

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER an application to the Invercargill City Council by HWCP Management Ltd for resource consent to demolish, alter and redevelop land and buildings in the Central Business District on a block bound by the east side of Dee Street, the south side of Esk Street, the west side of Kelvin Street and the north side of Tay Street

LEGAL SUBMISSIONS ON BEHALF OF HWCP MANAGEMENT LIMITED

Introduction

1. HWCP Management Limited (**HWCP**) proposes to redevelop the key block of land in central Invercargill bounded by Dee, Esk, Kelvin and Tay Streets. It proposes to demolish two, and partially demolish one, Category II buildings listed with Heritage New Zealand Pouhere Taonga (**HNZ**)¹ (retaining the façade of the Southland Times), and partially or completely demolish 16 buildings listed in the proposed Invercargill City District Plan (**District Plan**) as having heritage value. HWCP also proposes to re-develop the block with a range of dining, retail, office, residential and other opportunities, as well as carparking.
2. The application by HWCP presents an exciting opportunity to deliver the long held aspiration of the Invercargill community to rejuvenate the city centre, a vision which is articulated in both non-statutory and statutory planning documents. The benefits of the project are not merely aspirational however; they have been assessed by the New Zealand Institute of Economic Research.² Key findings of that assessment include that:

¹ The Newburgh Building (33 Dee St), the Lewis & Co Building (29 Esk St), and the Southland Times Building (67 Esk St).

² NZIER, *Invercargill city centre redevelopment*, February 2019; Appendix 1 to Statement of Evidence of Christine McMillan.

- (a) Southland's real GDP increases by \$48M/year and real household spending increases by \$44M/year;³
 - (b) Between 500 and 550 per annum temporary construction jobs will be created over the five years of the rebuild (HWCP acknowledges that this timeframe is now estimated at 3 ½ years);⁴
 - (c) The proposal will increase visitor spend for tourists by 5% per annum;⁵
 - (d) 340 jobs are likely to be created as a result of the redevelopment's contribution to increasing the number of permanent residents in the region;⁶
 - (e) The expected boost to GDP is between \$286m and \$475m until 2035.⁷
3. The application is relatively complex, and unique given the land mass of the proposal in a central city location. Key aspects are:
- (a) The application site does not include the Reading Cinema and Kelvin Hotel, but otherwise encompasses the whole block (including the old Bank of NSW building which is to be retained).
 - (b) The application site is located within the Business 1 (Central Business District) Zone. It is also subject to some 'overlays' being the:
 - (i) Priority Redevelopment Precinct;
 - (ii) City Centre Heritage Precinct;
 - (iii) Entertainment Precinct; and
 - (iv) Pedestrian Friendly Frontages Precinct.

³ Page ii.

⁴ Page iii.

⁵ Page iii.

⁶ Page iii.

⁷ Page 24.

- (c) