evidence for the Applicant subsequently advised of their agreement with the s.42A report that these standards are not matters to be complied with.<sup>5</sup>
12. During the hearing, however, Ms Morgan acknowledged that Rule C1.8 was relevant to this matter. This rule states:

*(2) When considering an application for resource consent for an activity that is classed as a discretionary or non-complying activity, the Council will have regard to the standards for permitted activities on the same site as part of the context of the assessment of effects on the environment.*
13. This appeared to be the approach adopted by the respective planning witnesses in any event, and the relevant standards had been identified on the plans and potential adverse effects arising from those infringements had been assessed. The changes to the proposal as formalised within the Applicant's reply reduced the number of residential units from 81 to 72 and removed the height in relation to boundary infringements (Block A) as well as the height infringement for Block D (and reduced its length for Block A).
14. The amended maximum height infringements (against the 8m standard under H3.6.6) are described in the supplementary evidence of Ms Morgan/Pettengell as follows:<sup>6</sup>
  - Block A infringes the permitted 8m height by approximately 3.2m at the western boundary reducing to 2.5m at the centre of the building;
  - Block B infringes the permitted 8m height by approximately 2.6m at the western boundary reducing to 2m at the eastern boundary; and
  - Block C infringes the permitted 8m height by approximately 2.4m at the western boundary reducing to 1.3m at the eastern boundary.
15. The proposed combined retaining walls and fencing exceed the 2m fence height standard under H3.6.12 by:
  - 1.06m for a length of 31.6m adjacent to 11 Cresta Avenue; and
  - 1.24m for a length of 26m adjacent to 1/15 and 2/15 Cresta Avenue.
16. The supplementary evidence of Ms Morgan and Ms Pettengell also advised that the proposal is also now considered to comply with the landscaped area coverage

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<sup>4</sup> Application Volume 1, at p.41

<sup>5</sup> EV12 at [6.3]

<sup>6</sup> EV33, at Appendix 2

standard under H3.6.11 with 42.7% proposed (previously 36.9%) “as the grade separated pedestrian pathways adjoining the accessway are included as landscaped area in accordance with [the] AUP(OP) definition”.<sup>7</sup>

17. It is also relevant to note that the Applicant has sought and obtained a separate resource consent for the earthworks required to undertake the development. These were originally consented by land use consent LUC60384512 (granted on 21 December 2022). A variation to that consent (pursuant to s.127 of the RMA) to align the earthworks design with the present proposal was approved on a non-notified basis under officer delegated authority on 27 July 2023 (reference LUC60384512-A) and a copy of this consent was attached to the Applicant’s reply evidence.<sup>8</sup> That consent addresses geotechnical, overland flow path and retaining wall design considerations, and authorises revised construction noise infringements as follows:

Piling

- a. *75 dB LAeq and 90dB LAm<sub>ax</sub> at 120 Beach Haven Road for a total duration not exceeding ~~three~~ seven days.*
- b. *73 dB LAeq and 90dB LAm<sub>ax</sub> at 98C and 100D Beach Haven Road for a total duration not exceeding five days.*

Earthworks/Compaction

- c. *73dB LAeq and 90dB LAm<sub>ax</sub> at 2/92 and 120 Beach Haven Road, and 2/5, 2/7, 2/9, 3/17, 29, 98C and 100D Cresta Avenue for a total duration not exceeding two weeks at any individual site.*

18. The Panel notes that while site stability issues were a matter raised during the hearing, those matters have been addressed in the aforementioned consents and so we do not traverse these aspects further in this decision.

**Procedural matters**

**Pre-hearing Directions**

19. Prior to the commencement of the hearing (on 28 June 2023), the Hearing Panel issued directions requiring additional information to be provided by the Council and the Applicant prior to or at the start of the hearing. This related to:
- (a) A map of submitter locations (as usually provided in agenda reports);
  - (b) Details of the information provided to the Council’s Development Engineer, Mr Salvador, from Watercare Services Ltd (**Watercare**) and Healthy Waters in regard to wastewater and water supply capacity and agreed network upgrades;

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<sup>7</sup> EV33, at [6]

<sup>8</sup> EV37 and EV38

- (c) A site plan depicting a generally compliant subdivision in accordance with the provisions of Chapter E38 of the AUP(OP), and an indication of possible dwellings (in plan form but preferably including basic outline elevations) that are compliant with the provisions of the Single House Zone.
- (d) Details of agreements with Watercare regarding network upgrades.
20. This information was provided prior to the hearing. We refer to these matters further under the relevant topic headings. It is relevant to note here that the site plan (and associated outline elevations) were referred to during the hearing as a 'compliant development', notwithstanding that the subdivision itself would require consent as a restricted discretionary activity. This theoretical scheme as presented was comprised of nine lots/dwellings, with access from Cresta Road. We were advised that the Overland Flow Path (**OFP**) on the site would be directed through a central access lot and driveway, rather than adjacent to the western boundary as shown in the plans of the proposal.

### **Late Submissions**

21. Two submissions on the application were recorded as late, although only marginally so. Under ss.37 and 37A of the RMA, the time limit for the receipt of submissions is waived to accept the late submission(s) of Kathryn Atkinson and Ruth Jackson.<sup>9</sup> This is in view of the fact that they were received only just after the close of submissions, and their acceptance is not considered to prejudice any party. We note that the Applicant raised no objection to the acceptance of the submissions. Our findings in respect of these submissions is recorded at the end of this decision.

### **Relevant statutory provisions considered**

22. In accordance with s.104 of the RMA, we have had regard to the relevant statutory provisions including the relevant sections of Part 2 and ss.104, 104B, 104D and 108.

### **Relevant standards, policy statements and plan provisions considered**

23. In accordance with s.104(1)(b)(i)-(vi) of the RMA, and in addition to the National Policy Statement on Urban Development 2020 (**NPS-UD**), we have had regard to the relevant policy statements and plan provisions of the AUP(OP), as identified at section 15 of the agenda report, being:
- Chapter B (Auckland Regional Policy Statement);
  - Chapter E1 (Water quality and integrated management);
  - Chapter E11 (Discharge and diversion);

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<sup>9</sup> Agenda, pp.696 and 687 respectively

- Chapter E25 (Noise and vibration);
  - Chapter E26 (Infrastructure);
  - Chapter E36 (Natural hazards and flooding);
  - Chapter E38 (Subdivision – Urban); and
  - Chapter H3 (Single House Zone).
24. Despite all s.104 considerations being “*subject to Part 2*”, the Court of Appeal<sup>10</sup> has held that consent authorities “*must have regard to the provisions of Part 2 when it is appropriate to do so*”. The Court of Appeal went on to find that there may be situations where it would be “*appropriate and necessary*” to refer to Part 2 when considering consent applications, including where there is doubt that a plan has been “*competently prepared*” under the RMA.
25. We find that the AUP(OP), in relation to this proposal, has addressed the relevant Part 2 matters and there are no identified issues with the competence of its preparation, although we include some concluding comments regarding Part 2 at the end of this decision.
26. We also find that the relevant provisions of the district plan provisions of the AUP(OP) have “*given effect*” to those of the Regional Policy Statement (**RPS**) contained within the AUP(OP). Accordingly, we have relied primarily on the relevant zone and Auckland-wide provisions of the AUP(OP) in our consideration of this application.
27. We also considered the following other matters to be relevant and reasonably necessary to determine the application in accordance with s.104(1)(c) of the RMA.
- The submission and comments from the Kaipātiki Local Board; and
  - The submissions on the application more generally.

### **Local Board comments**

28. The Kaipātiki Local Board lodged a submission on the application and its concerns were summarised in the s.42A report as follows:
- *the precedent that could be set in terms of the Unitary Plan by consenting a development with large breaches of zoning rules;*
  - *natural justice ramifications by allowing for a development that does not adhere to Unitary Plan requirements, noting that it was adopted following an extensive public consultation period;*
  - *the Unitary Plan rules within the RSHZ should take precedence over the NPSUD and the Medium Density Residential Standards;*
  - *that there is insufficient physical and social infrastructure in place to support the proposed development;*

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<sup>10</sup> *RJ Davidson Family Trust v Marlborough District Council*, [2018] NZCA 316

- *concern with the extent of the development and parking gradient standard noncompliances;*
- *concern that construction activity will exceed the applicable construction noise standards; and*
- *concern that overflow parking may utilise carparks near the end of Cresta Avenue within Shepherds Park, which are intended to support activity at the park.*

29. Members of the Local Board also attended the hearing and their evidence is summarised later in this decision.

### **Summary of evidence heard**

#### **Agenda report**

30. The s.42A report for the hearing was prepared by Mark Ross, a consultant planner appointed by the Council. Mr Ross' report provided an overview of the application, and an assessment against the relevant provisions of the AUP(OP) and RMA, with reference to the expert assessments provided by the Council's specialists, the submissions and the comments received from the Local Board.

31. It was Mr Ross' conclusion that the proposal meets the relevant tests of ss.104, 104B and 104D, because:<sup>11</sup>

*...the level of development will be of an appropriate scale and intensity and will be in keeping with the form considered acceptable within the subject environment, with the proposed bulk, scale, design, and location of the proposed buildings, the vehicular and pedestrian access and parking arrangements, and the level of landscaping, ensuring that adverse effects in respect of construction nuisances, traffic, infrastructure and servicing, character and amenity values, and subdivision are either avoided, or remedied or mitigated to appropriate levels.*

*For similar reasons, the proposal will be generally consistent with, and not contrary to, the relevant objectives and policies within the AUP(OP), including as amended by Plan Change 78.*

32. Further reasons were set out in Mr Ross' 'reasons for the recommendation' at page 77 of his report. We will refer to those reasons where relevant to particular topics discussed later in this decision.

33. Mr Ross' report included a second recommendation with respect to the subdivision component of the application, and that it also be approved (as an overall non-complying activity), for the reasons set out on pages 101-102 of his report.

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<sup>11</sup> Agenda, at p.76

34. Given his recommendations, Mr Ross also prepared a set of recommended conditions to be imposed should this Panel determine that consent was able to be granted.
35. Mr Ross's report drew on the advice and recommendations of the Council's specialists who had reviewed the proposal: Michelle Chan (Urban Design); Gabrielle Howdle (Landscape Architect), Bin Qiu (Acoustic Specialist), Gil Salvador (Development Engineer), Nagaraj Prabhakara (Auckland Transport) and Shane Ingley (Consultant Traffic Engineer).<sup>12</sup>
36. The legal submissions and evidence presented at the hearing responded to the matters identified in the s.42A report, the application itself and the submissions made on the application. The submissions and evidence presented at the hearing from all parties is set out below. In the interests of brevity this summary draws on the Applicant expert's summary statements in the first instance. Further particular points included in submissions and evidence are addressed within our subsequent assessment of the matters in contention where applicable.<sup>13</sup>

### **Applicant**

37. **Jeremy Brabant** presented legal submissions in support of the application and introduced the evidence to be presented on behalf of the Applicant. His submissions provided an overview of the relevant policy framework and statutory considerations. It was his submission that "*if the legal framework governing the assessment required is properly applied you can and should conclude that the grant of consent is appropriate*".<sup>14</sup>
38. Mr Brabant also described what he considered were the key matters from a legal perspective, being that:<sup>15</sup>
  - A correct understanding of the receiving environment is critical to accurately assessing actual and potential effects on the environment.
  - Objectives and policies must be assessed in the round and include all relevant objectives and policies. While particular provisions may be of more relevance in the context of a given application, it is rare that a single objective or policy or a very select number of them, are determinative.
  - The provisions of the AUP(OP) provisions should be interpreted and applied in a manner consistent with Environment Court case law.
  - Distinguishing characteristics and a proper understanding of the receiving environment answer any potential concern with respect to precedent and plan integrity.

