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LAW

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Attention Boyd Wilson

Dear Boyd

HWCP Management Ltd - Resource consent application - Legal assessment

1. HWCP Management Ltd (**HWCP**) has made a resource consent application regarding the re-development of central Invercargill and in particular the block bounded by Tay, Dee, Esk and Kelvin Streets. As part of this, HWCP seeks resource consent to demolish three Category II buildings listed with Heritage New Zealand Pouhere Taonga (**HNZPT**) (retaining the façade of one), as well as the partial or complete demolition of 16 buildings listed in the Invercargill City District Plan as having heritage value.

2. The application also seeks resource consent to re-develop the block with a range of dining, retail, office, residential and other opportunities, as well as carparking. It represents a hugely exciting project for the re-development of Invercargill city centre.

3. Due to the demolition of the NZHPT listed buildings, the resource consent application attracts non-complying activity status, and you have therefore asked for a legal assessment. We understand that the letter will be provided to the Invercargill City Council when the resource consent application is lodged, and indeed it would be sensible to read this letter alongside the application and assessment of environmental effects.

Summary of advice

4. We have specifically considered whether the proposal passes the second gateway test of s 104D of the Resource Management Act 1991 (**RMA**), i.e. that the activity will not be contrary to the objectives and policies of the district plan. On this question we consider that the objectives and policies of the proposed Invercargill District Plan (**District Plan**) should be read as a whole, and that the Heritage and Business 1 provisions are the most relevant. Based on a careful assessment of the proposal against the objectives and policies, we consider that the proposal is *not* contrary to the objectives and policies of the District Plan.

5. In terms of the s 104 assessment then required, we have also considered the relevance of Part 2 of the RMA following recent case law. Given an express limitation in the District Plan as to the methods the Council has chosen to address the viability and vibrancy of the Invercargill City Centre, we have some doubt as to whether the enabling aspects of Part 2 RMA have been coherently addressed by the District Plan and would not rule out consideration of Part 2 (and in particular s 5). However, given the conclusion we have reached on s 104D(1)(b) RMA, we do not see this as justifying an outcome contrary to the policies of the District Plan in this case.

Relevant background

6. The HWCP resource consent application is accompanied by a number of technical assessments, including a thorough heritage assessment by New Zealand Heritage Properties Limited which runs to over 700 pages, detailed and initial seismic assessments by Batchelar McDougall Consulting, and quantity survey costings by WT Partnership. Based on the heritage assessment, the assessment of environmental effects (**AEE**) concludes that the demolition of the buildings with heritage value will have adverse effects on heritage values which are more than minor. Accordingly, for the purposes of the assessment required by s 104D of the Resource Management Act 1991 (**RMA**), the AEE focuses on whether the activity will be contrary to the objectives and policies of the District Plan (this being the relevant planning instrument).

7. Given the number of buildings with heritage value which are subject to the resource consent application, we think this is a responsible concession even accounting for the heritage-related mitigation measures which are proposed by HWCP. This is particularly given that the 'gateway test' in s 104D(1)(a) of the RMA is concerned with the adverse effects of a proposal rather than the *positive* effects of the proposal (of which there are many arising from the redevelopment).

8. This does bring the question of the objectives and policies of the District Plan into focus however, and so that question is the focus of this letter, together with other issues relating to the s 104 assessment.

Relevant legal framework

9. We touch on the following aspects of the legal framework:

   (a) The non-complying activity gateway test in s 104D(1)(b) regarding the objectives and policies of the District Plan; and

   (b) When the proposal then falls to be assessed in terms of s 104, the relevance of Part 2 RMA.

Section 104D RMA

10. Under s 104D of the Resource Management Act 1991 (**RMA**), the Council can only grant consent for a non-complying activity if it is satisfied that either:

   (a) The adverse effects of the activity on the environment will be minor; or

   (b) The activity will not be contrary to the objectives and policies of the District Plan.

11. As discussed, the application acknowledges that the adverse effects of the proposal on *heritage* values will be more than minor, so we do not address that issue further. We note for completeness that in relation to the objectives and policies assessment, it is only the objectives and policies of the District Plan that are relevant (rather than the objectives and policies in other planning instruments such as the regional policy statement).

12. In relation to the objectives and policies of the District Plan we consider that a key legal question is whether the objectives and policies of the District Plan should be approached as a whole.

