

**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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**SYNOPSIS OF LEGAL SUBMISSIONS FOR THE APPLICANT**

Dated: 7 December 2016

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## **INTRODUCTION**

- 1 The Applicant seeks consent to demolish the Hydro Grand Hotel (Hydro Grand) located on the Bay Hill in Timaru and to construct a mixed use development (consisting of 3 new buildings containing a hotel, offices, retail, food and beverage and apartments) on the site of the Hydro Grand and the immediately adjacent land (the site).
- 2 The decision to seek consent to demolish the Hydro Grand was not easy. As set out in the evidence of Mr Booth, the property was purchased with the intent of restoring it.
- 3 However the cost of the strengthening works required to ensure the building is safe and useable are so high that they cannot be contemplated by the Applicant and are not financially feasible. The Applicant has gone to great measures to ensure that the proposed development honours the Hydro Grand in both its use and design.

## **ACTUAL AND POTENTIAL EFFECTS ON THE ENVIRONMENT**

- 4 A detailed summary of the effects of the proposal on the environment is contained within the planning and urban design evidence of Mr Cleese. The effects can be split into those stemming from the demolition of the Hydro Grand building and those which may occur as a result of the proposed new development. In summary, the following actual and potential effects are anticipated and have been assessed:

### *Demolition of the Hydro Grand*

- (a) Heritage effects.

### *Proposed Bayhill Development*

- (b) Transport effects (traffic and car parking).
- (c) Urban design effects.
- (d) Reverse sensitivity effects.
- (e) Amenity effects relating to potential noise and shading.
- (f) Positive effects.

## Heritage Effects

- 5 The evidence of Mr Salmond addresses the significance of the Hydro Grand Hotel as a heritage building. There is further discussion in relation to the heritage nature of the building in the Heritage New Zealand submission and in the evidence of Mr Lochhead for the Civic Trust.
- 6 The Applicant does not dispute the heritage value of the Hydro Grand, however it is important to note that the building is not described as outstanding or nationally significant<sup>1</sup>. The building is listed by Heritage New Zealand as a Category II heritage place and is listed as a Group 2 heritage item in the Timaru District Plan.
- 7 Demolition of a Group 2 heritage item is a discretionary activity in the Timaru District Plan. An Archaeological Authority will not be required to demolish the building as it does not fall within the definition of an archaeological site in the Heritage New Zealand Pouhere Taonga Act 2014.
- 8 As set out in Mr Booth's evidence, the Applicant's aspiration when purchasing the site was to restore the Hydro Grand and revitalise an area of the Timaru town centre that was, and remains, increasingly run down:

*"At that time it was my preference and hope that the building might be able to be restored to its former glory. I was aware that the previous plans for the site had not panned out but felt that the site and location still held considerable potential."*<sup>2</sup>

And further

*"Despite this I was still optimistic about the prospect of a restoration when we initially purchased and during 2014 I undertook some work alongside the Civic Trust to assess different restoration options for the site."*<sup>3</sup>

- 9 Mr Charity, the Applicant's advisor, describes the process that was followed in undertaking the engineering, design and costing work

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<sup>1</sup> Statement of evidence, Jonathan Clease at [32].

<sup>2</sup> Statement of evidence, Allan Booth at [4]

<sup>3</sup> Statement of evidence, Allan Booth at [6]

necessary to evaluate the options available to adapt the Hydro Grand for re-use. He explains that his *“technical brief to the project design team was to investigate all development options that could provide a commercially sound and financially viable development on site. This included refurbishment and re-use options.”*<sup>4</sup>

- 10 The project design team looked at a number of different adaptive re-use options as set out in Mr Paterson’s expert engineering evidence. These include:
- (a) strengthening the building to 100% of building code;
  - (b) retaining the façade only and building a new building within the existing building envelope; and
  - (c) retaining the façade and building a new building to the 20m height limit permitted in the Plan.
- 11 All of these options for re-use were then assessed for use as:
- (a) A hotel;
  - (b) An office and retail building; and
  - (c) Apartments.
- 12 Mr Paterson (structural engineer) describes the requirements for strengthening the building under the Building Act 2004 (Building Act) and the Timaru District Council policies. His recommended works are in accordance with those documents and address the serious degradation and earthquake prone nature of the building. Mr Paterson confirms that *“The building, in its current state, would have to undergo significant compulsory repairs and upgrade in order to satisfy the requirements of the NZBA”*<sup>5</sup> and that *“Strengthening of the building would be difficult, expensive, and impose significant limitations of the form and utilisation of the building in a way which is not compatible with the ideal site utilisation or with an integrated hotel facility.”*<sup>6</sup>.

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<sup>4</sup> Statement of evidence, Darron Charity at [15].

<sup>5</sup> Statement of evidence, Phil Paterson at [19]

<sup>6</sup> Statement of evidence Phil Paterson at [20]

13 Costs for each option were then provided by Mr Davidson, the Applicant's quantity surveyor, with the least costly of the options (strengthening to 100% of the building code and maintaining a hotel use) being estimated at approximately \$15,278,000.

14 Mr Charity considered the estimated costs for all options from a financial feasibility perspective in relation to estimated revenue return for each option. He summarised:

*"Based on a mix of high capital costs and in some models, low revenue projection returns across the options, none of the options explored presented a commercially sound investment or financially viable outcome to progress with any further detail."*<sup>7</sup>.

15 The new building proposal by comparison *"provides an economic solution for the Applicant that is both commercially sound and financially feasible. Initial capital cost investment on this option is approximately \$6 million less than any other option explored by the project design team and provides a sustainable return on investment"*<sup>8</sup>.

16 The financial feasibility studies lead to the Applicant concluding that strengthening the Hydro Grand and re-using it was not a possibility for any of the options investigated, despite the heritage value of the building and despite a willingness to include an adapted Hydro Grand in the future plans for the site<sup>9</sup>.

17 As well as not being financially feasible, the strengthening works required would have resulted in the retention of very little of the heritage material. Mr Paterson noted that *"the amount of strengthening work required to meet the requisite standards will result in little of the original fabric of the building remaining."*<sup>10</sup>

18 Mr Salmond has reviewed the options for adaptive re-use and similarly states:

*"In my opinion, it would be necessary to substantially reconstruct the whole of the interior of the building to adapt it to new use. I consider that the existing floor-to-floor heights remain*

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<sup>7</sup> Statement of evidence, Darron Charity at [29]

<sup>8</sup> Statement of evidence, Darron Charity at [32]

<sup>9</sup> Statement of evidence, Allan Booth at [8]

<sup>10</sup> Statement of evidence, Phil Paterson at [12]

*appropriate for a contemporary hotel, but I recognise that a new primary internal structural system is likely to be necessary in the event that it was adapted for new use.”<sup>11</sup>*

And further:

*“I conclude that if the building were to be adapted for continued use as a hotel meeting contemporary standards of accommodation and structural integrity, very little of the interior is likely to be salvaged, apart from the floor plates.”<sup>12</sup>*

- 19 It is accepted that the demolition of the Hydro Grand building will result in the loss of the heritage features that remain, even given the building’s run-down state. However the reality is that the building cannot be safely occupied in its current state and the works required to enable re-occupation of the building for any use are prohibitively expensive and likely to damage the heritage fabric in any event.
- 20 In summary, while the Applicant initially wished to retain the Hydro Grand building, it has proved to be unfeasible as a result of:
- (a) The dilapidated state of the building (when the Applicant purchased the building it had already been unoccupied for 10 years);
  - (b) The earthquake prone state of the building;
  - (c) The unusable internal layout;
  - (d) The high costs of mandatory strengthening work;
  - (e) The high impact of mandatory strengthening works on the heritage fabric; and
  - (f) Limited revenue projections.
- 21 Part II of the RMA looks to protect heritage buildings from “inappropriate” development. As outlined in *Hamilton East Community Trust v Hamilton City Council*<sup>13</sup>, what is inappropriate is a matter of judgement in each case. In some situations the combinations of time,

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<sup>11</sup> Statement of evidence Jeremy Salmond at [25]

<sup>12</sup> Statement of evidence Jeremy Salmond at [27]

<sup>13</sup> [2014] NZEnvC 220 at [108]

condition and financial issues may mean that demolition is not inappropriate. Those are all issues here, and in my submission demolition of the Hydro Grand is not inappropriate.

### **Transport Effects**

- 22 An assessment of the development in respect of potential transport effects was carried out by Mr Rossiter and was included as part of the application and AEE. This assessment was then peer reviewed by Paul Durdin of Abley Consultants as part of the Officer's review.

#### *Traffic Effects*

- 23 Both Mr Rossiter and Mr Durdin agree that any effects on the adjacent intersections and wider road network will be less than minor. In relation to wider network effects, Mr Durdin summarised that:

*"The wider network effects are largely immaterial given there is considerable spare capacity at the two nearby signalised intersections of Theodosia / Sefton and Sefton / Port loop / The Bay Hill, even allowing for significant growth in travel on the State Highway."*<sup>14</sup>

- 24 Mr Rossiter has concluded that overall *"the traffic effects of the proposal will have no noticeable effects on the operation of the State Highway network or the Bay Hill."*<sup>15</sup>
- 25 Mr Henderson, the Reporting Officer for the Council, considered that all effects, other than those relating to parking, could be addressed through conditions of consent:

*"I consider that the remaining issues identified in the assessment can be appropriately addressed by way of conditions of consent."*<sup>16</sup>

- 26 Evidence was lodged by Mr Fletcher on behalf of the New Zealand Transport Agency (NZTA) setting out some remaining minor issues. Mr Cleese has updated the suggested conditions to address Mr Fletcher's comments.

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<sup>14</sup> Abley Peer Review Report, pg18 at [5].

<sup>15</sup> Statement of evidence, Chris Rossiter at [46]

<sup>16</sup> Section 42A report at page 19

- 27 In short, there are no effects on the traffic network that would prevent the grant of consent.

#### *Car Parking*

- 28 The parking effects highlighted in the Abley report and summarised in the Officers report centre around the demand for offsite parking at peak times.
- 29 Following lodgement of the application and receipt of submissions raising parking concerns, the onsite car park was reconfigured to include further parks, as set out in the Applicant's s92 response. The Applicant has now purchased an additional car park site in close proximity to the proposed development. Overall, the development will now provide 123 car parks as opposed to the initial 63 proposed at the time of application.
- 30 In his evidence Mr Rossiter confirms that:

*"With the proposed changes to the basement car parking to increase the number of spaces and the purchase of the upper carpark on Theodosia street, the proposal will have sufficient car parking to meet the typical day to day parking demands."<sup>17</sup>*

- 31 The concerns raised in the Abley report regarding the ability of the receiving environment to absorb the parking demands are (on the evidence of Mr Rossiter) largely negated by the additional carparks provided in both the onsite car parking and the additional offsite car parking. The Applicant is also proposing a condition requiring the preparation of a Management Plan.
- 32 Mr Fletcher's evidence for NZTA does not raise any concerns with the quantum of car parking to be provided as part of the development.

#### **Urban Design Effects**

- 33 Mr Burgess, the Applicant's architect, describes the existing Hydro Grand in his evidence and summarises the impact of the current built form from an urban design perspective as follows:

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<sup>17</sup> Statement of evidence, Chris Rossiter at [63].



*"In its time the Hydro Grand would have been an important focal point and generator of activity. In its current vacant condition it makes no contribution towards the vibrancy and levels of activity in Timaru's town centre. The lack of activation 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>

34 Mr Burgess further notes that the remainder of the site, which is vacant and currently used for vehicle parking, also contributes very little to the public realm either visually or by generating pedestrian activity. He confirms that *"in urban design terms the use of a visually prominent site in a key location for surface carparking represents a significant lost opportunity."*<sup>19</sup>

35 By contrast, Mr Burgess considers the proposed development will have a positive impact on the surrounding area:

*"From an urban design perspective, the proposal takes a site that is currently comprised of a long vacant building and surface carpark and replaces it with a modern mixed use development set around an open courtyard. It will result in a significant increase in the level of pedestrian activity and vibrancy at the northern end of Timaru's prime retail and commercial street and will create an activity link between the retail area, the Piazza, and the hospitality precinct to the north."*<sup>20</sup>

36 Mr Burgess also describes the efforts the design team have gone to in order to ensure the proposed replacement for the Hydro Grand appropriately references the existing building. This includes, inter alia, the emphasis of the prominent corner of the site where the dome is currently located, the orientation of the building towards Caroline Bay and the use of an external deck similar to that on the existing Hydro Grand.

37 As set out in Mr Burgess' evidence, the proposed development has been the subject of two Urban Design Panel (UDP) reviews. Steps

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<sup>18</sup> Statement of evidence James Burgess at [34]

<sup>19</sup> Statement of evidence, James Burgess at[33]

<sup>20</sup> Statement of evidence James Burgess at [71]

have been taken following each review to address concerns raised by the Panel. Mr Burgess explains in his evidence that the most recent version of the proposed development (updated following the Officer's report) responds to all remaining concerns of the UDP including:

- (a) An improvement of the pedestrian environment on Sefton Street;
- (b) Incorporation of an activated laneway between the Hotel entrance and the Office lobby;
- (c) The adjustment of the corner of the office building to better accent the corner "*with a more pronounced gesture*"<sup>21</sup>.