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<sup>12</sup> The respective memoranda are included at Attachment 2 to the Agenda.

<sup>13</sup> All the information, evidence and submissions are available on the Council's internet site 'Find a resource consent hearing' and using the application site address.

<sup>14</sup> EV01, at [5]

<sup>15</sup> Ibid, at [7]

39. Mr Brabant's submissions concluded that:<sup>16</sup>

*....the proposal before you has a pathway through the gateway tests of section 104D and then section 104. That pathway is evident consequent on a proper and lawful identification of the environment against which effects must be assessed, a clearheaded and accurate identification of what those effects are, and then a balanced and comprehensive consideration of applicable Unitary Plan provisions.*

40. **Leon Da-Silva** is the managing director for the Applicant company and his evidence described his development and building experience and the types of projects undertaken by BHRAL, and the background and rationale for the proposal. He also described the way in which the site was selected, and its various locational attributes. These aspects were described in his conclusion as follows:<sup>17</sup>

*The proposal has been developed to ensure high quality residential outcomes are achieved in an appropriate and efficient manner. BHRAL's goal is to provide a high-quality residential outcome for the Site which has been expertly designed to sit within the North Shore suburb of Beach Haven. The proposal will create numerous positive benefits to the community by significantly increasing housing options in this highly sought after suburb.*

41. He also referred to an agreement with Watercare whereby BHRAL would undertake improvements to local infrastructure through a development agreement to upgrade the existing water pipe. Further details in this regard were clarified in response to our pre-hearing directions.

42. In response to questions, Mr Da-Silva confirmed that the units would be designed for individual purchasers and acknowledged the need for long term maintenance obligations to be clearly set out as a basis for a future body corporate arrangement.

43. **Justin Newcombe** provided evidence on the landscape design aspects of the application, and described the general design approach, coordination of the design with other disciplines, the response to visual mitigation requirements and responded to the s.42A report and submissions. His evidence noted in respect of visual mitigation that:<sup>18</sup>

16. *In my opinion, the landscape strategy provides the mitigation required by wider interests without compromising the experience of the project's future residents or the [neighbours] directly adjacent to the proposal address. The structural planting of large columnar or oval tree forms such as Acer Rubrum 'Bowhall' and Knightia excelsa will alleviate any abrupt visual disruption to the view beyond the buildings without shading the entire complex.*

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<sup>16</sup> Ibid, at [67]

<sup>17</sup> EV02, at [20]

<sup>18</sup> EV03

17. *Tree planting proposed along the northern, southern and western site boundaries will improve amenity and reduce the effects of visual dominance.*
44. Mr Newcombe also described the changes to the landscape arrangement along the western boundary to better accommodate the OLFP, and responded to questions relating to long term maintenance aspects where trees and plants are located in common areas.
45. **Kevin Brewer** is the architect for the proposed development and provided evidence in respect of its architectural and urban design attributes. His evidence described the site and its locality as being attractive for low rise apartment development, and that the proposal would respond well to the suburban and urban character of surrounding properties. In particular, he noted that:<sup>19</sup>
54. *The proposed design adapts to this different context by locating buildings closer to the more urban character of the three level terrace housing at 120 Beach Haven Road. This eastward shift and 'rotation' of Building C creates a densely planted common space on the western boundary which forms a large, landscaped buffer to the lower density detached houses on the western boundary. This landscaped space is high quality mitigation for the scale change to the three level apartment buildings which enable efficient use of what is a comparatively large brownfields site.*
55. *The architectural design splits the development into four smaller scale individual buildings and includes architectural finishes and features to respond to the existing neighbourhood scale.*
56. *By adapting to the neighbouring suburban and urban character the proposal respects these different contexts whilst providing an appropriate level of residential intensification close to a high amenity neighbourhood centre and transport linkages.*
46. Mr Brewer also prepared a rebuttal statement in response to the evidence of John Hudson on behalf of a submitter (Cherylee Lonsdale), and the shading effects raised therein.<sup>20</sup> His rebuttal statement also described the additional information provided in response to the Panel's pre-hearing direction relating to a 'compliant development' (11-lot subdivision).
47. Mr Brewer responded to questions about design and compliance aspects of the proposal, and the proximity of social infrastructure. In his response he noted the starting point for the scheme for the site was whether the three-storey walk-up typology was feasible, rather than starting with an assessment of the site context and zoning and developing a base scheme that complied with the zone provisions.
48. **Kyle Meffan** provided evidence relating to geotechnical considerations for the site, and concluded that, "*provided that expert construction is completed under diligent*

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<sup>19</sup> EV05

<sup>20</sup> EV04

*engineering direction, that the Site is suitable for the proposed bulk earthworks and apartment building proposals included in the Resource Consent application”.*<sup>21</sup>

49. While Mr Meffan’s evidence responded to matters raised in some submissions, it did not expressly refer to the concerns raised by adjacent property owners in respect of the stability of boundary retaining walls.<sup>22</sup> In response to questions in this regard Mr Meffan expressed the view that the proposed retaining walls would be subject to building consent approval and would be appropriately designed to avoid adverse ground stability issues.
50. **Sally Peake** provided evidence in respect of landscape and visual effects matters in respect of the proposed subdivision. Her evidence summarised the conclusions of her previous landscape and visual assessment and key issues and included a commentary on the Council assessments related to urban design and landscape matters and responded to the issues raised in submissions. She noted there would be a reduced sense of spaciousness as a result of the proposed development, but a better quality of landscape treatment around the edges of the site. Overall, it was Ms Peake’s view that while she agreed that *“there will be some adverse effects for immediate neighbours arising from the building height and scale”*, these effects *“are mitigated through building and landscape design and treatments”* and are reduced to *“an acceptable scale”*.<sup>23</sup>
51. **Michael Williams** provided evidence addressing development engineering matters, including the management of earthworks, stormwater, wastewater and water reticulation. He addressed these topics with reference to matters raised in submissions, particularly those relating to concerns as to infrastructure capacity in local networks. His conclusion was that *“the necessary infrastructure and civil engineering requirements can be provided to appropriately service the development and mitigate any effects”* and considered that the proposed conditions regarding civil engineering matters were appropriate.<sup>24</sup>
52. Mr Williams responded to questions in response to the infrastructure agreements with Watercare, and the apparent adoption by the development of all available capacity within the downstream wastewater network but remained of the view that this capacity was adequate, and the proposal had been approved by Watercare.
53. **Mike Nixon** provided evidence in respect of traffic engineering and transport matters more generally. His evidence addressed the traffic-generating potential of the proposal and effects on the surrounding road network; parking and loading requirements and demands; public transport accessibility; and the provision for walking and cycling. His evidence concluded in regard to these matters that:<sup>25</sup>

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<sup>21</sup> EV06, at [24]

<sup>22</sup> N & L Curran and Airedale Property Trust

<sup>23</sup> EV07, at [39] and [40]

<sup>24</sup> EV08

<sup>25</sup> EV09

- a. *The proposed development is expected to generate 45 vehicle movements during the morning and evening peak hours and this can be accommodated with negligible effects on nearby intersections;*
  - b. *The proposed development has no minimum or maximum parking requirements. Despite that, 62 parking spaces will be provided onsite with an estimated parking demand of 102 spaces. As such, 40 on-street parking spaces may be required to satisfy this demand. In my view, this can be accommodated along Cresta Avenue and Beach Haven Road near the site;*
  - c. *The proposed development is located near existing bus and ferry services. The services operate 7-days a week with regular frequencies. Given the proximity of the nearby bus stops and wharf, I consider access to these services is convenient and provides a genuine alternative to private vehicle transport;*
  - d. *The on-site walking and cycling provisions are considered appropriate and safe, and connect to existing facilities on Cresta Avenue and Beach Haven Road...*
54. Mr Nixon also considered that the recommended conditions are acceptable from a transport engineering perspective, and that the concerns of submitters have been adequately addressed in the proposal and subsequent amendments.
55. **Fadia Sami** provided evidence on acoustic matters, and this included a description of relevant AUP(OP) noise standards; predictions of on-site noise (relating to construction, vehicle movements and rubbish collection); a response to submissions and the Council review of noise effects. Her evidence concluded that:
32. *The predicted noise levels from rubbish / recycling collection may exceed the Auckland Unitary Plan noise standards by up to 7dB.*
  33. *The rubbish / recycling noise effects will be mitigated through restricting collection to daytime hours between 9am – 4pm Monday to Friday. These collections will take no more than 15 minutes to complete.*
  34. *The short duration, restriction to daytime weekday hours, and infrequent nature of this source of noise will result in less than minor noise effects.*
  35. *All other source of noise associated with the proposed residential development will comply with the Auckland Unitary Plan noise standards.*
56. Accordingly, Ms Sami considered that any effects associated with noise would be “less than minor”.<sup>26</sup>
57. **Rachel Morgan** (in conjunction with **Hannah Pettengell** but principally presented by Ms Morgan), provided evidence that addressed the planning issues with the

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<sup>26</sup> Ibid, at [36]

application.<sup>27</sup> The detail within their evidence in chief was encapsulated within a summary statement provided at the hearing,<sup>28</sup> and we draw on this statement in the first instance in this overview. This summary referred to several key themes relating to the interpretation of the “planned suburban built character” of the neighbourhood; the appropriateness of multi-unit development within the SHZ; effects on adjacent sites in terms of sunlight, visual amenity and dominance; and the provision of quality on-site residential amenity.

58. The planning summary statement concluded that:

*For these reasons, and as set out in our EIC/EIR, in our view, the proposal is consistent with the objectives and policies of the Single House zone as well as the wider objectives and policies of the Unitary Plan. We also consider the potential adverse effects on the environment will be minor, taking into account the proposed mitigation measures. The proposal will also give rise to a range of positive effects, including providing for a greater range of housing choices in an accessible location close to public transport, community facilities and other amenities. In our view, the proposal passes the s104D test for non-complying activities, and meets the other relevant statutory tests in s104 and 104B and consent may be granted.*

59. Ms Morgan and Ms Pettengell had also prepared a rebuttal statement<sup>29</sup> which had responded to the evidence of Mr Hudson relating to the location of the rubbish storage area and shadowing effects on Ms Lonsdale’s dwelling; the matters raised by the Airedale Trust in terms of the fencing and lighting of the walkway to Beach Haven Road; and outlined the Applicant’s response to the pre-hearing directions. The rebuttal statement also addressed proposed changes to the conditions.

#### Mid-hearing amendments

60. Prior to hearing from the submitters on the second day of the hearing, Mr Brabant advised that the Applicant had decided to remove the third floor from Block D (adjacent to the southern boundary), in order to reduce bulk and dominance effects, particularly on neighbours to the south and west. The Applicant also provided further drawings and illustrations to depict shading effects and views of the ‘compliant development’ scheme that had been provided prior to the hearing.

#### **Local Board**

61. The Local Board was represented by its Chairperson, **John Gillon**, and Board Member **Erica Hannam**. Mr Gillon, spoke on behalf of the Local Board and with respect to its comments as referred to earlier in this decision.

62. While the Local Board is not able to have standing as a submitter (a point raised by Mr Brabant during the hearing), the Council has a policy that enables local boards to express their views and preferences on any application, in accordance

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<sup>27</sup> EV12

<sup>28</sup> EV11

<sup>29</sup> EV13

with and as directed by s.15(2) of the Local Government (Auckland Council) Act 2009. We heard and have accepted their address on that basis.

63. Mr Gillon's statement set out the reasons why the Local Board is fundamentally opposed to the proposal, and highlighted the restrictive provisions of the SHZ that were arrived at through the AUP(OP) process. He noted the "reality" of a subdivision of the site which would have a far lesser yield than the 81 units (originally) proposed in the application. He was concerned as to the precedent a grant of consent would have for other SHZ properties. Overall, he did not consider the proposal would merit the grant of consent, stating that the proposal:

*is not what was intended by the Unitary Plan, not what was anticipated by the Unitary Plan, not what was expected by the Unitary Plan, and is not allowed for in the Unitary Plan. It does not comply. The applicant is purely gambling on meeting the Gateway Test for a non-complying application, which is not good way to plan our city.*

64. In response to questions Mr Gillon described current plans for the provision of more on-street parking within Cresta Avenue to address current demands from the local sports facility, through provision of angled parking on one side of the street. He also described the effect of wastewater overflows in the area on local waterways.

### Submitters

65. **Charles Grinter** spoke on behalf of his own submission and that of **Harriet Allan**. While acknowledging the work undertaken by the Applicant to address the concerns raised in submissions, he did not consider that "*it is enough to reasonably justify making an exception to the zoning for the area, especially given the level of social amenities in Beach Haven, already stretched by recent housing developments*".<sup>30</sup>
66. Mr Grinter went on to describe what was 'reasonable' meant in terms of the phrasing of the SHZ provisions, stating that "*[w]e find it unusual to think that a person of sound judgement who is fair and sensible would think that when they had purchased a property adjacent to an area that is zoned as Single House would think that they would live next door to four three-storey apartment blocks with a total of 81 apartments involved*". He was therefore of the view that the "*application should be declined in line with what we consider to be a reasonable understanding of Single House and Mixed Housing Suburban zoning. It is non compliant in many ways and we do not think that adequate justification has been provided for an exception to be made in this case to the current zoning requirements*".
67. Mr Grinter compared the application to the Kainga Ora development to the east on Beach Haven Road, which provides 70 units over a larger site area (10,093m<sup>2</sup>). He also noted the recent apartment development in Northcote, which incorporates streets that separate the development from surrounding neighbours. He also noted

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<sup>30</sup> EV18

the pressures on infrastructure that would arise and what he considered was the relative paucity of social infrastructure in the locality.

68. **Crispin Robertson** noted the stress that the application had caused in the local community, which was beyond what residents could reasonably anticipate in a site zoned for single dwellings. In Mr Robertson's view the proposal would affect all four of its site boundaries, and that "*[i]t is impossible to hide the imposing nature these buildings and their balconies overlooking people's living spaces with trees and hedges*".<sup>31</sup> He did not consider that studio units would represent quality housing in a suburb, and that the 'tweaks' being made to the proposal "*demonstrate that its about trying to push the development through legally rather than genuinely trying to create something that is sympathetic to its setting*". Mr Robertson also observed that Beach Haven School is at capacity and that the Birkenhead FC is a very popular club that utilises Shepherds Park.
69. Mr Robertson also read a tabled statement from **Ruth Jackson**.<sup>32</sup> Ms Jackson's statement set out the reasons why she considered the proposal to represent "*an egregious overreach*" of the SHZ standards, and that "*[a]ll of the arguments opposing this development would be entirely moot if the developer had submitted plans which comply with the current [SHZ]*". She therefore sought that the application be declined in its entirety.
70. **Rachel Beer** spoke on behalf of the Airedale Property Trust, which has developed three residential buildings (incorporating seven dwellings) at 98 Beach Haven Road housing people from the disabled housing register. Ms Beer noted that the Trust has two main concerns regarding the proposal, relating to the pedestrian walkway to the site and the retaining wall adjacent to the common boundary. In terms of the walkway, Ms Beer advised that the Trust seeks that "*a covenant should be placed on the proposed site to ensure that the pedestrian walkway to Beach Haven Road is maintained with low level lighting and landscaping*" (with fencing not to exceed 1.2m, and that the walkway is kept clear of obstructions at all times).<sup>33</sup>
71. With respect to the retaining wall adjacent to the Trust's property, Ms Beer advised that the Trust seeks:
- that an engineer be appointed by the developer to inspect and monitor the excavation and retaining wall build. We would also request that an independent inspection of the dwellings at 98 Beach Haven Road be carried out, at the cost of the developer both prior and after construction to ensure there is no damage caused by the excavation and construction of the retaining walls close to our boundary.*
72. **Cherylee Lonsdale** owns an apartment which she described as being one of four units that form a small stand-alone block at the northern end of 120 Beach Haven

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<sup>31</sup> EV27

<sup>32</sup> EV25

<sup>33</sup> EV21

Road, which is made up of individual units spread across four blocks. She noted that her apartment is located immediately east of the proposed development.

73. Ms Lonsdale was not opposed to the overall form and density of the proposal per se, commenting that she “*would rather see more people living closer to existing facilities than endlessly expanding the city outwards*”. However, she did not consider such development should be at the detriment of neighbours, and advised of her recent understanding of zone provisions and that the scale of development was not provided for on the site. She advised of three main issues of concern, relating to the proposed placement of rubbish bins; the shading effects of the proposal (and sought removal of the eastern corner of Block A) and potential effects on the stability of her apartment building from adjacent earthworks.
74. **John Hudson** provided expert landscape evidence in support of Ms Lonsdale’s submission. Mr Hudson noted that all four blocks exceed the height standard for the SHZ and he made reference to the zone description and policies that provide for one to two storey buildings. The main issue that he highlighted in this regard was the extent of shadow that would affect Ms Lonsdale’s apartment from the over-height elements of Block A and Block B. These effects were illustrated by the use of 3-dimensional shadowing diagrams, that show the extent of shadow crossing the wall or bedroom windows.
75. Based on those diagrams, it was Mr Hudson’s view that Ms Lonsdale “*will generally lose the last hour of sun at most times of the year as a result of shadow cast mainly from Block A and to a lesser extent from Block B*”.<sup>34</sup>
76. The remedies proposed by Mr Hudson were:<sup>35</sup>
- (a) To decline the application, based on the over-height nature of the proposal and exceedance of density standards;
  - (b) If consent is able to be granted, then to make the following changes at a minimum:
    - Relocate the rubbish and recycle bins to the entryway;
    - Reduce the western end of Block A by 3m; and
    - Preferably reduce all units to two-storey.
77. We received two documents from submitters prior to the hearing and these were tabled as part of proceedings. These were photographs of parking within Cresta Avenue by Dayne Thomson at a period when the sports facilities at the adjacent Shepherds Park are being utilised;<sup>36</sup> and photographs from Neil & Liz Curran of the view from their deck at 2/7 Cresta Avenue towards the site.<sup>37</sup>

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<sup>34</sup> EV22, at [27]

<sup>35</sup> Ibid, at [28] – [32]

<sup>36</sup> EV19

<sup>37</sup> EV20

## Council Response

78. The responses by Council officers to the evidence provided are summarised as follows:
- (a) **Gil Salvador**, the Council's Development Engineer, did not attend the hearing on the first day. Nevertheless, he answered questions from the Panel in respect of the infrastructure matters raised with Mr Williams. He generally endorsed Mr William's assessment and did not indicate any concern with respect to the capacity of infrastructural networks serving the proposed development.
  - (b) **Gabrielle Howdle**, the Council's Landscape Architect, responded to matters relating to the assessment scale used by Ms Peake, and commented on particular details related to proposed landscape planting (including those to the south of Block D), as well as maintenance of the same. She noted the changes made to the application in terms of Block D, and in her written response memorandum noted that the changes to Block A, made as part of the Applicant's verbal reply. Ms Howdle highlighted that her assessment in respect of Block A had considered the effects on 29 Cresta Avenue but did not offer an opinion as to whether the changes would be beneficial in this regard. However, she stated that "*it is positive to hear that the other architectural aspects of the building design are to be retained (e.g., staggered building form, window / louvres, materiality / brick)*".<sup>38</sup>
  - (c) **Michelle Chan**, the Council's Urban Designer, also responded to the changes to the proposal, noting that these had "*adequately responded to and mitigated the effects of increase in building bulk and residential intensity from an urban design perspective*".<sup>39</sup> She considered that shading effects would be appropriate and that the Auckland Design Manual provided a useful reference in terms of determining what was reasonable in this regard. Ms Chan also remained of the view that effects relating to overlooking (of 29 Cresta Avenue) and the provision of outdoor living space was acceptable, and in respect of the latter, would be functional and adequately sized for the day to day needs of residents.

Ms Chan also commented on the accessibility of the development and considered that some choice was available in this regard in respect of ground floor apartments. In terms of the rubbish bin area, she considered that these were well designed and appropriately located and screened from adjacent properties. In terms of the changes to the proposal, Ms Chan stated that, although she had not yet seen the revised plans, they "*will further reduce the bulk of the buildings and the effects of overlooking, shading and visual dominance on the neighbouring properties*", and that "*[n]otwithstanding, my overall support of the proposal from an urban design*

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<sup>38</sup> EV30 at [5.1]

<sup>39</sup> EV31, at [2.2]

*perspective remains*".<sup>40</sup> Ms Chan also made some comments on the proposed conditions in respect of urban design matters.

- (d) Mr Ross' response memorandum noted that the changes referred to in the Applicant's verbal reply would reduce the scale of the proposal and that, as he had supported the originally submitted scheme, "*it stands to reason that I support a scheme with a lower number of apartments and reduced bulk and scale, subject to the integrity of the roof form and overall design quality of Blocks A and D being maintained*".<sup>41</sup> His memorandum responded to issues raised during the hearing in respect of zone provisions and the range of activities for which the SHZ may be used, and re-affirmed his view that the "*development will be of an intensity that is compatible with both the existing and planned suburban built character of the area and is an appropriate form of development*".<sup>42</sup> In this regard he also made reference to the use of the site for an Integrated Residential Development for which he considered a clear consenting pathway existed.

Mr Ross also commented on issues regarding neighbour expectations, interpretations with respect to what is 'reasonable' when considering effects such as shading, the sufficiency of outdoor living areas, and the location of the refuse storage area, as well as relating, unusually, to his personal experiences of using public transport at some time in the past in Beach Haven. He also provided comments on particular conditions.

### **Applicant Reply**

79. Mr Brabant provided comments in reply at the end of the hearing, noting from the outset that the Applicant had resolved to make further changes to the proposal, involving the removal of three units from the eastern end of the third floor of Block A (adjacent the northern boundary), in addition to the removal of the entirety of the third floor from Block D. He otherwise set out a summary of the Applicant's response to the evidence and matters raised during the hearing and confirmed that a more detailed written statement would be provided in approximately one or two weeks.
80. The Panel noted the additional information that would be required to be provided with the formal reply to address the various changes to the proposal made during the hearing (architectural, landscape and scheme plans), along with certain revisions to proposed conditions. The hearing was subsequently adjourned.
81. The Applicant's written reply was received in full on 31 July 2023. This was comprised of nine documents that addressed the matters raised during the hearing and the changes to the proposal, as follows:
- Supplementary evidence from Mr Brewer, Ms Peake and Ms Morgan;

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<sup>40</sup> Ibid, at [9.1]

<sup>41</sup> EV32, at p.1

<sup>42</sup> Ibid, at p.3

- Amended architectural, landscape, engineering and scheme plans;
- Updated visual impact photo simulations (updating Views 5 – 10);
- Updated Visual Impact Computer Renders showing neighbours views from outdoor living spaces at 2/5, 2/7 and 2/9 Cresta Avenue, 2/88 2/90, 292, 94A and 98C Beach Haven Road;
- An updated assessment of the relevant AUP(OP) rules;
- Updated revised proposed conditions of consent;
- A copy of the Applicant’s separate earthworks consent for the site; and
- Reply submissions from Mr Brabant.

82. Mr Brabant’s reply helpfully summarises the supplementary evidence included in the Applicant’s reply, and we set out a further summary of that evidence to complete the overview of evidence heard as follows:<sup>43</sup>

- Mr Brewer’s supplementary statement explains that in making the amendments the designs of Blocks A and D have been reviewed and existing design features retained. That evidence is that the revised Block D avoids shadowing on the neighbour’s property throughout the day, and the eastward shadows from Block A are less than those from a compliant height building. Other changes have included increases to the outdoor living spaces for Blocks C and D.
- Ms Peake’s supplementary statement considers changes to potential visual impacts and impacts on local landscape and amenity values, noting that in a number of those visualisations Block D is now not visible at all. Ms Peake records that effects would be reduced further for all viewpoints considered, and specifically that effects from Viewpoints 5, 8 and 9 would be very low, and there would be no visual effects from Viewpoint 7.
- The supplementary statement from Ms Morgan/Ms Pettengell summarises the changes to the proposal, identifies the reduction in the number and scale of consent infringements, and provides further commentary in light of the amendments with reference to effects on neighbourhood character, visual dominance effects on neighbours, shading effects on neighbours and appropriateness of outdoor living spaces. Ms Morgan/Ms Pettengell also respond to Council supplementary evidence and matters raised by submitters before proposing and explaining a small number of additional changes to proposed conditions of consent

83. We refer to various aspects of the supplementary evidence and closing submissions as part of our discussion below.

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<sup>43</sup> EV36, at [11] – [19]

84. Following the Panel's review of the Applicant's reply, the Panel determined that there were two matters of outstanding information that it required before it could close the hearing. These related to a consideration of future body corporate obligations to be incorporated into proposed conditions, and a 'Word' copy of those conditions for the use of the Panel if it were to determine that consent could be granted. A response to these matters was received on 10 August 2023 and the detail in respect of the body corporate obligations are referred to later in this decision.
85. It was subsequently determined by the Panel that there were no outstanding matters and the hearing was closed on 11 August 2023.

### **Principal issues in contention**

86. After an analysis of the application and evidence (including proposed mitigation measures), undertaking a site visit, reviewing the Council planning officer's recommendation report, reviewing the submissions and concluding the hearing process, the proposed development raises a number of important issues for consideration. We note in this regard that it was apparent that there were no remaining areas of contention between the experts for the Applicant and the Council, and so that matters of contention that we address in this decision are largely those arising from the evidence for submitters and the Local Board, and matters raised in questions during the hearing from this Panel. In that respect the principal issues in contention that we have discerned to be the key matters for us to determine are:
- The effects of the proposal in terms of building scale (shading, privacy and dominance);
  - Rubbish storage and collection effects;
  - Parking and transportation effects;
  - Effects on local infrastructure networks; and
  - Whether the proposal is contrary to the objectives and policies of the AUP(OP), including considerations as to neighbour's expectations as to development within the SHZ.
87. Our main findings on the principal issues that were in contention are discussed in the following section of this decision.

### **Main findings on the principal issues in contention**

#### **Introduction**

88. Because the proposal is a non-complying activity, it is necessary for us to reach a finding as to whether it passes either of the 'gateway' (or 'threshold') tests of s.104D(1), before we can go on to consider the proposal on its merits under s.104. The gateway tests require us to determine whether the effects of the proposal will

be more than minor, or whether it will be contrary to the objectives and policies of the plan (i.e., those of the AUP(OP)). We have therefore considered the matters in contention in a thematic way that aligns with these tests.

### **Basis for consideration of effects**

89. While we have set out the matters of contention above to reflect the order of consideration under s.104D(1), we are conscious that an analysis of the noted effects will be aided by doing so through the lens of the relevant AUP(OP) provisions, and in particular those that apply under the SHZ.
90. Starting with the application of the SHZ to the site, the Applicant's witnesses, along with Mr Ross, considered that this was something of an anomaly, having been 'rolled over' from the previous district plan without being given due consideration by the then Independent Hearings Panel (for the Proposed Auckland Unitary Plan). As a corollary to that, they have opined that the zone provisions of the surrounding neighbourhood should be taken account when assessing the proposal in terms of the objectives and policies, not just the area zoned SHZ.
91. In the Panel's view, and as the evidence at least appeared to initially acknowledge, we must take the zoning of the site as we find it, and the way it was decided upon is speculative and irrelevant for the assessment of the proposal. In that regard we do not consider it to be a 'spot zone' given its application to the sites to the north, and those nearby and adjacent to the coast and elsewhere throughout Beach Haven. It is also relevant to note that under Proposed Plan Change 78 (**PC 78**) the site's development capacity will remain constrained until such time as the infrastructure-related 'qualifying matter' is resolved, alongside such other changes that may occur during the (now extended) PC 78 process.
92. The Panel notes that the SHZ establishes reasonably clear, and restricted, parameters for development. In particular, the Zone Description (H3.1) for the SHZ states that its purpose is to "*maintain and enhance the amenity values of established residential neighbourhoods in number of locations*" and that:
- To support the purpose of the zone, multi-unit development is not anticipated, with additional housing limited to the conversion of an existing dwelling into two dwellings and minor dwelling units. The zone is generally characterised by one to two storey high buildings consistent with a suburban built character.*
93. The corresponding provisions of the SHZ reflect that purpose, providing for one dwelling per site, and apply certain height, height to boundary and coverage standards. The subdivision standards of the AUP(OP) provide for a minimum net site area of 600m<sup>2</sup>.<sup>44</sup> As previously noted, the Panel requested from the Applicant (prior to the hearing) an illustration of a subdivision and development form that was in line with these provisions of the SHZ, to provide a basis for its consideration of the effects that would arise from the more intensive apartment typology that the

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<sup>44</sup> AUP(OP) at E38.8.2.3(2)

Applicant has proposed. This ‘permitted baseline’<sup>45</sup> example was one that provides for nine dwellings arranged within the site around a central access (primarily from Cresta Avenue) with one dwelling accessed from Beach Haven Road.

94. The Panel also notes that there is a limited range of other permitted activities within the SHZ. These include non-residential activities such as boarding houses, care centres, residential care, and visitor accommodation (all for up to ten persons), residential home occupations and integrated residential development. It is clear from the SHZ bulk and location standards that any of these activities are anticipated to occur within buildings of a relatively modest scale consistent with the expectations of the zone.
95. Both Mr Ross in his response memorandum and Mr Brabant in his reply expressed some criticism of submitters’ views as to what form and type of development could be expected in the SHZ.<sup>46</sup> Mr Brabant highlighted the aforementioned permitted activities, along with non-permitted (discretionary) activities such as camping grounds, education facilities, etc,<sup>47</sup> as well as the potential for an Integrated Residential Development (IRD). However, we note in this regard that the AUP(OP) itself states at A1.7.4 that discretionary activities are so classed “*where they are not generally anticipated to occur in a particular environment, location or zone or where the character, intensity and scale of their environmental effects are so variable that it is not possible to prescribe standards to control them in advance*”.
96. At this juncture, we record that the Panel has declined to consider the effects of discretionary activities, which as noted by Mr Brabant would require assessment on their merits (and are also not a relevant consideration for us in terms of s.104(2)).
97. In drawing attention to the other activities listed within the SHZ activity table, Mr Brabant suggested that evidence for the submitters “*reflects a lack of understanding regarding how the RMA works and how the AUP works*”, insofar as there is no reference to ‘expectations’ in the SHZ provisions.<sup>48</sup>
98. From its own review of the submissions, the Panel rejects that criticism, noting that a number of submissions acknowledged the potential for more development that might be provided for as a permitted activity, with some suggesting, for example, that a medium intensity terrace-house approach could be considered for the site. We also consider that submitters have been able to discern the intent of the AUP(OP) in respect of the SHZ because it has been plainly conveyed within the zone description which provides a clear ‘anticipated’ (or ‘expected’) outcome for this zone. Mr Ross’ approach went as far as to say that the SHZ title is misleading in terms of permitted development and “*sets an unrealistic expectation as to potential / likely development expectations*” and that “[*the*] *only thing neighbours could not expect is development that is prohibited, such as the subdivision of a*

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<sup>45</sup> Noting that the subdivision, even of compliant size, would still require consent as a restricted discretionary activity (Rule E38.4.2(A16))

<sup>46</sup> EV32, at p.4

<sup>47</sup> EV36, at [35]

<sup>48</sup> EV36, at [30], see also EV32 at p.4

*minor dwelling*".<sup>49</sup> We consider that such a sentiment appears to misrepresent the clear purpose of the SHZ while overstating the intensity and scale of potential non-residential activities.

99. Mr Brabant went on to acknowledge that the pathway to approval in this case is "a narrow one". Furthermore, changes offered to the proposal in the course of the hearing appear to have been made in acknowledgement as to the types of concerns raised by submitters, notwithstanding Mr Ross' and other officer support for the original proposal.
100. As a further contextual observation, we refer to Mr Brabant's opening and reply submissions in respect of the 'environment' against which effects should be assessed, being the existing and reasonably foreseeable future environment.
101. In that regard, the Panel agrees that the site and its immediate surrounding properties comprise a mixed zoning pattern in terms of the existing and planned built character. We also heard that it is well served and proximate to public transport via frequent bus services and (less frequent) ferry services. However, our observation from our site visit is that the existing environment on Cresta Avenue and Beach Haven Road, to the south and west of the subject site, is predominantly comprised of single-storey detached dwellings, with some two-storey dwellings. There is some evidence of infill development, with a few sites in this vicinity containing more than one dwelling from a single point of vehicular access. The pockets of local shops to the south and south-east are also single-storey. There are some exceptions including the three-storey apartment buildings immediately to the east of the subject site at 120 Beach Haven Road and the Kāinga Ora development approximately 700m further to the east on Beach Haven Road.
102. We find the predominant character of the neighbourhood to be that of a low-rise and low-density residential environment, with certain exceptions as noted above.
103. The planned environment includes the Business-Local Centre zone focused around the Rangatira Road/Beach Haven Road junction, with a significant area of Mixed Housing Urban (**MHU**) around the centre and along the key corridors to the south and east of the subject site. As noted by Mr Brabant, these zones enable a range of outcomes in terms of intensification, activities and building heights. However, any new buildings within these zones are required to be assessed as restricted discretionary activities and therefore the form, scale and design of any future intensification within these sites is somewhat speculative, particularly where single-storey development on some sites to the south appears to be of very recent construction.
104. We further note that to the north and west of the site, the existing zoning is Mixed Housing Suburban (**MHS**) and SHZ. The zone descriptions for both zones refer to their provision for a suburban built character, and the objectives and policies for the MHS are similar to SHZ in that they anticipate a relatively low intensity of mainly detached dwellings of one-two storeys (to a maximum height of 8m). The

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<sup>49</sup> EV32, at p.4

primary difference is that the MHS provides for greater site intensity than the SHZ (up to three dwellings as a permitted activity). The Panel considers that the evidence for the Applicant and the Council tended to overstate the relevance of the units at 120 Beach Haven Road, and the more intensive zoning to the east and south, with less regard to the more suburban scale outcomes anticipated to the west and north. In the Panel's view, a broader reading of the term "neighbourhood" would properly acknowledge this overall context and incorporate the extent of SHZ found within it.