13. The Court of Appeal in *Dye v Auckland Regional Council*[1] noted that in a case of a non-complying activity concerning rural-residential subdivision, one cannot expect to find support for the activity in the plan. The Court concluded that the view which the Environment Court took - that the objectives and policies allowed for the possibility, albeit limited, that such activities might still appropriately be allowed to occur outside the designated areas and in the general rural part of the district - was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law.

14. The High Court in *Queenstown Central Limited v Queenstown Lakes District Council*[2] suggested that gateway two was not intended to be used for finessing out qualifiers of one objective by looking at another objective to reach some overall conclusion that viewed "as a whole" the objectives allowed the activity. The question is whether the proposal will not be contrary to any of the objectives or policies. However, this is an outlier in terms of the Court of Appeal decision in *Dye* and the weight of Environment Court authority:

    (a) The Environment Court in *Living Earth Ltd v Auckland Regional Council*[3] concluded that the question was whether the proposal would be contrary to the objectives and policies of the relevant plans, in an overall consideration of the purposes and scheme of the plans.

    (b) The Environment Court in *Fonterra Co-operative Group Ltd v Manawatu-Wanganui Regional Council*[4] concluded that in considering the policy gateway it is necessary to consider relevant objectives and policies as a whole.

    (c) The Environment Court in *Saddle Views Estate Ltd v Dunedin City Council*[5] stated that for most of the life of the RMA the correct legal inquiry is whether the proposal is *generally* not contrary to the objectives and policies of a plan, not whether it is not contrary to *any* objective and policy. The Court noted that the *Queenstown Central Limited v Queenstown Lakes District Council* cases may have cast some doubt on this position, as the High Court seemed to suggest that being contrary to one objective in a proposed plan meant gateway two was not met. However, the Court preferred the approach taken by the Court of Appeal in *Dye v Auckland Regional Council* and concluded that the test requires standing back and looking at the objectives and policies read as a whole.

15. In summary, we consider that the assessment of whether the proposal passes the s 104D(1)(b) gateway test can be approached on an overall basis. We are reinforced in this view by the recent Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council*[6] which discusses appraisal of objectives and policies read as a whole (discussed further below).

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[1] *Dye v Auckland Regional Council* [2001] NZRMA 513 (CA).
[2] *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815 (*Foodstuffs*); *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 (*Cross Roads*).
[3] *Living Earth Ltd v Auckland Regional Council* 4/10/2006, A126/06.
[4] *Fonterra Co-operative Group Ltd v Manawatu-Wanganui Regional Council* [2013] NZEnvC 250.
[5] *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243, [2015] NZRMA 1.
[6] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

Part 2 RMA

16. The Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council*[7] has confirmed that Part 2 of the RMA is relevant to resource consent applications. It does not consider that the Supreme Court in *King Salmon* intended to prohibit Part 2 being considered in resource consent applications. The Court listed the following additional three reasons to support that conclusion:

    (a) The Supreme Court made no reference to s 104 of the RMA or the phrase "subject to Part 2";
    (b) There is no indication from the decision that the Supreme Court intended its reasoning to be generally applicable, including to resource consent applications; and
    (c) The statutory language of s 104 clearly contemplates direct consideration of Part 2 and there cannot be the same assurance outside the New Zealand Coastal Policy Statement (**NZCPS**) that plans made by local authorities will reflect the provisions of Part 2.

17. However the Court of Appeal did think that in some situations recourse to Part 2 is not required:

    (a) Where resource consent applications engage the NZCPS;

    (b) Where plans already address Part 2 matters. On this topic, the Court of Appeal determined that relevant plan provisions are not properly had regard to if they are considered for the purpose of putting them to one side; consent authorities must conduct a "fair appraisal of the objectives and policies read as a whole". It stated that if a plan was prepared having regard to Part 2 and has a coherent set of policies designed to achieve clear environmental outcomes then the policies should be implemented and recourse to Part 2 will not add anything, and cannot justify an outcome contrary to its policies. However consent authorities need to give emphasis to Part 2 if it appears the plan was not prepared in a manner that appropriately reflects Part 2.