38 Mr Clease summarises the improved urban design outcome that will result from the proposed development as follows:

*"The proposed development has been purposefully designed to present an attractive and activated street edge with the site oriented towards the pedestrian-focussed The Bay Hill and Caroline Bay Piazza. The design is heavily glazed at ground level facing towards The Bay Hill with ground floor tenancies opening out into a publicly accessible courtyard space."*<sup>22</sup>

39 It is clear then that, in terms of urban design, the proposed development results in significant improvements when contrasted with the current site which does not make any positive contribution to the area or the town centre as a whole.

### **Reverse Sensitivity Effects**

40 The submission filed by the J R Lambie Trust (The Trust) indicates concern that, should the Trust want to develop its neighbouring site to the full extent permitted (i.e. up to 20 metres in height), the Applicant (or any successor) may object on the basis that the views from a small number of windows on the Applicant's hotel would be compromised.

41 The Trust has also expressed concern that any 'potential redevelopment' of their site would make the proposed hotel building no

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<sup>21</sup> Statement of evidence, James Burgess at [87]

<sup>22</sup> Statement of evidence, Jonathan Clease at [41]

longer compliant with the building code in relation to fire ratings and inadequate provision of natural lighting.

- 42 These concerns do not form part of the environment in terms of section 104 and should therefore not be taken into account in your assessment. The Court of Appeal in *Queenstown-Lakes District Council v Hawthorn Estate Limited*<sup>23</sup> was clear that the 'environment' includes consented activities, any activities that could be permitted as of right under the relevant plans, and any activities for which an unimplemented resource consent exists<sup>24</sup>. While the Trust could develop a 20 metre high building on its site, it would be unable to do so without resource consent. The rules for the 'Commercial 1A Zone' are restrictive in that a discretionary resource consent is required to demolish an existing building that has visible street frontage<sup>25</sup> and to erect any new building along a street frontage<sup>26</sup>. Both of those standards would be triggered by a redevelopment of the submitter's site.

### **Positive Effects**

- 43 The positive effects of a proposal can be considered under s104(1)(a) RMA. As Mr Cleese outlines in his evidence, there are a number of positive effects that would arise from granting this proposal. These include:
- (a) Providing a high quality multi use development of a grade that is currently not available in Timaru;
  - (b) Creating a publically accessible space and café dining precinct with views out to Caroline Bay;
  - (c) Connecting Stafford Street retail area with the Caroline Bay Piazza and the restaurant strip further north on the Bay Hill.
  - (d) The proposal will also add vibrancy and occupation to a currently derelict, unsafe, and unoccupied building and adjoining large vacant site. This will provide economic benefits and employment to Timaru through both construction and once it is developed.

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<sup>23</sup> *Queenstown-Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 at [84]

<sup>24</sup> *Queenstown-Lakes District Council v Hawthorn Estate Limited* (2006) 12ELRNZ 299, at [84]

<sup>25</sup> Timaru District Plan, Part D 1.A.3.2

<sup>26</sup> Timaru District Plan, Part D 1.A.3.3

## PLANNING DOCUMENTS

### Timaru District Plan

- 44 The evidence of Mr Clease provides an assessment of the provisions of the Timaru District Plan (Plan) that are relevant to this proposal. Mr Clease states that *"the District Plan's objectives and Policies seek two, potentially competing outcomes. The first is the identification and protection of historic heritage, subject to various criteria. The second is the efficient use of land within the commercial town centre zone to reinforce the role and amenity of the town centre and to ensure that new buildings are well designed and make a positive contribution towards the vitality and attractiveness of the town centre."*
- 45 Heritage Objective 1 of the Plan seeks the identification and protection of items of heritage importance which contribute to the character of the District. The related policies then look to protect those buildings with higher heritage values and to ensure a careful assessment of those with a lesser significance.
- 46 It is submitted that the Hydro Grand as it currently stands makes little positive contribution to the character of the District given its long term vacancy and deterioration. As Mr Clease states, *"in its current dilapidated and vacant state the current use of the site is contrary to the District Plan's objectives of a vibrant and attractive town centre."*<sup>27</sup>
- 47 Mr Burgess agrees that the site currently contributes very little to the public realm and as such constitutes a lost opportunity for such a visually prominent site<sup>28</sup>.
- 48 The current site, incorporating both the Hydro Grand buildings and the surrounding vacant areas, does not meet the objectives and policies of the Plan that specifically seek a vibrant and attractive town. Therefore it is difficult to see how the Hydro Grand contributes to the character of the District as set out in Heritage Objective 1.
- 49 It is submitted that the protection of heritage included in the Plan is not absolute. Protection is not to be achieved at the cost of all other objectives and policies. Rather, the discretionary status of demolition

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<sup>27</sup> Statement of evidence, Jonathan Clease at [68]

<sup>28</sup> Statement of evidence , James Burgess at [34]

and the inclusion of a policy prescribing assessment matters for applications affecting heritage matters imply that there are circumstances where protection will not be the most appropriate option. In this respect, guidance can be taken from the higher order documents in order to obtain a balance between the competing provisions.