105. The purpose of the preceding discussion is to set out those areas in which the Panel was troubled by some of the evidence that it received in terms of the characterisation of the existing zoning of the site and the neighbourhood generally, and the basis on which subsequent assessments of effects and against the objectives and policies of the SHZ were based. With that background we discuss the particular matters in contention below.

### **Building scale effects**

106. A number of submitters raised concerns regarding the effects of the proposal in terms of its proposed height and scale. In particular, submitters were concerned with impacts on shading, privacy and dominance, including on immediate neighbours and the visibility of the development from the surrounding streets. Many of the submitters noted that they were not opposed to the intensification of the site per se and offered constructive suggestions such as removing top floors of the buildings to reduce these impacts or, as previously mentioned, using a terrace-housing typology.
107. Prior to the hearing, the landscape and urban design experts for the Applicant and the Council were all in agreement that the scale, proposed setbacks from boundaries, design of the buildings, orientation of outdoor living spaces and landscape treatment would result in less than minor adverse effects on immediate neighbours and the existing character of the neighbourhood. Notwithstanding that, as discussed previously in this decision, a number of amendments to the proposal were offered at two stages during the hearing and were subsequently formalised within the Applicant's reply. These removed or reduced certain infringements to the height standards and, in doing so, reduced the extent of potential effects on neighbouring properties.
108. As described, a level has been removed from Block D, lowering the building from three to two levels in height. Combined with the lowered ground level of the site in this area (as provided for by the approved earthworks consents referred to earlier in this decision), this change reduces the shading impacts on the properties to the south, at 90-94 Beach Haven Road, to levels consistent with the height and height to boundary standards of the SHZ. These changes were described in the supplementary evidence of Ms Morgan/Pettengell as follows:<sup>50</sup>

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<sup>50</sup> EV33, at [18] and [19]

- the extent of shading cast by Building A during the March/September equinox periods is less than the extent of shading cast from a compliant development. With respect to the other boundaries, the shading analysis illustrates that the shading cast by a permitted development would be similar to the shading cast by the revised proposal; and
  - the extent of shading cast by Building D during the equinox is fully contained within the site boundaries and will result in no additional shading effects to the adjacent properties to the south.
109. We note that effects from Building D are assisted by the lowering of ground level (to be given effect to through the approved earthworks consent) but observe that shadowing in the winter solstice is somewhat exacerbated by the more monolithic apartment building form, as compared that which would arise from separate dwellings. Nevertheless, and noting the reply comments from Council officers in this regard, the Panel concludes that all adjoining properties will continue to enjoy good levels of solar access, such that any adverse perceived or actual effects arising from the proposal are minor.
110. The Panel also acknowledges that the amendments also reduce the visual effects of Block D when viewed from Beach Haven and Rangatira Roads, as described in the supplementary evidence of both Ms Peake and Mr Brewer.
111. The evidence of Ms Morgan/Pettengell also noted that the outdoor living spaces and the principal living areas for all the apartments are orientated towards the north and east, away from neighbouring properties to the south.<sup>51</sup> In their view this will result in limited potential for overlooking from the development, which the Panel agrees will also be further reduced by removal of the upper level. Notwithstanding the reduction in scale and consequent effects, the Panel notes Ms Howdle still recommends trees to a minimum of 8m high and 3m wide planted to the south of Block D of a sufficient scale “*to ensure a softer filtered outlook for neighbours*”.<sup>52</sup> Given the length of this building we agree that this recommendation is appropriate.
112. Block A was arguably of greater concern to neighbouring submitters at the hearing. The Panel heard from the owners of 29 Cresta Avenue and Unit 3L/120 Beach Haven Road. In response to written and verbal submissions from these submitters, the Applicant has removed the three eastern-most units from the top level of Block A. The effect of this is to remove any height in relation to boundary infringements on 120 Beach Haven Road and reduce the length of the height infringement for this building. Removing the top level also reduces the more direct extent of overlooking from the proposed development onto the private open space of 29 Cresta Avenue to the north of the site. The Panel notes Ms Chan’s view in this regard that:

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<sup>51</sup> EV12, at [9.16]

<sup>52</sup> EV30, at [4.2]

*the effect of overlooking [on 29 Cresta Avenue] is reduced by the proposed building setback distance of 7.6m from the northern boundary. The removal of three units on the eastern top floor of Block A ... will further reduce the effect of overlooking.*<sup>53</sup>

113. While this effect was 'reduced', we nevertheless retained some concern about the extent of overlooking towards 29 Cresta Avenue from Block A. We similarly hold some reservations about the effects towards 2/7 and 2/9 Cresta Avenue from the western end of Block B in the case of 2/9 Cresta Avenue (and with reference to the revised computer renders included in the Applicant's response). In terms of 2/7 Cresta Avenue, Ms Howdle's response memorandum considered the setback of Block C and Block D to be "*moderating factors*". The effects to 2/9 Cresta Avenue will include potential for overlooking from the western end of units from Block B, and this would be primarily mitigated by the more oblique relationship of this building to 2/9 Cresta Avenue, with no large trees within the intervening view.<sup>54</sup>
114. We note in general that the extent of privacy screening effects in respect of all site boundaries will be dependent, at least in the medium to longer term and for the northern, western and southern boundaries, on the successful implementation and maintenance of the larger specimen trees detailed within the landscape plan. Given the transparent form of balcony railings, the mitigation for such effects will therefore be reliant in the short term on the setback of the buildings and/or having an oblique relationship between respective buildings and neighbours' living areas.
115. Overall, however, the Panel concludes generally in line with the expert evidence we heard in respect of matters related to building scale. While the proposal will be a noticeable and significant visual change within its immediate setting, we find that adverse effects associated with amenity, shading and visual dominance on neighbouring sites have been sufficiently reduced so as to be minor in overall terms (subject as we note to successful implementation of the proposed landscape plan).

### **Rubbish storage and collection effects**

116. The proposal incorporates a refuse bin storage enclosure along the eastern side boundary, adjacent to Block A and adjacent to the northern-most residences of 120 Beach Haven Road. We note that the bin storage area is an enclosed structure, with a concrete rear wall, to minimise potential noise and odour effects. The evidence of Ms Morgan/Pettengell advised that:<sup>55</sup>

*A Waste Management Plan is proposed to manage rubbish collection, which will be restricted to between 9am-4pm only with a collection predicted to take no more than 15 minutes, to minimise potential adverse effects on sensitive noise receivers. Two collections per week are anticipated. These collections are for functional reasons and of brief duration.*

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<sup>53</sup> EV31, at [4.1]

<sup>54</sup> EV33, at pp. 163 and 164

<sup>55</sup> EV12 at [9.23]

117. Mr Hudson advised during the hearing that the location of the refuse bin storage areas appeared to favour internal occupant convenience over the amenity of neighbours and was concerned as to potential odour effects if not collected frequently enough.
118. In respect of the concern regarding odours, Ms Morgan/Pettengell rebuttal evidence further clarified the advice from a rubbish collection firm (Green Gorilla) that a total of four individual truck collections would be anticipated on the site per week (rather than two), including two recycling and two rubbish collections. Each individual collection was confirmed as taking no more than 15 minutes, and that the total incidence of such collection activities across the entire week would be a maximum of one hour.<sup>56</sup>
119. In terms of noise, Mr Brabant's reply noted that this effect has been the subject of specific consideration by Ms Sami and Council's acoustic specialist (Bin Qiu<sup>57</sup>), and that "*both agree potential noise effects from collection (subject to conditions of consent mandating an appropriate time window for collections) are reasonable and acceptable*".<sup>58</sup>
120. Mr Hudson also suggested that a better location for the rubbish enclosure would be close to the street frontage along the Cresta Avenue accessway,<sup>59</sup> as this would not adjoin the residential site at 120 Beach Haven Road and would be more readily accessed by collection vehicles. Mr Hudson highlighted the approach used at 120 Beach Haven Road, where the bins were located immediately adjacent to Beach Haven Road and thereby did not require a rubbish collection vehicle to enter into nor circulate within the site.
121. The evidence of Ms Morgan/Pettengell was that the refuse bin enclosures were located as proposed to ensure that they are within 30m of the entranceway of each building<sup>60</sup> (being a requirement of the Building Act 2004). As a result, positioning the enclosures along the accessway would not comply with this requirement. It was also noted that this would then result in similar amenity considerations for the adjacent sites at 11 and 15 Cresta Avenue, and could conflict with sightlines and the safe operation of the vehicular and pedestrian access to Cresta Avenue.
122. The Panel accepts the expert evidence in this regard. While the matter at issue arises from the particular apartment typology and development intensity proposed, we accept that the proposed refuse bin storage areas are located appropriately taking into account all relevant factors. We therefore find that any adverse noise effects will be reasonable and of short duration, and minor overall.

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<sup>56</sup> EV (rebuttal) at [6]

<sup>57</sup> Agenda at pp.124-128

<sup>58</sup> EV36, at [27]

<sup>59</sup> EV22, at [30]

<sup>60</sup> EV (Rebuttal) at [5]

## Parking and transportation effects

123. The proposed development provides for 62 at-grade parking spaces, generally located along the accessway to Cresta Avenue and along the eastern boundary. As a result, it was proposed that 62 units would have one parking space each, and originally 19 units would not have a carpark. The applicant advises through its reply has since reduced to 10 units as a result of the reduction in the total number of units.<sup>61</sup>
124. The Panel notes however that four of the 62 carparks are located in a 'stacked' formation (i.e., two pairs), adjacent to the western side of Building A. No application was made to depart from the relevant requirements of the AUP(OP) in terms of such spaces.<sup>62</sup> Accordingly, it is apparent that two units will need to be provided with two (stacked) parking spaces, and the number of units without any parking allocation would consequently increase to 12.
125. It was Mr Da-Silva's evidence that "*we have not provided carparks for the studio apartments as there are multiple transport options close to the Site*".<sup>63</sup> Although not expressly stated in the Applicant's reply evidence, the changes to the proposal would appear to enable four of the 16 studio units to be provided with a carpark.
126. A relevant consideration in respect of carparking provision was the fact that the parking standards of the AUP(OP) have changed in response to the NPS-UD, and via Plan Change 71, such that minimum parking requirements for many activities, including residential, have reduced to zero. While we accept the position of the Applicant and the Council that consequently no parking spaces are in fact required, the overall density of the proposal in this case could exacerbate the resulting effects of demand for on-street parking well beyond what could otherwise be anticipated by development of this site in accordance with (or in greater alignment to) the provisions of the SHZ.
127. In this regard, and notwithstanding the present carparking requirements (or lack thereof), Mr Nixon's evidence provided an assessment of likely parking demands based on published data within the Road and Traffic Authority of NSW Guide to Traffic Generating Developments (Version 2.2, October 2002), which includes both resident and visitor parking demand. It was Mr Nixon's assessment that the proposal (as notified) would generate parking demand for some 102 vehicles at peak times (86 resident vehicles and 16 visitor vehicles), being 40 more vehicles than provided for on-site. He noted that this could be accommodated within Cresta Avenue and Beach Haven Road, based on surveys of these streets.<sup>64</sup> On that basis, Mr Nixon had "*no concerns with the vehicle parking effects of the proposed development*".<sup>65</sup>

