

**BEFORE THE TIMARU DISTRICT COUNCIL**

**IN THE MATTER OF**

the Resource Management Act 1991

**AND**

**IN THE MATTER OF**

An Application for Resource Consent  
by Bayhill Developments Limited

---

**CLOSING LEGAL SUBMISSIONS FOR THE APPLICANT**

Dated: 22 March 2017

---

---

**GREENWOOD ROCHE**  
LAWYERS  
CHRISTCHURCH  
Solicitor: H G Marks  
(hannah@greenwoodroche.com)

Applicant's Solicitor  
Level 5  
83 Victoria Street  
P O Box 139  
Christchurch  
Phone: 03 353 0574

## **INTRODUCTION**

- 1 The central matters of focus for this application remain the same as when the hearing opened, however those matters have become sharply focused, and further evidence has been lodged in support of the proposal.
- 2 Recognising that the Hydro Grand has some heritage value, the initial intention of the Applicant on purchasing this property was not to demolish the building. However, the evidence is that there is no feasible alternative to doing so. If the proposed development does not go ahead, the significant costs of repair will mean the Hydro Grand will continue to degrade and likely become more dangerous and more of an eyesore than it is today.
- 3 The proposed development is likely to have a positive impact on the centre of Timaru, revitalising an important central site that has been largely un-used for as long as 23 years. The demolition and redevelopment of the Hydro Grand site is strongly supported by the business community and in particular the South Canterbury Chamber of Commerce.

## **ADDITIONAL INFORMATION**

- 4 Following adjournment of the hearing the Applicant has provided the following further information at the Commissioner's request:
  - (a) Supplementary legal submissions in relation to the scope of the application;
  - (b) Updated plans showing the existing ground level, and elevations showing the height of the proposed buildings with reference to that ground level;
  - (c) Internal elevations of the northern façade of the proposed development;
  - (d) Shading diagrams at a 1:200 level of detail;
  - (e) Additional information from Mr Rossiter setting out the answers to various transport queries raised during the course of the hearing; and

- (f) Additional information from Mr Davidson confirming the nature of the work included in the cost estimates.
- 5 An independent heritage impact assessment (HIA) has been carried out by Mr John Gray in order to identify whether there are exceptional or considerable heritage features in the Hydro Grand and to provide the Commissioner with an independent assessment of the nature and condition of the relevant features.
- 6 The Applicant has further refined the proposed conditions of consent following discussions with Timaru District Council experts and the HIA. The following further amendments are now proposed:
- (a) The transport conditions have been expanded to effectively tie the separate car park area to the development; and
  - (b) Heritage mitigation conditions have been expanded to reflect those suggested by Mr Gray in the HIA.

#### **MATTERS OF FOCUS AT HEARING**

- 7 The evidence called by submitters in opposition to this application pertained to 2 main areas of potential effect: effects on heritage values and on neighbouring properties. My opening legal submissions remain relevant in that respect.
- 8 Evidence was also given that the proposed development will have considerable positive effects for Timaru as a whole and more specifically for the central business area.<sup>1</sup>

#### **Heritage Values of the Hydro Grand**

- 9 As set out in my opening, and in the evidence of Mr Booth<sup>2</sup> and Mr Charity<sup>3</sup>, on first purchasing this property the Applicant wished to retain the existing Hydro Grand building. Unfortunately after extensive structural, design, quantity surveying and feasibility work, it was clear that the adaptive reuse of the building would not be possible<sup>4</sup>.

---

<sup>1</sup> South Canterbury Chamber of Commerce submissions at hearing.

<sup>2</sup> Evidence in Chief, Mr Booth at [4].

<sup>3</sup> Evidence in Chief, Mr Charity at [9].

<sup>4</sup> Evidence in Chief, Mr Charity at [9].

- 10 In coming to the decision that adaptive reuse is not feasible, the Applicant has had the heritage values of the Hydro Grand squarely in focus. It was not a case of simply deciding that an alternative proposal would be easier, as has been suggested by some submitters, a number of repair and reuse options were genuinely considered.

*Section 6(f) Case Law*

- 11 The submitters opposed to the proposal have argued that a thorough assessment of alternative options had not been completed. They have relied on the decisions in the *Lambton Quay* cases, in both the High Court<sup>5</sup> and the subsequent reconsideration of the application in the Environment Court<sup>6</sup>, and the decision in *Te Puna Matauranga v Wanganui District Council* as supporting their position<sup>7</sup>.
- 12 The *Lambton Quay* High Court decision makes it clear that to determine whether a heritage building should be demolished, all of the competing considerations need to be weighed to ensure that the outcome is “*fair, appropriate and reasonable*”<sup>8</sup>. I agree that this is the way this application should be treated. However, the Environment Court rehearing of *Lambton Quay* and *Te Puna Matauranga v Wanganui District Council* both have considerable factual differences to this proposal.
- 13 In the Environment Court rehearing of *Lambton Quay*, the final decision was based on whether there was a ‘reasonable alternative’ to demolition. In that instance the ‘reasonable alternative’ test was derived from the heritage objectives and policies in the Wellington District Plan and resulted in the Environment Court declining consent to demolish the building in question. The Court summarised that “*the Plan emphasises that we must be convinced that there is no reasonable alternative*”<sup>9</sup>. This should not be used as a blanket test for all cases involving the demolition of heritage buildings, but rather the appropriate test should be derived with reference to the relevant district plan.

---

<sup>5</sup> *Lambton Quay Properties Nominee Limited v Wellington City Council* [2014] NZHC 878

<sup>6</sup> *Lambton Quay Properties Nominee Limited v Wellington City Council* [2014] NZEnvC 229.

<sup>7</sup> Legal submissions on behalf of Timaru Civic Trust at [33].

<sup>8</sup> *Lambton Quay* (EnvC), above at n 5, at [73].

<sup>9</sup> *Lambton Quay* (EnvC), above at n 5, at [142].

- 14 Significantly, the heritage policies in the Timaru District Plan are far less prescriptive than those in the Wellington District Plan. The relevant policy requires a “*careful assessment of the character of heritage buildings of lesser significance and the effect of development proposals on those buildings*”<sup>10</sup> and the “*alternative or viable uses for the building, object or site*”<sup>11</sup>. These policies require a case-by case assessment of each proposal, rather than an assurance all ‘reasonable alternatives’ have been ruled out. The High Court was clear that the RMA does not require the consent authority to “*exhaustively and convincingly exclude*” all alternatives to demolition before consent may be granted to demolish a heritage building<sup>12</sup>.
- 15 The Applicant has undertaken a thorough assessment of the viable options for the reuse and redevelopment of the site but none of these were viable. Mr Heenan for the Council agrees that the options for strengthening and repair assessed by the Applicant are appropriate and that the levels of intervention required to bring the building up to 100% NBS would be extremely invasive<sup>13</sup>. In fact, Mr Heenan considered that the assessment completed by Mr Paterson was conservative and that further work may be required<sup>14</sup>. Mr Heenan agreed that whatever work would be required to reuse the building would be extensive and that there would be a significant cost to get the building to the 100% NBS level<sup>15</sup>.
- 16 I also note that there are a number of other important factual differences that distinguish the ultimate decision of the Environment Court in the re-hearing of *Lambton Quay* from this application. The Harcourts Building in question in the *Lambton Quay* cases was listed as a Category 1 building by Heritage New Zealand<sup>16</sup> and as such is of outstanding heritage value, unlike the Hydro Grand. In addition, the Harcourts Building was described as contributing positively to the sense of place and character and to a high quality street environment<sup>17</sup>. This is a direct contrast to Mr Burgess’s description of the Hydro Grand as making “*no contribution towards the vibrancy and levels of activity in Timaru’s town centre. The lack of activation*”

---

<sup>10</sup> Timaru District Plan, Part B , Chapter 10 Heritage Values Policy 3

<sup>11</sup> Timaru District Plan, Part B, Chapter 10 Heritage Values Policy 7(g)

<sup>12</sup> *Lambton Quay* (HC), above at n 5, at [74].

<sup>13</sup> Oral submissions of Mr Heenan at application hearing, (8/12/16).

<sup>14</sup> Section 42A report, Report of Mr Heenan, October 2016, at page 4.

<sup>15</sup> Oral submissions of Mr Heenan at application hearing, (8/12/16).