- 50 Mr Salmond notes in his evidence<sup>29</sup> that the Plan provides little to assist in an assessment of the effects for applications relating to heritage buildings. A small amount of guidance is set out in Policy 7 which provides a list of criteria against which applications may be assessed. Mr Salmond has assessed those criteria as they apply to the Hydro Grand and notes that while the proposal will result in the loss of the building, and therefore its heritage value, it will also result in a prominent replacement building.
- 51 It is also noted that the Plan specifically lists methods to achieve the objectives and policies of the Heritage chapter in addition to the rules of the Plan. These methods include offering grants, enhancing the character of selected commercial areas through revitalisation programmes, encouraging protective covenants of heritage features and consideration of Heritage Orders. None of these additional methods have been employed by the Council, Heritage New Zealand or any other party in respect of the Hydro Grand which, in my submission, is a clear indication that the building is not considered of higher significance within the District.

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<sup>29</sup> Statement of evidence, Jeremy Salmond at [34]

## Canterbury Regional Policy Statement

52 Mr Cleese addresses the relevant provisions of the Canterbury Regional Policy Statement (CRPS). He confirms that the provisions of the CRPS seek the identification of significant heritage items and the protection of such heritage items from inappropriate subdivision, use and development (which directly reflects the wording in Part II of the Act). The CRPS also recognises the potential for economics to impact on the ability for the objectives to be achieved.<sup>30</sup>

## Part II of the Resource Management Act 1991

53 There are two components to Part II of the Act. Section 5 sets out an overarching purpose which is to promote sustainable management of natural and physical resources, while sections 6, 7 and 8 “*supplement [that purpose] by stating the particular obligations of those administering the RMA in relation to the various matters identified.*”<sup>31</sup> Put another way, section 5 “*is a carefully formulated statement of principle intended to guide*”<sup>32</sup> decision makers. Sections 6, 7 and 8 give further elaboration to that principle.

54 In terms of the relationship between the sections in Part II, the Courts have accepted there is a statutory hierarchy. The Supreme Court considered that the requirement to “recognise and provide for” the matters in section 6 is more strongly directive than the requirement to “have particular regard to” the matters in section 7. However, sections 6, 7 and 8 are subordinate to the Act’s single purpose of sustainable management. As the Environment Court has stated, they are not objectives in their own right, to be achieved at any cost<sup>33</sup>.

55 The relationship between Part II and other planning mechanisms under the RMA was the focus of the recent Supreme Court decision of *Environmental Defence Society Inc v The King Salmon Company Ltd*<sup>34</sup>. In essence, the Supreme Court determined that the matters in Part II of the Act must be applied as they are particularised through the

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<sup>30</sup> Canterbury Regional Policy Statement Objective 13.2.1 and 13.3.1

<sup>31</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [26].

<sup>32</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [25].

<sup>33</sup> *Mainpower NZ Limited v Hurunui District Council* [2011] NZEnvC 384 at [54].

<sup>34</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

hierarchy of planning instruments under the Act. That is to say, if you are giving effect to the provisions of a District Plan, then those provisions should be giving effect to Part II and any other higher order documents.

- 56 The Supreme Court also made clear that where a particular planning document does not “cover the field” by prescribing how the higher order principles are to be applied, or where there is uncertainty as to its meaning, an overall assessment of the principles of Part II will form an essential part of an assessment.
- 57 In this context it is appropriate to assess the proposal with reference to Part II and the CRPS as they provide more recent expression of how the sustainable management purpose of the RMA is to be achieved than the Timaru District Plan. While the heritage chapter of the Plan does reference Part II of the RMA, that reference is specifically in relation to an earlier version of Part II that included the recognition and protection of heritage values as part of section 7 rather than section 6 where it is now located.

#### *Section 6*

- 58 Section 6 of the RMA sets out the matters of national importance that a decision maker must “recognise and provide for” in making decisions. Section 6(f) is specifically relevant to this application and states:

*“In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources shall recognise and provide for:*

...