18. In summary, the Court of Appeal agreed that allowing plans to be rendered ineffective by general recourse to Part 2 is inconsistent with the scheme of the RMA, provided that the plans have been properly prepared having regard to Part 2. However the High Court was incorrect to apply the reasoning in *King Salmon* with equal force to resource consent applications. Rather, the implications of *King Salmon* in resource consent applications are that proper application of relevant plans may leave little room for Part 2 to influence decisions.

Relevant caselaw – heritage cases

19. Under Part 2 of the RMA, the protection of historic heritage from inappropriate subdivision, use and development is a matter of national importance (s 6(f)). Heritage cases have therefore attracted some attention before the Environment Court.

20. On the question of alternatives assessment, this may be a relevant matter in determining whether the proposal recognises and provides for the protection of historic heritage from

[7] By way of background, in 2014 the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 *"King Salmon"* determined that (contrary to existing caselaw) unless there are questions of invalidity, incomplete coverage or uncertainty of meaning in planning documents, there is no need to refer back to Part 2 when considering a plan change application. The High Court then concluded in *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 that the reasoning of *King Salmon* applies to resource consent applications and decision makers are unable to refer back to Part 2 unless the *King Salmon* caveats apply because they are bound by its expression in planning documents.

inappropriate subdivision, use and development. This will depend to some extent on the wording of relevant objectives and policies, which we discuss in due course. In *Lambton Quay Properties Nominee Ltd v Wellington City Council*[8] the High Court held:[9]

> Section 6 of the Resource Management Act does not mean a consent authority is required to "exhaustively and convincingly exclude" alternatives to demolition before granting resource consent to demolish a heritage building. The statutory requirement for a consent authority to recognise and provide for the protection of historic heritage is a less onerous obligation than the Environment Court's "exhaustively and convincingly" test for excluding alternatives to demolition of a heritage building. In my assessment the Environment Court overstated the effect of s 6 of the Resource Management Act.

21. The continued deterioration of a building may also be relevant. In *New Zealand Historic Places Trust v Manawatu District Council*[10] the Environment Court observed:[11]

> 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. In coming to an overall assessment under s 5, the loss of the heritage value of this building, while regrettable, is outweighed by the other factors we have outlined. One might have hoped that, to retain it for the sake of its heritage value to the community, sufficient funding from some public source might have been available to make up the shortfall of what the building can of itself sustain and what could reasonably be expected of its owners. In this case, that has not been so. For those reasons, the decision of the Council is confirmed and the resource consent is granted.

22. We note lastly that the question of what is proposed post-demolition of a building appears to bear some relevance to the question of whether demolition is appropriate. In the Environment Court decision which saw two Commissioners determine by majority decision that the derelict Gordon Wilson flats in Wellington should not be de-listed from the District Plan Heritage List (as a first step to demolition), the Commissioners were mindful of homelessness/lack of social housing, and strengthened in their view that care should be taken before demolition by the fact that the proposed use of the site was the creation of a green/park space and a strategic land banked asset by Victoria University for an unidentified purpose.[12]

Invercargill District Plan

23. The Invercargill City Council has a proposed district plan, on which decisions were released in October 2016. Sixteen appeals were lodged, however we understand that all sections of the proposed district plan relevant to the resource consent application are beyond challenge/appeal and are therefore deemed operative. For that reason, we focus only on the proposed district plan and all references to the District Plan should be read as reference to this.

24. The District Plan contains district wide and zone specific objectives and policies. The Heritage objectives and policies (section 2.8) are clearly relevant. Other relevant sections include:

    (a) Section 2.10 which includes townscapes (including the CBD).

[8] *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878.
[9] At [74].
[10] *New Zealand Historic Places Trust v Manawatu District Council* [2005] NZRMA 431.
[11] At [33].
[12] *The Architectural Centre v Wellington City Council* [2017] NZEnvC 116, at [55].

(b) Section 2.21 (Business Overview).
(c) Section 2.22 (Business 1 (Central Business District) Zone).

25. Within the Heritage section, we note Objectives 1 and 2, as well as Policies 3, 4 and 5.

> Objective 1: Heritage values are identified and protected from inappropriate subdivision, use and development.
>
> Objective 2: The built heritage of Invercargill is appropriately recognised and utilised.
>
> Policy 3 Effects on heritage: To avoid, remedy or mitigate the potential adverse effects of subdivision, use and development on heritage.
>
> Policy 4 Integration: To encourage the integration of new subdivision, use and development with heritage.
>
> Policy 5 Active management: To promote the active management, in particular the adaptive reuse, of heritage buildings to:
> (A) Avoid serious risk to human safety.
> (B) Investigate and evaluate all reasonable means of restoration, adaption, reuse and relocation as alternatives to demolition.