<sup>16</sup> *Lambton Quay* (HC), above at n5, at [11].

<sup>17</sup> *Lambton Quay* (EnvC), above at n4, at [44].

on the site creates a void or dead space. This functionally severs the retail areas to the south from the hospitality area to the north and the Piazza and Caroline Bay to the east".<sup>18</sup>.

- 17 It was also clear that strengthening of the Harcourts Building could take place in such a way that there would be minimal impact on the useable space<sup>19</sup>. That is not the case for the Hydro Grand<sup>20</sup>.
- 18 The case of *Te Puna Matauranga v Wanganui District Council*<sup>21</sup> was also referred to by counsel for the Timaru Civic Trust as an example of adaptive reuse being considered appropriate where demolition was not. Again, there are a number of factual differences distinguish this proposal from that considered in *Te Puna Matauranga*:
- (a) *Te Puna Matauranga* involved a Category 1 building<sup>22</sup>;
  - (b) The Court in *Te Puna Matauranga* considered there was very little chance that if consent was not granted the 'do nothing' option would occur<sup>23</sup>. In this instance history shows that nothing is likely to be done with the Hydro Grand in the event consent is declined, resulting in the further decline of the building<sup>24</sup>;
  - (c) The difference in cost between re-using the heritage building and a new building in *Te Puna Matauranga* was not considerable, and in stark contrast to the Hydro Grand, there was an option for Heritage New Zealand funding to assist<sup>25</sup>.
  - (d) Further, in *Te Puna Matauranga* the relevant heritage building was a suitable layout for the proposed purpose and the redevelopment of the heritage building would not require significant works to bring it up to a modern standard<sup>26</sup>. That is very clearly not the case for the Hydro Grand.
- 19 Mr Paterson and Mr Davidson have outlined the extensive work and cost required to reuse the Hydro Grand as a commercial viable

---

<sup>18</sup> Evidence in Chief of Mr Burgess, at [34].

<sup>19</sup> *Lambton Quay* (EnvC), above at n5, at [128].

<sup>20</sup> Evidence in Chief of Mr Philip Paterson at [12].

<sup>21</sup> *Te Puna Matauranga v Wanganui District Council* [2013] NZEnvC 110.

<sup>22</sup> *Ibid*, at [94].

<sup>23</sup> *Ibid*, at [59].

<sup>24</sup> Evidence in Chief of Mr Darron Charity at [14].

<sup>25</sup> *Ibid*, at [41].

<sup>26</sup> *Ibid*, at [102].

building. Mr Salmond also noted that *"if the building were to be adapted for continued use as an hotel meeting contemporary standards of accommodation and structural integrity, very little of the interior is likely to be salvaged"*<sup>27</sup>. He further stated that *"any reuse of the building in this would effectively result in "façadism", which could not be seen as an appropriate conservation option for the building"*<sup>28</sup>.

#### *Independent Heritage Impact Assessment*

- 20 Following the adjournment of the hearing Mr John Gray has completed a detailed and extensive Heritage Impact Assessment (HIA) in respect of the Hydro Grand. Mr Gray's assessment is comprehensive, detailing the specific values that are present in each room and each external façade and rating each of those items in respect of their significance to the overall importance of the building. The report also includes a history of the building and the architects, an assessment of the relevant Timaru District Plan provisions, and discussion of when it might be appropriate to demolish a heritage building.
- 21 In summarising the detailed assessment of specific spaces, Mr Gray noted that *"several modifications have been made to the building over the years, many of which have been to the detriment of significance and legible form, including the removal of three large gable forms across the Bay Hill façade and two along Sefton Street, which has created disconnection between the form of the oriel windows and overall proportions of the main façade. This has in my opinion considerably diminished the rhythm and form of the building and thereby the overall integrity of the original design. I was disappointed by the overall lack of significance of the interior of the building. The detailed schedule of significance indicates very few elements which have been classed as A or B indicating "Exceptional" or "Considerable" significance."*<sup>29</sup>
- 22 As well as having very few elements of exceptional or considerable significance, Mr Gray also highlights the dilapidated nature of the building in his summary, *"While there is some notable public esteem*

---

<sup>27</sup> Evidence in Chief Mr Salmond at [27].