**(f) ...the protection of historic heritage from inappropriate subdivision, use and development...”**

- 59 What constitutes “inappropriate” development has been the subject of a number of decisions that provide helpful direction in what will be relevant in making such a consideration.

- 60 The Supreme Court has acknowledged that section 6 does not give primacy to preservation or protection<sup>35</sup>. Preservation or protection is to be recognised and provided for as part of the concept of sustainable management. However, a particular planning document may allocate primacy to protection or preservation in particular circumstances. It is therefore for the decision maker to assess where the balance of protection of historic heritage lies in the context of the broader principles of sustainable management as set out in Part II, and in the context of how those principles are articulated in the planning documents.
- 61 Section 6(f) does not refer to protecting historic heritage from *any* subdivision, use and development.<sup>36</sup> Rather, section 6(f) contemplates that there may be appropriate uses, raising the question of the standard against which appropriateness is to be assessed.
- 62 In its review of the same phrasing used in section 6(a), the Supreme Court held that the scope of the words “appropriate” and “inappropriate” are heavily influenced by the context.<sup>37</sup> In particular, where “inappropriate” is used in the context of protection, it must be assessed by reference to what it is trying to protect.<sup>38</sup> In the *King Salmon* decision, the standard of inappropriateness emerged from the way the objectives and policies of the New Zealand Coastal Policy Statement were expressed.<sup>39</sup>
- 63 The High Court has held that “appropriate” in the context of the potential demolition of a heritage building means the consent authority only approves a demolition when it is “proper” to do so.<sup>40</sup> This decision must be *“founded upon an assessment of whether or not demolition is a balanced response that ensures all competing considerations are weighted, and the outcome is a fair, appropriate*

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<sup>35</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [149].

<sup>36</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [98].

<sup>37</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [100].

<sup>38</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [101] and [105].

<sup>39</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [102].

<sup>40</sup> *Lambton Quay Properties Nominee Limited v Wellington City Council* [2014] NZHC 878 at [73].



*and reasonable outcome*".<sup>41</sup> Considerations may include the condition of the building, the cost of repair and the availability of finance,<sup>42</sup> demand and commercial return if the building was refurbished,<sup>43</sup> the cultural and heritage value and uniqueness of the building to the community<sup>44</sup>, the impact of continued deterioration, and the private and financial interests of the owners.<sup>45</sup> Because an assessment of what is "inappropriate" is dependent on the particular context, the significance or weighting of each consideration will differ.

64 Critically, the Act 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>46</sup> "Recognise and provide for" the protection of historic heritage is less onerous than this.

65 An example of a similar case relating to the interpretation of what is "inappropriate development" that may provide assistance is *New Zealand Historic Places Trust v Manawatu District Council*<sup>47</sup> which involved an application to demolish a category B heritage building in Fielding. All parties were agreed that the building had heritage value but it had not been occupied for some time and required prohibitively expensive strengthening and upgrade works to enable its future use. In granting consent to demolish the building, the Environment Court stated, in relation to section 6(f):

*"the protection of historic heritage is not an end in itself. Factors under s6 are to be weighed among themselves (if necessary), and with other relevant factors, to inform the decision-maker in making an overall judgment about the proposal under s104. That judgment must, of course, be guided by the overarching purpose of the Act – sustainable management of natural and physical*

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<sup>41</sup> *Lambton Quay Properties Nominee Limited v Wellington City Council* [2014] NZHC 878 at [73].

<sup>42</sup> See for example *Hamilton East Community Trust v Hamilton City Council* [2014] NZEnvC 220.

<sup>43</sup> See for example *New Zealand Historic Places Trust v Manawatu District Council* [2005] NZRMA 431 (EnvC).

<sup>44</sup> See for example *Lambton Quay Properties Nominee Limited v Wellington City Council* [2014] NZEnvC 229; *New Zealand Historic Places Trust v Manawatu District Council* [2005] NZRMA 431 (EnvC).

<sup>45</sup> See for example *Hamilton East Community Trust v Hamilton City Council* [2014] NZEnvC 220.

<sup>46</sup> *Lambton Quay Properties Nominee Limited v Wellington City Council* [2014] NZHC 878 at [74].

