

**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

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**SUPPLEMENTARY LEGAL SUBMISSIONS**

Dated: 10 February 2017

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## **INTRODUCTION**

- 1 These supplementary legal submissions are filed as part of the Applicant's response to the Commissioner's request for further information under section 41C(3) of the Resource Management Act 1991 (RMA).
- 2 In addition to these submissions the Applicant has also lodged the following further information:
  - (a) Updated plans showing the existing ground level and elevations showing the height of the proposed buildings with reference to that ground level;
  - (b) Internal elevations of the northern façade of the proposed development;
  - (c) Shading diagrams at a 1:200 level of detail;
  - (d) Additional information from Mr Rossiter setting out the answers to various transport queries raised during the course of the hearing; and
  - (e) Additional information from Mr Davidson confirming the nature of the work included in the cost estimates.
- 3 An independent Heritage Impact Assessment is also being prepared by Mr John Gray and is expected to be lodged by Mr Gray in early February.
- 4 The Applicant expects to lodge an updated proposed condition set at closing to ensure any remaining issues are captured.
- 5 It is noted that the updated plans referred to in paragraph 2(a) above include some amendments to the northern facade of the hotel building. The windows have been adjusted to address the concerns of the Lambie Family Trust relating to privacy. 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.

## Scope

- 6 The Commissioner has sought specific submissions addressing "*any scope issues arising in particular from the addition of the car park to the application*".
- 7 It is the Applicant's position that the addition of the carpark does not raise any jurisdictional or scope issues. The addition of the carpark does not alter the nature of the activity. The application remains the same but for the mitigation of an identified adverse effect related to vehicle parking. The carpark is currently used for carparking and has been so for some time. No additional consents are required to authorise its continued use for that purpose. Moreover the addition of the car park does not materially alter the scale and nature of the proposal such that it is "in substance a different application". Nor does it alter the magnitude of the effects. To the contrary the addition of the carpark reduces the originally assessed effects of the proposal. Finally, it is not considered that any party or potential party to these proceedings is prejudiced in any way by the inclusion of the car park within the proposal at this time.
- 8 By way of background, the car park in question was purchased after the application for consent was lodged but details of the car park were included in the evidence of the Applicant lodged on 23 November 2016 and made available to all parties.
- 9 The car park is located on The Bay Hill approximately 200 metres from the main application site and has been used as a public car park for a number of years. The title for the car park site is subject to an encumbrance requiring that the site be used only for car parking.
- 10 The car park was purchased by the Applicant on 17 November 2016 in order to address concerns expressed by the reporting officer and Council transport expert in relation to the quantum of parking to be provided as part of the development.

### *Legal Position*

- 11 It has long been accepted that an applicant for resource consent may amend the application up until the point that a decision is made. The overarching question as to the acceptance of that by a decision

maker is identified by the Supreme Court in *Waitakere City Council v Estate Homes Ltd*<sup>1</sup> as:

*"We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it **becomes in substance a different application.**"*<sup>2</sup> (emphasis added)

- 12 Determining the extent of change is a matter of fact and degree as articulated by the Court of Appeal in *Shell NZ Ltd v Porirua CC*:

*"Whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority."*<sup>3</sup>

- 13 This is echoed in *Atkins v Napier CC*<sup>4</sup> which provides a useful summary of the case law in relation to whether an amendment is within the scope of the original application. Wild J there sets out the legal test to be applied when assessing such questions, based on a review of a number of previous cases, stating:

*"I consider the test, as developed by the Environment Court and Court of Appeal through a series of cases, is whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:*

- *The scale or intensity of the proposed activity, or*
- *The altered character or effects/impacts of the proposal."*<sup>5</sup>

- 14 The High Court further explained that in applying the above test it is helpful to consider whether there may have been other submitters if

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<sup>1</sup> *Waitakere CC v Estate Homes Ltd* [2007] 2 NZLR 149; (2007) 13 ELRNZ 33; [2007] NZRMA 137 (SC)

<sup>2</sup> *Ibid* at [29].

<sup>3</sup> *Shell NZ Ltd v Porirua* CCCA57/05, 19 May 2005 at [7]

<sup>4</sup> *Atkins v Napier CC* (2008) 15 ELRNZ 84 (HC)

<sup>5</sup> *Atkins v Napier CC* (2008) 15 ELRNZ 84 (HC) at [20]

the amended activity had been notified, but was clear that such a consideration does not form part of the test<sup>6</sup>.

- 15 In respect of the first part of the test (scale and intensity), the addition of the car park in this instance does not result in the activity being significantly different in scale or intensity to that set out in the application for resource consent. The additional car parking area is already used for car parking and would not require resource consent to continue such a use. The activity is essentially exactly the same as that applied for, but with increased certainty in its ability to provide sufficient car parking. In that regard it is pertinent to note that in *Shell NZ Ltd v Porirua CC* the Court of Appeal determined that in that instance an amendment that did not require resource consent could not be considered outside the ambit of the application<sup>7</sup>.
- 16 The inclusion of the additional car parking area as part of the application will likewise not result in significantly different adverse effects given the site is already used for car parking. In fact, the inclusion of the car park will provide mitigation for any potential shortfall in car parking that may result from the development as a whole.
- 17 Further, the likelihood of any potential submitters wanting to be heard on the addition of the car park is unlikely given the activities on the car park site will not change. The area is currently used for carparking; by virtue of the encumbrance on the site it must continue to be used for carparking and no consent is required to permit its continued use as carparking.

## **H G Marks**

**10 February 2017**

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<sup>6</sup> Ibid at [21]

<sup>7</sup> *Shell NZ Ltd v Porirua CCCA57/05*, 19 May 2005 at para [8]