26. Section 2.10 refers, through Policy 5, to the identification and promotion of the rich variety of built heritage in the CBD as a townscape of value to the City District, but also looks through Policy 6 to encourage new development to complement and build on existing character and heritage.

27. Within the Business provisions, Section 2.21 describes the continuing development and vibrancy of the CBD as follows:

> Central Business District: One of the main thrusts of the Plan is that the Council wishes to use it as one of several methods to support the ongoing viability and vibrancy of the City Centre, to reinforce its role as the City's primary centre for retailing, business, cultural and entertainment activities, and to retain the best of its rich architectural character and heritage.

28. Through the Business 1 (Central Business District) Zone provisions, Objective 1 is maintenance and enhancement of the primacy of the Invercargill Central Business District as the primary centre for retailing, business, culture, entertainment, education and social services for Invercargill City and the wider Southland region. Objective 4 is protection of the heritage values of the Central Business District. These themes are also reflected in the policies, with Policy 1 encouraging new commercial/retail activities in the CBD, and Policies 15 (Demolition or removal activities) and 22 (Heritage value) looking to encourage consideration of restoration/adaptive re-use in preference to demolition, and promotion of the retention of the character and scale of heritage structures, buildings and places.

Our analysis

Section 104D

29. The first question to consider is whether the activity will *not* be contrary to the objectives and policies of the District Plan. On this question, we consider that it is important to pay particular

attention to the Heritage related objectives and policies, as well as the Business related objectives and policies.

30. The key Heritage objective is Objective 1 (Heritage values are identified and protected from inappropriate subdivision, use and development). This immediately raises the question of what is *appropriate* subdivision, use and development. On this issue, the AEE takes cues from both the District Plan objectives and policies as to what is appropriate, as well as the provisions relevant to the Business 1 zone. For example:

    (a) The AEE considers other options for the city block, and canvasses why these would be inappropriate in relation to the option proposed. This gives expression to Policy 5 (Active Management) which looks to applicants to investigate and evaluate all reasonable means of restoration, adaption, reuse and relocation as alternatives to demolition.

    (b) The AEE considers the Business 1 zone provisions such as the zone statement that it seeks to maintain and reinforce the viability and vibrancy of Invercargill's City Centre by enabling a wide range of activities, by encouraging and maintaining a high level of amenity, and by encouraging good urban design. The AEE further expands on this (supported by the technical heritage and architectural assessments which consider amenity and good urban design).

31. Based on that analysis in the AEE, we consider that the re-development proposal is clearly *appropriate* subdivision, use and development.

32. We also note that the Heritage objectives and policies clearly contemplate redevelopment and do not seek protection at all costs. This is evident from Policy 3 which anticipates that an activity may avoid, *remedy or mitigate* the potential adverse effects of subdivision, use and development on heritage, Policy 4 (Integration), and Policy 5 (Active Management). On this it would be important for Policy 5 to be given careful attention, but our assessment of the AEE is that it has paid careful assessment to this issue. We refer here to the heritage, architectural, seismic and quantity surveying assessments, as well as sections 7, 8.3 and 11 of the AEE.

33. For the above reasons we do not consider the proposal to be contrary to the Heritage objectives and policies of the District Plan. However that is not the end of the matter because the Business 1 objectives and policies are also relevant.

34. The proposal clearly supports Objective 1 through the enhancement of the primacy of the Invercargill Central Business District as the primary centre for retailing, business, culture, entertainment, education and social services for Invercargill City and the wider Southland region (and reinforces the appropriate nature of the proposal).

35. At the same time, Objective 4 looks to the 'protection' of the heritage values of the Central Business District. It is not clear what is meant by this given that protection is not defined and given that the Heritage provisions do not contemplate preservation of existing buildings at all costs. Given that the function of a policy is to achieve objectives,[13] we take interpretative support from Policy 22 which is to *promote* the retention of the character and scale of the heritage structures, buildings and places within the City Centre. We think this has been given close consideration and expression through the technical heritage and architectural assessments

[13] Section 32 RMA.

which support the AEE and their influence on the proposal which includes the retention of some facades and the 'reflection' of facades on Tay Street.