<sup>47</sup> *New Zealand Historic Places Trust v Manawatu District Council* [2005] NZRMA 431 (EnvC)

*resources, as defined in s5. No factor in s6 creates a veto over an application being considered under s5.”<sup>48</sup>*

And further:

*“It would certainly not, in our view, promote sustainable management in the sense of enabling Mr and Mrs Sidnam to provide for their economic well-being to attempt to impose upon them the cost of preserving this building as a form of museum exhibit..... nor would it provide for sustainable management in the sense of providing for the cultural well-being of the community by refusing consent and thus condemning this building to a slow and sad deterioration to the point where, quite feasibly, it would have to be demolished as a safety risk”<sup>49</sup>*

66 Mr Clease in his evidence considers that in this instance demolition is not inappropriate:

*“In my view demolition becomes appropriate when both the necessary strengthening works are so intrusive as to result in the loss of much of the remaining heritage fabric and associated heritage values, and secondly where the cost of those works is so high as to make them financially unfeasible to undertake. In essence the ongoing retention and reuse of the building then becomes implausible and as such the loss of the building is not inappropriate.*

*As set out in the above assessment of effects, the various expert evidence provided for the applicant has concluded that the strengthening works required are intrusive to the point that much of the existing heritage fabric would be lost, and that it is not financially viable, by a wide margin, to retain the existing building. The ongoing retention of a vacant and deteriorating building prevents the comprehensive redevelopment of the wider site which would retain the site’s historic association as the location of Timaru’s premier hotel.”<sup>50</sup>*

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<sup>48</sup> *New Zealand Historic Places Trust v Manawatu District Council* [2005] NZRMA 431 (EnvC).at [15]

<sup>49</sup> *Ibid* at [32] - [33]

<sup>50</sup> Statement of evidence, Jonathan Clease at [78]-[79]

67 It is submitted that the demolition of the Hydro Grand is not inappropriate in terms of section 6(f) given:

- (a) the condition of the building;
- (b) the exorbitant cost of repair;
- (c) the fact that it is Category 2 and Group 2 building and not of national importance;
- (d) the potential for continued degradation if repairs do not occur; and
- (e) the wider benefit to the community, including from the revitalisation of this area.

#### *Section 7*

68 Section 7 of the RMA requires that decision makers have particular regard to specific factors in their decision making process. Of the section 7 matters, the following are relevant here:

- (a) *"The ethic of stewardship" (section 7(aa));*
- (b) *"The efficient use and development of natural and physical resources" (section 7(b));*
- (c) *"The maintenance and enhancement of amenity values" (section 7(c));*
- (d) *"Maintenance and enhancement of the quality of the environment" (section 7(f)); and*
- (e) *"Any finite characteristics of natural and physical resources" (section 7(g)).*

69 The ethic of stewardship was discussed with specific reference to heritage buildings in *New Zealand Historic Places Trust/Pouhere Taonga v Christchurch City Council*<sup>51</sup>, where the Environment Court specifically noted that the ethic of stewardship does not require heritage buildings to be retained in all circumstances, particularly in

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<sup>51</sup> *New Zealand Historic Places Trust/Pouhere Taonga v Christchurch City Council*, EnvC 9/10/2001

situations where the plan does not prohibit demolition but allows its consideration, as the Plan in this instance does:

*"In terms of the plan there is clearly an assumption by the Council of stewardship in respect of the heritage items identified in the plan. However the plan itself recognises that there are circumstances where the retention of heritage items may not be appropriate."*<sup>52</sup>

- 70 The Court further recognised that the ethic of stewardship did not go so far as requiring the Council to purchase a heritage site where the owner could no longer find a use for it, nor did it place any positive onus on a landowner to maintain or improve a heritage site:

*"We do not believe that the ethic of stewardship can be interpreted so far as to place an obligation on the Council to purchase a heritage item where it is no longer suitable for use by the original landowner. Nor do we consider that the provision can give rise to a implied obligation upon the landowner to maintain the heritage item in all circumstances."*

- 71 The same case assessed the requirement in section 7(b) to have particular regard to "the efficient use and development of natural and physical resources" in conjunction with the requirement to have particular regard to "any finite characteristics of natural and physical resources" in section 7(g). Smith, J. agreed that while the finite characteristics of the heritage building would be lost if demolished, the other criterion must also be taken into account saying "*under section 7(b), efficient use imports concepts of economic use into the consideration.*"<sup>53</sup>

- 72 A similar situation exists with this proposal where it is clear that, while the finite heritage characteristics of the Hydro Grand would be lost if the building is demolished, that loss must be balanced with the need for the efficient use and development of the site. The Applicant's evidence is clear that without extensive and prohibitively expensive strengthening works, the building will remain unused and unsightly as

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<sup>52</sup> Ibid at [91]

<sup>53</sup> Ibid at [93]

it has for the past 13 years. That result is not efficient for the land owner or for the town centre in general.