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<sup>61</sup> EV36 at [10]

<sup>62</sup> AUP(OP) at E27.6.3.1(1)(d) and E27.6.3.3(3)

<sup>63</sup> EV02, at [17]

<sup>64</sup> As summarised within EV36, at [50]

<sup>65</sup> EV09, at [17]

128. We note that the assessment of the Council's expert, Rahul Kumar (Senior Transportation Engineer, Abley Consultants), was in agreement with the assessment provided within Mr Nixon's Transport Assessment.<sup>66</sup>
129. Both traffic experts also considered the effect of the proposal in terms of traffic generation and potential effects on nearby intersections (Beach Haven Road and Cresta Road, and Rangatira Road). Mr Nixon provided evidence in respect of the modelling undertaken in for the Transport Assessment and stated that:<sup>67</sup>

*Both intersections performed well with the proposed development traffic volumes added. Indeed, both intersections were assessed to operate at Level of Service A (which is a simplified intersection performance metric based on average delay). Level of Service A (or LOS A) is the highest performance level while LOS F is the worst performance level.*

130. Mr Kumar was in agreement with that analysis.<sup>68</sup>
131. Mr Nixon did not provide supplementary evidence in respect of the changes to the proposal, and we were not provided with a revised assessment as to the anticipated parking demand arising from a reduction to 72 units. However, it is self-evident that the reduction in the number of units will have a proportionate reduction in both resident and visitor parking demand (perhaps in the order of 86 spaces). Given Mr Nixon's conclusion with respect to the larger assessed number of units, the Panel concludes that the revised proposal will not adversely impact on the capacity of the local road network to accommodate the potential demand for on-street parking.
132. Mr Brabant also stated in in his reply in respect of parking demand as follows:<sup>69</sup>

*[62 carparks provided for 72 units]... Therefore the anticipated volume of on street parking from this development is low. Further in the context of the shift in approach to parking mandated through the AUP, management of parking on street is a matter for AT who have the power to impose a range of restrictions if they deem that to be necessary. I emphasise in that regard that roads are a public resource and no landowner has any proprietary right to public parking outside their property. While an accepted function of a road corridor may be to provide parking opportunities, that is always subject to safety and efficiency considerations which it is for AT to manage.*

133. Mr Nixon also advised in his evidence that the site is well connected to public transport options which reduces reliance on private vehicle travel. These services were described as being comprised of four different bus services, along with the ferry service from Beach Haven Wharf to the CBD.<sup>70</sup> We note that these would be

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<sup>66</sup> Agenda, at pp.131-140

<sup>67</sup> EV09, at [10]

<sup>68</sup> Agenda, at p.137

<sup>69</sup> EV36, at [49]

<sup>70</sup> EV09, at [20]

expected to reduce reliance on private vehicle travel and would be of particular importance for occupants of those units who did not own a vehicle.

134. The Panel acknowledges submitter concerns as to other demands on on-street parking, particularly in Cresta Avenue, arising from peak usage times and associated overspill parking associated with use of the sport and recreation facilities at Shepherd's Park. We note that Mr Nixon's surveys covered the weekend period<sup>71</sup> and we consider that the reduction in parking demand from changes to the proposal will not result in adverse impacts on the capacity of the local street network, and where they do coincide with peak demands for Shepherd's Park, that these will be of a temporary nature. The Panel also notes Mr Brabant's observation that residents of the proposed development will be able to access those same facilities by foot, and thereby not add to the demand for parking for the use of this resource, or other commercial premises nearby. We accept that the proposal will be very likely to result in a greater demand for on-street parking but find that it will be within the capacity of these adjacent streets.
135. Submitters also raised concerns about increased traffic flows and additional parking demand on Beach Haven Road (to the west of the intersection with Rangatira Road). Beach Haven Road is relatively narrow and we were told that parking on the street causes disruption to the flow of traffic. This effect would be exacerbated by increased traffic flows and an increased demand for on-street parking.
136. Based on the modelling he had undertaken, Mr Nixon's evidence was that the Rangatira Road and Cresta Avenue intersections with Beach Haven Road would be able to operate at 'Level of Service A' (the highest performance level).<sup>72</sup> In response to questions from the Panel, he expressed confidence that any effects of increased traffic flows and an increased demand for on-street parking on Beach Haven Road would be minor.
137. Overall, the Panel is satisfied that the proposal provides a sufficient level of parking to meet its typically expected demands, and both parking and travel demand can be accommodated within the site and surrounding road network with minor adverse effects on the convenience, functionality and safety of that network.

### **Effects on local infrastructure networks**

138. The proposed development would result in increased demands on local infrastructure due to the introduction of increased paved surfaces (stormwater) and occupation of the 72 units (water supply and wastewater). Many submissions raised concerns as to the impact on those local infrastructure networks which were said to be already at capacity and noting the effects of flooding arising from the storm events in Auckland during January/February 2023 and the resulting water quality impacts in Hellyers Creek. Associated with this is the fact that an OLFP

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<sup>71</sup> During May 2021 as confirmed in Mr Brabant's reply (EV36, at [50]). The Panel notes that this was a 'Level 1' period within the COVID-19 alert settings.

<sup>72</sup> EV09, at [10]

runs across the western part of the site (entering from 2/92 Beach Haven Road and exiting via 2/15 Cresta Avenue).<sup>73</sup>

139. The Panel also noted that the site is subject to an infrastructure-related 'qualifying matter' under PC 78, being 'Water and/or Wastewater Constraints Control'. As previously noted, we sought further information prior to the hearing as to the assessments provided by the Council and the underlying agreements that had been reached between the Applicant and the Council (via Healthy Waters) and Watercare with respect to upgrades of local networks. This was provided prior to the hearing and consisted of a memorandum that had been sent to the Council's Development Engineer, Mr Salvador from Healthy Waters (dated 17 November 2022), and an Infrastructure Funding Agreement between Watercare and Bentley Studios Limited (dated 29 November 2021).
140. The memorandum from Healthy Waters noted a number of matters pertaining to stormwater effects which we summarise here:<sup>74</sup>
- *Stormwater quality treatment for the site will be serviced by Hynds Upflo devices. The devices will be sized for runoff for all paved surfaces. Treatment of roof runoff is not required as the site is classified as small brownfields under the Regionwide [Network Discharge Consent].*
  - *Connection to an existing 750mm SW line will service the site. Attenuation for the 10% AEP to pre-development runoff volumes will be provided via underground detention tanks. An existing grated SWMH lid will be replaced with a scruffy dome.*
  - *An existing OLFP traverses site boundaries. As part of the proposal, the entry and egress locations will be maintained. The OLFP will be formalised within site boundaries by a grassed conveyance swale. Peak water depth within the channel is 150mm for the 1% AEP storm event, with pre-post development change of flow rate at a maximum increase of 0.07m<sup>3</sup>/s. Peak flow rate is 0.75m<sup>3</sup>/s, which is classified as a minor OLFP (less than 2m<sup>3</sup>/s). The prepost development change in flow rate and depth is highly likely to remain minimal as part of the development, and effects upstream and downstream can be considered as minimal.*
141. As noted above, that review by Healthy Waters was provided on 17 November 2022, and prior to the weather events of early 2023. Mr Williams' addressed this aspect in his evidence, advising of the additional modelling undertaken since that time utilising a climate change adjustment (2.1°C as required under the Council's Code of Practice), which yields a higher rainfall depth (245mm) than that recorded for Beach Haven during January/February 2023 (230mm). He advised:<sup>75</sup>

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<sup>73</sup> Although we note that Mr Crispin included a photograph in his submission of storm flows traversing across to his property at 29 Cresta Avenue.

<sup>74</sup> EV26

<sup>75</sup> EV08, at [53]

*The increase in Overland flow depth is 10mm post development. We have also investigated the TP108 1% AEP Rainfall with 3.8°C climate change. The increase in Overland flow depth is 20mm post development. Our design review indicated the small increase in flood depth is easily accommodated within the existing overland flow paths located in downstream properties. It is my opinion that this increase in flood depth is considered to be within typical margin of error requirements and will not create nuisance to downstream properties.*

142. The Infrastructure Funding Agreement, included as Appendix 2 to the rebuttal evidence of Ms Morgan/Pettengell<sup>76</sup> advises that Watercare's current infrastructure does not have sufficient capacity to provide the necessary water services for the development. Therefore the Applicant has agreed to a contribution to the cost of works and Watercare will undertake the upgrade works to replace the existing 150mm Council watermain with a new 250mm ID watermain under that part of Rangatira Road between Tramway Road and Lysander Crescent, in accordance with the agreement.
143. The evidence of Mr Williams addressed infrastructural matters, noting his agreement with Mr Salvador's conclusion that "*there is sufficient capacity in the existing infrastructure network to service the development, with any adverse effects falling within appropriate levels and being less than minor*".<sup>77</sup>
144. The Panel acknowledges Mr Brabant's reply submission point that "*assessing infrastructure is fundamentally a technical matter*" and that "*[t]here is advice from chartered engineers and advice from Watercare (being the entity empowered to manage and operate relevant infrastructure) that this proposal is appropriate and from a capacity perspective it can be accommodated*".<sup>78</sup> The Panel was nevertheless interested, in the context of the PC 78 qualifying matter, to understand the capacity implications of the local wastewater network arising from the proposed development. This was in light of the assessment within the Applicant's Infrastructure Assessment that "*the total pipe capacity was calculated at 98 l/sec whereas the design flow was calculated at 96.31 l/sec, therefore resulting in sufficient capacity within the 300mm [dia] transmission line*". This suggests an extremely narrow margin and appeared to underscore some of the submission points about observations as to existing overflows in the network (as also expressed in the Local Board's comments to us).
145. We did not have any direct or specific comment on this issue from Watercare itself, but Mr Williams' evidence (as appeared to be agreed by Mr Salvadore) advised that "*Watercare have confirmed via their catchment model that the existing network has sufficient capacity to cater for the existing catchment including the proposed development at 96 Beach Haven Road/13 Cresta Avenue*".<sup>79</sup>

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<sup>76</sup> EV13 at Appendix 2 p.10-14

<sup>77</sup> EV08 at [71], with reference to the Agenda at p.59

<sup>78</sup> EV36 at [41]

<sup>79</sup> EV08, at [38]

146. Mr Brabant included a fulsome response on this matter which has further described Mr Williams' approach to his assessment and has assuaged any remaining concerns of the Panel in this matter. We reproduce that in full below:<sup>80</sup>

41. *...I note in that regard with respect to any potential concern about capacity that the RMA operates on a first in first served basis where you are required to assess effects in the context of the position before you.*

42. *With respect to wastewater matters, in my oral reply I referred to further advice provided to me by Mr Williams by email in the context of issues arising. He clarified that the Watercare Code of Practice require developers to accommodate the site development plus potential development upstream. Notwithstanding this direction, Mr Williams advises that for any development he typically undertakes a capacity check also to the immediate downstream line, which in this case was the 150 mm line which has plenty of capacity.*

43. *Mr Williams went on to advise that depending on Watercare's modelling of the wastewater network in the area, they can request a level 1 or 2 survey of downstream networks, however in this case they were happy with the level of modelling and did not request any further surveys from the Applicant's engineers.*

44. *In addition Mr William states that an Applicant would not usually check a 300 mm pipe as these are considered transmission lines and are outside Watercare's Code of Practice. Notwithstanding that, Mr Williams chose to check that line in this case, and found it to be at virtually full capacity albeit the analysis done was a quick gravity flow review based on GIS data which is not highly accurate. In contrast, Watercare's modelling will include pumping stations and they have the ability to respond to constraints, for example by staggering pump starts to avoid peak flows.*

45. *Ultimately, Watercare reviewed their modelling which is more extensive and detailed than what an Applicant's engineering consultant can undertake, and determined there were no downstream constraints or issues as confirmed by Watercare via email.*

147. The Panel is also aware in respect of this matter that Watercare (and Healthy Waters) would have a further role in its review of any future building consent and Engineering Plan Approval documentation (and presumably in respect of the PC 78 process as it relates to this site), which would then enable further consideration of any network constraints as part of those processes.