<sup>28</sup> Evidence in Chief Mr Salmond at [28].

<sup>29</sup> *Hydro Grand Hotel Heritage Assessment*, prepared by Mr John Gray for Timaru District Council, February 2017, page 91.

*for the building, the lack of maintenance and dereliction over the past 13 years or more, has resulted in an extreme state of disrepair, which may be difficult to reverse in the case of this building, while maintaining or enhancing the buildings heritage significance.”<sup>30</sup>*

23 As set out in opening, Part 2 of the Resource Management Act 1991 (RMA) requires a decision maker to recognise and provide for the protection of historic heritage from inappropriate subdivision, use and development. Paragraph 63 of my opening submissions summarises the factors to be considered when making an assessment of whether demolition of a heritage item is “appropriate”. Mr Gray’s report contains a similar list of factors setting out when he considers demolition of a heritage building will not be inappropriate. He includes an assessment of the current application against that list in the HIA. In this respect Mr Gray found the following:

- (a) The building is earthquake prone under the definition in the New Zealand Building Act<sup>31</sup>. Earlier in the report Mr Gray also expressed a concern that the building is likely to constitute an unsanitary building, injurious to public health under section 122 of the Building Act<sup>32</sup>;
- (b) The building is in an “*extreme state of disrepair to the point where it may be difficult to reverse, while maintaining the buildings heritage significance. The building is not yet deteriorated to the point of there being no other option but demolition, but it is close*”<sup>33</sup>;
- (c) Mr Gray is satisfied that “*fundamentally all of the potential options for adaptive reuse or redevelopment have been investigated and analysed*”<sup>34</sup>;
- (d) The options for adaptive reuse are likely to be very invasive in relation to the existing heritage fabric and will also be cost prohibitive. Mr Gray notes “*Strengthening the existing structure to above 34% of NBS will require extensive work, as described in Mr Paterson’s evidence, which will not only be extremely*

---

<sup>30</sup> Ibid, at page 92.

<sup>31</sup> Ibid, at page 101.

<sup>32</sup> Ibid, at page 24.

<sup>33</sup> Ibid, at page 102.

<sup>34</sup> Ibid.



*invasive upon existing heritage fabric, but will be expensive and probably cost prohibitive as explained in the evidence of Mr Ross Davidson, Quantity Surveyor*<sup>35</sup> and further *“It would therefore appear, when using my hospitality and business knowledge, that any of these schemes would be cost prohibitive, when compared to the rates of returns which could be expected from any of the considered uses”*<sup>36</sup>;

- (e) The works required to allow adaptive reuse are so intrusive they will result in the loss of much of the heritage fabric. Mr Gray comments that the works are likely to *“be so intrusive and invasive upon the existing heritage fabric as to result in little more than façadism, which is not a desired outcome for a heritage building”*<sup>37</sup>;
- (f) The overall heritage values of the building are less than exceptional. As Mr Gray’s assessment shows, while some individual elements have exceptional or considerable value, *“the majority of spaces or elevations are found to be rated as some or no significance”*<sup>38</sup>;
- (g) Mr Gray’s report suggests a number of mitigation measures if consent is granted for the demolition of the Hydro Grand. All of these mitigation measures have been included in the consent conditions now proposed by the Applicant.

#### *Weight of Evidence*

- 24 The Timaru Civic Trust has provided a response to the further information lodged by the Applicant.
- 25 The Environment Court Practice Note 2014 clearly outlines the expectations for witnesses in resource management hearings. Expert witnesses have an *“overriding duty to impartially assist the Court”*<sup>39</sup> (or in this case the Commissioner), and they must not *“behave as an advocate for the party who engages the witness”*<sup>40</sup>. Both Mr McBride and Mr Gilkison are members of the Timaru Civic Trust for whom

---

<sup>35</sup> Ibid, at page 103.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid at page 104.

<sup>38</sup> Ibid

<sup>39</sup> Environment Court Practice Note 2014 at para 7.1

<sup>40</sup> Environment Court Practice Note 2014 at para 7.2

they gave evidence and therefore cannot be considered to be impartial experts. In *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*<sup>41</sup> the Court decided that they were unable to place much weight on the opinion of an expert witness given the close association the expert witness had with the environmental society. As both Mr McBride and Mr Gilkison are current members of the Civic Trust Board it is my submission that very little weight can be given to their evidence, or to the response they have provided to the Applicant's further information.