- 73 In *AA McFarlane v Christchurch City Council*, the Environment Court assessed the potential costs of retaining a number of heritage buildings and concluded that *"to require the applicant to retain the existing buildings or their significant facades will be uneconomic from its point of view. Consequently unless the public benefit to be derived from retention is equal to or exceeds this private cost it would seem the principle in section 7(b) of the Act could not be met."*<sup>54</sup>
- 74 In this respect, the remaining two criteria of section 7 are particularly pertinent as an assessment of the proposed development in respect of those sections highlights the public benefit that will result from the development as well as the significant costs of the potential repair of the building. The Hydro Grand as it stands currently has an adverse impact on the amenity values of the surrounding area and likewise does not contribute to the maintenance and enhancement of the environment. Mr Burgess in his evidence summarised the amenity values of the Hydro Grand currently and its impact on the surrounding environment as:

*"Whilst the Hydro building in its day provided an attractive landmark, this is no longer the case with the building's dilapidated condition and ongoing vacancy detracting from, rather than enhancing, the amenity of the area and the vibrancy of the Timaru town centre. The balance of the site comprising surface car parking is likewise an inefficient use of this key site that does nothing to improve Timaru's urban fabric."*<sup>55</sup>

- 75 Mr Burgess considers that the proposed development constitutes a much more positive proposition from an amenity and environmental perspective.

## Section 5

- 76 Section 5 states:

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<sup>54</sup> *AA McFarlane v Christchurch City Council* (1999) NZRMA 365 at page 76

<sup>55</sup> Statement of evidence, James Burgess at[69]

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

77 As discussed above section 5 requires an overall balancing of the factors in sections 6, 7 and 8.

78 The Court has confirmed that the idea of sustaining the potential of physical resources to meet the reasonably foreseeable needs of future generations does not mean that demolition of a building with heritage values will always be inconsistent with the purpose of the RMA<sup>56</sup>. The application of section 5 requires an overall broad judgment. In *AA McFarlane*<sup>57</sup>, the Court concluded that:

*"In any given case it may well be that demolition of a building, even one with heritage values, is the only way to enable people and communities to provide relevantly, for their economic wellbeing or their safety. In such circumstances, the obvious adverse effects on the environment of demolition might be remedied or mitigated".*<sup>58</sup>

79 In this instance, where the building is unsafe to occupy and requires such extensive and costly strengthening works, it can be argued that people and communities are not able to provide for their social,

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<sup>56</sup> *AA McFarlane v Christchurch City Council* (1999) NZRMA 365 at , page 100 - 101

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid* at page 101

economic and cultural wellbeing in respect of the site while the building remains in this state. Further, the potential of the site to meet the reasonably foreseeable needs of future generations is essentially stymied by the presence of a building that cannot feasibly be used.

- 80 It is submitted that in this instance the demolition of the Hydro Grand and the development of the proposed buildings better promotes the sustainable development of natural and physical resources than the status quo. Mr Clease summarises the outcome of this balancing exercise as:

*"... it is considered that in balancing the effects associated with demolition and the loss of heritage values, with those associated with full redevelopment of the site, the purpose of the Act would be better served by the proposed comprehensive redevelopment. In the circumstances of this case, redeveloping the site is not considered to be "inappropriate" and would enhance the amenity values and the quality of the environment, as well as making a more efficient use of the land resource available on the development site as a whole. The proposed redevelopment will provide a range of activities which will make a significant contribution to the revitalisation of this part of the Town Centre. Consequently, whilst being a difficult conclusion to reach given the heritage values that are attached to the Hydro Grand, it is concluded that allowing demolition and thereby enabling the site to be redeveloped for commercial purposes better achieves the purpose of the Act than retaining the building."<sup>59</sup>*

- 81 The demolition of the Hydro Grand Hotel and the proposed redevelopment of the site clearly accord with the outcomes sought by each of the sections in Part II and with the sustainable management concept overall. The status quo (a building which cannot be used and will continue to degrade) on the other hand does not constitute sustainable management and will not achieve the purpose of the Act.

## **EVIDENCE**

- 82 Evidence in support of the application will be presented by the following witnesses:

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<sup>59</sup> Statement of evidence, Jonathan Clease at [84]

- (a) Jonathan Clease (planning and urban design);
- (b) Allan Booth (owner);
- (c) Chris Rossiter (transport effects);
- (d) Jeremy Salmond (heritage architect);
- (e) Phil Paterson (structural engineer);
- (f) Ross Davidson (quantity surveyor);
- (g) Darron Charity (project manager);
- (h) James Burgess (architect).

**DATED** this 7th day of December 2016

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H G Marks  
Counsel for the Applicant