148. In terms of the OFP, we note that the approved earthworks consent also provides for this to be 'actively managed'<sup>81</sup> during construction, and the Council's decision advises "[t]he amended earthworks will not diminish the capacity of the overland flow path that traverses the site, which ensures that its integrity will continue to be

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<sup>80</sup> EV36

<sup>81</sup> EV38, Erosion and Sediment Control Plan

*maintained and that adverse flooding related effects will not be exacerbated*".<sup>82</sup>

This was also noted in Mr Brabant's reply submission.<sup>83</sup>

149. Overall, we are satisfied from the evidence presented, and having regard to Mr Salvatore's review for the Council and the positions of Healthy Waters and Watercare that were provided to us, that the proposal would have no more than a minor adverse effect on the capacity of local infrastructural networks.

### **Accessibility of the development**

150. While not a matter of contention, or a statutory requirement, we sought comment during the hearing with respect to whether any of the 81 (now 72) proposed units would be 'accessible'. One of the key challenges in this regard was the 'walkup' nature of the units, as well as the inability to provide a ramp to the ground floor from the end of the pedestrian access from Beach Haven Road. The latter, it was explained, was due to site gradient, spacing restrictions and constraints associated with an existing stormwater pipe. In terms of the ground floor units, Ms Chan noted in her reply statement that "[w]hile building entrances to Block A and Block B contain stairs, levelled access is proposed for the entrances to Blocks C and D. I consider a choice is provided within the proposal with levelled access provided to 12 of the ground floor units".<sup>84</sup>

151. While we do not need to make a finding on this matter, we note that with no on-site accessible parking, nor convenient access from Beach Haven Road, the development would appear unlikely to provide for persons with mobility issues. We make the observation that is disappointing that such considerations do not form part such proposals from the outset. However, we recognise that accessibility is not a mandated requirement for this or any other form of residential development in Auckland, and confirm that this aspect did not inform the decision that we have reached.

### **Summary findings with respect to adverse effects**

152. Overall, in terms of those matters of contention related to adverse effects, and notwithstanding our reservations with respect to the potential privacy and overlooking overlooking effects from the proposal, we find that these will be minor overall.

### **Objectives and Policies**

153. In undertaking our consideration of the objectives and policies, we are familiar with the need to do so on the basis of undertaking a "*fair appraisal of the objectives and policies read as a whole*".<sup>85</sup> However, the Panel is also aware of the authority that allows us to consider those objectives and policies that, when the plan is read as a whole, are very important and central to the proposal before us, such that we may

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<sup>82</sup> EV37, at p.6

<sup>83</sup> EV36, at [59]

<sup>84</sup> EV31, at [6.4]

<sup>85</sup> Per *Dye v Auckland Regional Council* [2002] 1 NZLR 337(EA), at [25]

find the proposal to be contrary to the objectives and policies overall.<sup>86</sup> That is the situation that we have determined to apply in this case, including with respect to the clear direction under the SHZ provisions as set out below (excluding those related to streetscape considerations and non-residential activities):

### H3.2. Objectives

- (1) *Development maintains and is in keeping with the amenity values of established residential neighbourhoods including those based on special character informed by the past, spacious sites with some large trees, a coastal setting or other factors such as established neighbourhood character.*
- (2) *Development is in keeping with the neighbourhood's existing or planned suburban built character of predominantly one to two storeys buildings.*
- (3) *Development provides quality on-site residential amenity for residents and for adjoining sites and the street.*

### H3.3. Policies

- (1) *Require an intensity of development that is compatible with either the existing suburban built character where this is to be maintained or the planned suburban built character of predominantly one to two storey dwellings.*
- (2) *Require development to:*
  - (a) *be of a height, bulk and form that maintains and is in keeping with the character and amenity values of the established residential neighbourhood; or*
  - (b) *be of a height and bulk and have sufficient setbacks and landscaped areas to maintain an existing suburban built character or achieve the planned suburban built character of predominantly one to two storey dwellings within a generally spacious setting.*
- ...
- (4) *Require the height, bulk and location of development to maintain a reasonable level of sunlight access and privacy and to minimise visual dominance effects to the adjoining sites.*
- (5) *Encourage accommodation to have useable and accessible outdoor living space.*

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<sup>86</sup> *Akaroa Civic Trust v Christchurch City Council* [2010] NZENV 110, at [74]

(6) *Restrict the maximum impervious area on a site in order to manage the amount of stormwater runoff generated by a development and ensure that adverse effects on water quality, quantity and amenity values are avoided or mitigated.*

...

(8) *To provide for integrated residential development on larger sites.*

154. The Panel notes that the expert planning evidence for the Applicant and the Council was largely in agreement that the proposal would be in alignment with these provisions.<sup>87</sup> The evidence of Ms Morgan/Pettengell in this regard concluded that:<sup>88</sup>

*In terms of overall assessment, despite the infringements to the density standards, in our view the proposal is broadly consistent with the objectives and policies of the [SHZ], particularly with respect to effects on wider neighbourhood character and amenity, given the unique characteristics of the site and surrounding area. In terms of effects on neighbouring sites, the proposal generally complies with the height in relation to boundary standards of the zone, and design techniques have been used to reduce visual dominance and achieve reasonable privacy to neighbouring sites.*

155. On the basis of that approach, the expert planning evidence before the Panel was that the proposal would pass the s.104D(1)(b) gateway test (along with s.104D(1)(a) in respect of effects). There was no expert evidence to the contrary. We acknowledge that we must take into account the expert planning evidence presented. However, while we have reviewed and carefully considered that evidence, in this particular case we find it difficult to fully accept it, for the reasons set out in our discussion below.

156. The Panel's first concern is whether or not the proposed development would be consistent with the existing or planned suburban built character of the area. We note that this existing or planned suburban built character of the SHZ must be different to the suburban built character referred to in the MHS Zone (and also different to the planned urban built character of the MHU Zone), with the key difference between the character of the zones, as we see it, being that multi-unit development is not anticipated in the SHZ.<sup>89</sup> Through its provisions for single dwellings and relatively large minimum site sizes, the SHZ is clearly not identified as a zone where intensification is generally expected.

157. As discussed previously, we observed that while there is some evidence of infill development on sites zoned MHS in the area, multi-unit development is the exception. The predominant character of the area is that of a low-rise and low-density residential environment, as would be expected of the suburban built

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<sup>87</sup> By reference to the Agenda at pp.66 and 67, and EV12 at [10.11] - [10.20]

<sup>88</sup> EV12, at [10.21]

<sup>89</sup> H3.1 Zone Description AUP(OP)

character comprised of both the SHZ and MHS zones (and we have highlighted the similarities between these zones in built form outcomes earlier in this decision).

158. The objectives and policies of the SHZ are also explicit that amenity values of established residential neighbourhoods are to be maintained.<sup>90</sup> On this basis, it is clear that the proposal cannot be said to “maintain” the amenity values of the SHZ because it does not anticipate a development of the size and intensity proposed.
159. The on-site amenity provided by the proposed development, particularly for studio units of 37m<sup>2</sup> that incorporate balconies of just 6m<sup>2</sup>, for example, is wholly dissimilar to, and substantially less than, the amenity that would be provided by a typical SHZ development. Because of the form of development anticipated in the zone, there are no standards for apartment or balcony sizes. Accordingly, Ms Chan’s reply statement relied on analysis against the standards of the MHS and MHU Zone standards and the Auckland Design Manual (**ADM**). In noting that half the balconies provided would not meet the minimum 8m<sup>2</sup> standard, she considered that they would nevertheless be of “*usable dimension and size*”.<sup>91</sup> Ten of the units were also noted to be less than the requirements of the ADM.
160. The Panel does not accept that a comprehensive development of such a large site should be deficient with even those minimum guideline standards. In any case we do not consider it appropriate to rely on compliance with the standards for different zones where different levels of intensity are anticipated and sought to be enabled and provided for.
161. We further note that the effect of intensity will also be experienced by neighbouring properties through the need for large areas of at-grade parking and access areas (along the full length of the eastern boundary) and the associated movements of 62 vehicles to and from the site.
162. The Panel also observes that the ‘planned’ character of the SHZ is one of predominantly one or two-storey buildings “*within a generally spacious setting*”. If the subject site is developed as proposed, that area of SHZ cannot realistically be said to be ‘predominantly’ in accordance with the planned character of the zone. The built form is of a greater height and scale and dwelling intensity than anticipated and the resultant setting cannot be described as spacious.
163. On that basis we have not been able to accept the evidence that the proposal is in accordance with the fundamental provisions of the SHZ, in particularly Objectives (1) – (3) and Policies (1) and (2). While Policy (5) does not lead to a corresponding rule (outdoor living space requirements), the outcomes sought by this policy appear to be implicit within the minimum site size standards for the zone.
164. We consider the proposal to be neutral with respect to Policy (4), having regard to our previous conclusions with respect to the effects of building scale in terms of dominance and privacy outcomes, although we would observe that a permitted

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<sup>90</sup> The SHZ Description also refers to amenity values being ‘enhanced’, but this is not carried through to the objectives and policies.

<sup>91</sup> EV31, at [5.4]

form of development would lessen those effects further. While the building footprint is less than the 35% standard, the residual areas are comprised to a significant extent by parking and access areas and communal bicycle and rubbish storage areas. Against this, the Panel acknowledges the communal landscaped area on the western side of Building C, which does impart a good level of amenity and spaciousness to this part of the site, as well as a generous set back to the adjacent properties along Cresta Avenue. However, those factors do not outweigh, in our view, the significant issues we have determined to exist with the requirements of the SHZ in respect of the site in overall terms.