36. For those reasons, we do not consider the proposal to be *contrary* to the Business 1 objectives and policies, or the objectives and policies of the District Plan read as a whole.

37. As the proposal will attract non-complying activity status overall, we comment for completeness on Objective 2 of the Business 1 zone which is that inner city living is part of the land use mix within the Invercargill Central Business District other than in the Entertainment Precinct. The proposal includes residential activity and is within the Entertainment Precinct. On the face of it this appears to present an issue, but we note that the supporting policies explain that this is due to a higher level of noise being generated within the Entertainment Precinct, with the explanation to Policy 2 stating that:

> The Council wishes to see the Entertainment Precinct within the City Centre as the location of choice for entertainment establishments, including restaurants, bars and nightclubs. The District Plan provides for these activities by identifying a precinct in which the noise limits and hours of operation are more permissive than elsewhere in the City. **To minimise reverse sensitivity effects, the Council will be encouraging any residential activities to install a higher level of sound attenuation within the Entertainment Precinct.**

38. Given that the proposal incorporates suitable noise attenuation (refer section 8.6 of the AEE) we do not think the proposal is contrary to Objective 2 or its supporting policies. This means that the proposal can then be considered in terms of s 104 RMA.

Part 2 RMA

39. Following the Court of Appeal *Davidson* decision, the relevance of Part 2 to the s 104 assessment will depend on the extent to which if the District Plan has been prepared having regard to Part 2, and has a coherent set of policies designed to achieve clear environmental outcomes such that the policies should be implemented and recourse to Part 2 will not add anything, and cannot justify an outcome contrary to its policies.

40. The District Plan clearly articulates the environmental outcomes sought in relation to heritage values and therefore, in our view, has a coherent set of policies designed to achieve clear heritage outcomes.

41. We identify one area where we consider the District Plan has not necessarily covered the field and that is in relation to the environmental outcomes which are sought for the Business 1 CBD Zone. Although Policy 1 is to retain existing and encourage new commercial/retail activities in the Central Business District, the explanation to that policy states:

> Maintaining and reinforcing the viability and vibrancy of Invercargill's City Centre is of widespread concern to the Invercargill people and is a **key priority for the Council. Specific provisions in the District Plan are one method of many that the Council has chosen to address this issue.**

42. From this explanation we conclude that maintaining and reinforcing the viability and vibrancy of Invercargill's City Centre is a *key priority* for the Council, and that there are other methods the Council has chosen to address this. This creates some doubt as to whether the District Plan contains a coherent set of policies on this issue. For that reason we are not convinced that the District Plan itself means Part 2 (and in particular s 5) should be excluded from consideration.

However we would add that we do not see reference to Part 2 as justifying an outcome contrary to the policies of the District Plan in this case, as for the reasons traversed above we consider that the proposal passes the gateway test for non-complying activities.

43. We have considered what other methods the Council may have chosen to address the viability and vibrancy of the City Centre and note that the 2018-2028 Long Term Plan states:[14]

> **City Centre Revitalisation**
> Council has been working to strengthen Invercargill's city centre through the adoption and implementation of a Retail Strategy. The Retail Strategy incorporates past reports by Kobus Mentz, Craig Pocock, the CBD Renewal Project and recommendations from the Southland Regional Development Strategy (SoRDS).

44. We consider that these must amount to the other methods Council has chosen outside of the District Plan, and that therefore the Retail Strategy and the Southland Regional Development Strategy should be considered as part of the s 104 assessment as other relevant matters.[15]

Conclusion

45. For the reasons expressed in this letter, we consider that a careful assessment of proposal against the objectives and policies of the District Plan leads to a conclusion that the proposal is *not* contrary to the objectives and policies of the District Plan. This means that the proposal passes the second gateway test for non-complying activities in s 104D(1)(b) RMA.

46. In terms of the s 104 assessment, we consider that Part 2 will have relevance in assessment of this case, given that Council has expressly noted that specific provisions in the District Plan are one method of many which the Council has chosen to address the viability and vibrancy of the city centre. However, given the conclusion we have reached in relation to s 104D RMA, we do not see consideration of Part 2 (and in particular s 5) as justifying an outcome contrary to the policies of the District Plan in this case.

Yours faithfully
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[14] Page 263.
[15] Section 104(1)(c) RMA.