- 26 Mr Gray has undertaken a full heritage impact assessment of the Hydro Grand. Mr Gray and Mr Salmond are the only experts who have spent time in the Hydro Grand building in undertaking their assessments, something none of the other experts have done. Mr Salmond ultimately reached the same conclusion as Mr Gray – “*I note, in reference to Part 2 matters, the report refers to Sec. 6(f) of the Act and concludes that removal of the scheduled building and redevelopment of the site will not be “an inappropriate activity on the site”. I agree with that assessment.*”<sup>42</sup> I also note that Mr Gray's report was an independent report, undertaken at the request of the Commissioner and at the instruction of Timaru District Council. The combination of these factors mean that you should give significant weight to the HIA, and to Mr Salmond's evidence.

#### *Appropriate Demolition*

- 27 When discussing what is inappropriate for the purposes of section 6(f) of the RMA, the Courts have been clear that what is required is a weighing of competing interests in each individual matter. As the Environment Court set out in *Hamilton East Community Trust v HCC*, “*What is inappropriate is a matter of judgment in each case. In some situations the combinations of time, condition and financial issues may mean that demolition is not inappropriate*”<sup>43</sup>.
- 28 That the Hydro Grand has heritage value is not denied by the Applicant. However, in this case, demolition is the only option available for the Applicant, particularly noting:

---

<sup>41</sup> *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* ENC Christchurch C113/09, 13 November 2009.

<sup>42</sup> Evidence in Chief, Mr Salmond, at [36].

<sup>43</sup> *Hamilton East Community Trust v Hamilton City Council* [2014] NZEnvC 2002 at [108].

- (a) the limited extent of exceptional and considerable heritage features, as highlighted by the HIA;
- (b) the exorbitant cost of repair and strengthening;
- (c) the unsuitability of the internal layout for modern purposes;
- (d) the likely impact on the heritage features of the repair works, which are described as invasive and extensive in nature;
- (e) the extremely dangerous and dilapidated condition of the building;
- (f) the fact that it is Category 2 and Group 2 building and not of national importance;
- (g) the potential for continued degradation (and therefore potential danger to the public) if repairs do not occur; and
- (h) the wider benefit to the community, including from the revitalisation of this area.

### **Neighbouring Properties**

- 29 The legal submissions presented on behalf of the neighbouring Lambie property addressed the potential impact of the proposed development on the neighbouring site. Those submissions focussed on the potential effects on any potential future development on the Lambie site and the potential effects of the breach of the 20 metre height limit.
- 30 In respect of the breaches of the 20 metre height limit, the Applicant has provided further images showing the existing ground level and the extent of the breaches of the 20 metre height limit on the Lambie's boundary in the further information lodged during the adjournment of the hearing. The limited degree of non-compliance in relation to height is clear from the updated images.
- 31 As confirmed by Mr Burgess in his evidence, the results of the initial sun studies *"confirmed that the effects on the neighbouring sites will be minimal or non-existent when compared to a compliant 20m high*

*building constructed to the site boundaries.”<sup>44</sup> Mr Burgess further notes that “For the apartments the design includes a stepped roof plane to limit the shading to negligible effect on the neighbouring 28 The Bay Hill ‘Sea Breeze’ motel compared to a 20m base mass model. In essence, the shading effects generated by the increased height are cancelled by the apartment building being set in from the boundary. The hotel is largely compliant with height and is located to the south of the Sea Breeze motels and as such shading generated by the hotel falls primarily on Sefton Street.”<sup>45</sup>*

- 32 Additional shade studies were included in the further information produced by the Applicant. Those studies show the degree of shading expected on neighbouring properties, including the Lambie’s property, throughout the year. It is clear from these diagrams that a building that complied with the maximum permitted bulk and location standards would produce a higher degree of shading than what is proposed in this application.
- 33 As noted in my supplementary legal submissions, the Applicant has also made some changes to the windows on the northern façade of the Hotel building. All windows have been raised to 1000mm above floor level to encourage occupants to look up and out rather than down. The width of the windows has also been reduced.
- 34 Any potential development on the Lambie site does not form part of the environment against which the potential effects of this proposal are to be assessed. It is clear that the ‘environment’ includes activities that are permitted as of right, activities taking place in accordance with a resource consent and activities for which an unimplemented resource consent exists. The existing environment does not include potential, fanciful future activities that may or may not take place<sup>46</sup>.
- 35 Counsel for the Lambies also raised the issue of reverse sensitivity, which is generally defined as:

---

<sup>44</sup> Evidence in Chief, Mr Burgess at [79].