165. On that basis, we also consider that a further difficulty arises with respect to the subdivision provisions of the AUP(OP). The relevant objective and policy under Chapter E38, which are applicable to all zones, are:

*Objective E38.2*

- (1) *Land is subdivided to achieve the objectives of the residential zones, business zones, open space zones, special purpose zones, coastal zones, relevant overlays and Auckland-wide provisions.*

*Policy E38.2*

- (1) *Provide for subdivision which supports the policies of the Plan for residential zones, business zones, open space zones, special purpose zones, coastal zones, relevant overlays and Auckland-wide provisions.*

166. Because we have found that the proposed development will not achieve the objectives of the SHZ, nor support the associated policies, the proposed unit title subdivision will, in our finding, also be contrary to these particular objectives and policies. This is particularly so when considered in respect of the SHZ minimum site size standard of 600m<sup>2</sup>. We are therefore unable to accept the evidence we received in this regard from Mr Ross<sup>92</sup> and Ms Morgan/Pettengell.<sup>93</sup>
167. We have considered those objectives and policies that, when the plan is read as a whole, are central to the proposal before us and this has informed our finding that the proposal is contrary to the objectives and policies of the AUP(OP) in overall terms and therefore with respect to s.104D(1)(b).
168. There is one further matter to address in respect of objectives and policies and that is the effect of PC 78. Under this plan change, the site is proposed to change to the MHU Zone. As previously noted, the site is subject to a 'qualifying matter' relating to water supply and wastewater. From the evidence heard we understand that this is likely to be resolved given that Watercare have advised that the proposed development (which is consistent with the form of development anticipated by the MHU Zone) can be accommodated within the existing networks (subject to upgrades). The evidence of Mr Ross and Ms Morgan/Pettengell is that the proposal would be in accordance with the objectives and policies of the MHU

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<sup>92</sup> Agenda, at p.64

<sup>93</sup> EV12, at [10.32]

Zone (as amended by PC 78). They differed insofar as Mr Ross did not consider that greater weight need to be applied to the operative objectives and policies, because additional and/or different objectives and policies will likely apply at the end of the PC 78 process, which could modify or qualify the mandatory objectives and policies. However, because Mr Ross considered that the outcome was the same (because in his view the proposal was consistent with the SHZ provisions), the need to determine relative weighting is not necessary.<sup>94</sup>

169. The Panel is aware, however, that PC 78 has been subject to a one year delay in response to the need to inter alia further address natural hazards/flooding issues, and that *“the extent of changes required to PC 78 could be significant, and may require the Council to consider initiating a variation to PC 78 towards the end of this year / early next year”*.<sup>95</sup> As the site is subject to such hazards (an OFP), and the extent of possible changes to PC 78 are unknown in respect of the subject site (or indeed more widely), we find that a lower weighting should be ascribed to the provisions of PC 78.

### **Section 104D Summary**

170. For the reasons set out in the preceding paragraphs of this decision, we find that:
- (a) While we have some concerns as to the potential privacy and overlooking effects from the proposal, particularly in respect of 2/7 and 2/9 and 29 Cresta Avenue, we conclude that the effects of the proposal can be considered to be minor overall.
  - (b) The effects of the proposal will be contrary to the objectives and policies of the AUP(OP).
171. Overall, we consider that the proposal can be considered to pass one of the gateway tests of s.104D, in relation to effects. Accordingly, there is jurisdiction to consider the merits of the proposal in terms of s.104.

### **Section 104**

172. We now exercise our discretion in respect of our findings set out above, and in this regard we are required to have regard to such matters listed in s.104 of the RMA as are relevant. The exercise of our discretion requires us to make a determination in terms of s.104B to grant or refuse consent, in a manner that will achieve the purpose and principles of the RMA set out in Part 2.
173. The planning evidence also concluded that the proposal merits the grant of consent, when assessed in terms of s.104, subject to proposed conditions. There was no expert evidence to the contrary. We again acknowledge that we must take into account the expert planning evidence presented, however in this particular case we find it difficult to fully accept it, for the reasons that we have described and as we set out below.

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<sup>94</sup> Agenda, at p.71

<sup>95</sup> Memorandum of counsel to the PC 78 Hearing Panel, 21 April 2023

174. In terms of s.104(1)(a), and based on our previous findings in respect of building scale, noise, transport and infrastructural effects, and taking into account the positive effects of the proposal, in particular the provision of residential accommodation providing housing choice in a brownfields location, close to local amenities and public transport, we find that any adverse effects on the environment will be minor overall and acceptable. This finding is of course subject to the conditions that were presented with the Applicant's reply.
175. In terms of s.104(1)(b), we have previously highlighted the relevant provisions of the AUP(OP) that relate to the particular topics that we have need to address. Our conclusions in respect of the objectives and policies therefore inform our findings under s.104(1)(b)(vi), and our overall findings under this section generally, given the lack of direct relevance of other clauses. In particular we consider that the AUP(OP) gives effect to the higher order provisions of the RPS, while the NPS-UD has been given effect to in part (removal of minimum parking standards) and through commencement of the PC 78 process. In respect of the latter, the extent to which provisions will change under PC 78 are potentially significant and presently unknown, and we have placed less weight on those provisions accordingly. There are no relevant national policy standards, regulations or coastal policy statement that are relevant to our determination.
176. In respect of the objectives and policies of the SHZ, we have not been able to accept the evidence that the proposal is in accordance with (or has regard to) these fundamental provisions. Accordingly, we consider that the proposal is contrary to those objectives and policies in overall terms.
177. In terms of other matters of relevance under s.104(1)(c), we have had regard to submissions on the application and the comments of the Local Board. We have previously noted our response to the suggestions for the Applicant that submitters have not understood the RMA and planning process, or that a narrow pathway exists for the present proposal, and that its responses belie the changes that it has nevertheless made to the proposal in response to some of those submissions.
178. Overall, it is our finding that the proposal does not have sufficient regard to the SHZ provisions of the AUP(OP), and this informs our overall evaluation under s.104 as to its overall merits.

### **Precedent**

179. A question the Panel raised during the hearing was whether a grant of consent for this proposal would create an adverse precedent, in terms of whether future applications may arise for non-complying multi-unit developments elsewhere in the neighbourhood or the Region more generally within SHZ land. Because of the findings that we have reached in terms of s.104, this issue is of lesser significance. Nevertheless, we comment on it because it is a further matter that is relevant to the consideration of a non-complying activity.

180. It was Mr Ross' evidence that a precedent issue would not arise, for the reasons that:<sup>96</sup>

*A development with similar non-compliances (or even smaller non-compliances) within a different environment may not be supportable when the required assessment is undertaken. Accordingly, in this instance, I do not consider that granting this application would set a precedent in terms of AUP(OP) consenting requirements.*

181. Ms Morgan/Pettengell also addressed this issue in their evidence in chief, again returning to the theme of the 'anomalous' nature of the site's zoning and referencing other zones in the locality that enable "a significant level of intensification to occur". We have previously outlined our discomfort with that approach. Their evidence also claimed that the SHZ zoning will be phased out by March 2025 under PC 78.<sup>97</sup> However, given the pathway yet to be traversed by the PC 78 process as we have previously commented upon, we place little weight on that particular evidence point.
182. Mr Brabant's comment on this issue in his reply was that "*given the reliance on the distinct and somewhat unique nature of the subject site, zoning pattern and proposal, ... precedent or plan integrity concerns do not arise*".<sup>98</sup>
183. Notwithstanding the aforementioned opinions of the planning witnesses and Mr Brabant's response from a legal perspective, the Panel considers that on its face, there is a potential for an adverse precedent to arise, particularly given our observations about the factual extent of the SHZ within the Beach Haven area, and of course beyond. Therefore, and having found that the proposal is contrary to the clear policy intent of the AUP(OP), we find that granting consent would impact the integrity of the plan and has the potential to create expectations that similarly framed proposals would gain consent.

## **Part 2**

184. We have previously noted a general premise that, having regard to our understanding of case law on the subject, that our decision is able to be made with reference to the relevant planning provisions and without recourse to Part 2. While we have reached a conclusion in respect of the relevant matters to be determined in accordance with s.104D and s.104, we consider that for completeness it is appropriate to make a final check against Part 2, having regard to the Court of Appeal's conclusions in *Davidson*. Although we have found that adverse effects on the environment will be minor, given our findings in respect of the relevant objectives and policies for the SHZ, we find that the sustainable management purpose of the RMA will be appropriately served by refusing, rather than granting, consent to the application.

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<sup>96</sup> Agenda, at p.73

<sup>97</sup> EV12, at [14.1]

<sup>98</sup> EV36, at [62]

### **Proposed conditions**

185. Because our decision is to decline consent to the application, we do not need to make findings with respect to the proposed conditions, or the reply evidence that we heard in respect of them. Had we been able to reach a different decision, we would have adopted those condition amendments in full, noting that there was no apparent contention between the witnesses in respect of them.
186. In this regard we also acknowledge Mr Brabant's further reply in response to the Panel's query as to the way in which the future body corporate (arising from the proposed subdivision) would manage the common areas of the development, beyond the more limited maintenance obligations on the consent holder set out in the land use conditions. The Panel's query in the first instance was in light of the equivalent form of condition developed in the Environment Court's decision in *69 Roberta Avenue v Auckland Council* [2023] NZEnvC 126, albeit in that case for a residents' society where a different legal position applies. In his further reply, Mr Brabant outlined the form of the proffered condition (as compared to that adopted for *69 Roberta*) and incorporated specialist legal advice from Judy Cuellar, a Director of Evans Bailey Limited Lawyers.
187. The Panel considers that this condition would have addressed its request on this point, and although it will not form part of its decision, it may have broader application in addressing similar body corporate arrangements in other residential proposals that incorporate a unit title subdivision.

### **Decisions**

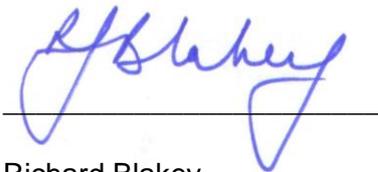
188. In exercising our delegation under ss.34 and 34A of the RMA, the late submissions of Kathryn Atkinson and Ruth Jackson are **accepted**.
189. In exercising our delegation under ss.34 and 34A of the RMA and having regard to the foregoing matters, ss.104, 104B and 104D and Part 2 of the RMA, we determine that the resource consent application by Beach Haven Road Apartments Limited for a 72-unit apartment development within the Single House Zone at 96 Beach Haven Road and 6 Cresta Avenue, Beach Haven, is **refused** for the reasons set out below.

### **Reasons for the decisions**

- I. In terms of the late submissions, we conclude that no persons are considered to be affected by the waiver of time to accept the submissions; the matters raised are generally consistent with those raised in other submissions; and the late submissions have not contributed to any unreasonable delay.
- II. Our reasons for our decision on the substance of the application can be discerned from the full text of this decision. For completeness, and on the basis of evidence that we heard, we have determined that consent is refused to the proposal on the basis of the following:
  - (a) The proposal is contrary to the objectives and policies of the SHZ, and to the AUP(OP) in an overall sense. However, it is able to pass one of the

threshold tests of s.104D because any adverse effects on the environment will be minor.

- (b) In terms of s.104(1)(a), the actual and potential effects from the proposal, as amended within the Applicant's reply, will be of an acceptable nature and scale.
- (c) In terms of s.104(1)(b) the proposal does not have appropriate regard to the relevant statutory documents, and in particular with the objectives and policies of the AUP(OP) relating to development within the SHZ.
- (d) We have had regard to other matters under s.104(1)(c) of the RMA, including the submissions on the application and comments from the Kaipatiki Local Board.
- (e) Because the objectives and policies of the relevant statutory documents were prepared having regard to Part 2 of the RMA, they capture all relevant planning considerations and contain a coherent set of policies designed to achieve clear environmental outcomes. Although we have found that adverse effects on the environment will be minor, given our findings in respect of the relevant objectives and policies for the SHZ, we find that the sustainable management purpose of the RMA will be appropriately served by refusing, rather than granting, consent to the application.



Richard Blakey  
Chairperson



Lisa Mein



Vaughan Smith

31 August 2023