<sup>45</sup> Ibid at [80].

<sup>46</sup> *Queenstown-Lakes District Council v Hawthorn Estate Limited* (2006) 12ELRNZ 299, at [84]

*“the effects of the existence of sensitive activities on other activities in the vicinity, particularly by leading to restraints and the carrying on of those other activities.”<sup>47</sup>*

- 36 The definition clearly refers to the impact that a new sensitive activity might have on **an existing activity**. The existing activity on the Lambie’s site is of a similar nature, in terms of sensitivity, to the hotel and apartments about which they are expressing concern. Certainly it is highly unlikely that the proposed development will result in the current motel activity being restrained in any way and therefore in my submission the issue of reverse sensitivity does not arise.

### **Beneficial Effects of the Proposal**

- 37 When considering the proposal under section 104 of the RMA, you are required to evaluate all effects, including the positive or beneficial effects.<sup>48</sup>
- 38 As outlined in the application and in the evidence of Mr Cleese and Mr Burgess, the proposal will have a number of urban design benefits, including:
- (a) Increasing the foot traffic in the area, reinforcing the commercial viability of the Town Centre and the links with Caroline Bay, the Piazza and the restaurants to the north;
  - (b) Providing high quality accommodation in close proximity to the Town Centre;
  - (c) Providing high quality office space of a grade that is not readily available in Timaru;
  - (d) Encouraging a significant increase in the level of pedestrian activity and vibrancy at the northern end of Timaru’s prime retail and commercial street by creating a activity link between the retail area, the Piazza and the hospitality precinct to the north<sup>49</sup>;

---

<sup>47</sup> *Auckland RC v Auckland CC* (1997) 3 ELRNZ 54 (EnvC) at page 3.

<sup>48</sup> *Elderslie Park Ltd v Timaru DC* [1995] NZRMA 433 (HC).

<sup>49</sup> Evidence in Chief, Mr Burgess at [71].

(e) Replacing a derelict, unsafe and underutilised site with modern well designed facilities will provide significantly superior urban design outcomes compared with the existing environment<sup>50</sup>.

39 The submission of the South Canterbury Chamber of Commerce (*the Chamber*) further outlined a number of benefits that this proposal will bring to the Timaru District on the whole.

40 The Chamber consider that the proposal will be the “*Key anchor development for the district and will lead to further investment and value for the district as whole*”<sup>51</sup>. Further, they consider that the proposal “*is clear, visible and demonstrable confidence in the future of the region and Timaru’s CBD will influence other investors due to the scale, quality and mix of provision that is planned for the complex and should lead to increased urbanisation within the town centre*”<sup>52</sup>. The Chamber further explained the importance of encouraging development in the centre of town, rather than developing on the periphery, “*the CDB of Timaru has been negatively impacted by developments away from the main centre*”<sup>53</sup>. The Chamber strongly believes that this is a “*once in a lifetime opportunity as the Timaru CBD has been withering for sometime*”<sup>54</sup> and this development will be an “*impetus for investment to follow*”<sup>55</sup>.

41 The status quo (a building which cannot be used and will continue to degrade) does not constitute sustainable management and therefore will not achieve the purpose of the RMA. The demolition of the Hydro Grand Hotel and the proposed redevelopment of the site more clearly accords with the outcomes sought by each of the sections in Part 2, and with the sustainable management purpose of the RMA overall.

## **H G Marks**

**22 March 2017**

---

<sup>50</sup> Evidence in Chief, Mr Cleave at [58].

<sup>51</sup> Oral submissions of South Canterbury Chamber of Commerce at application hearing, (9/12/16).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.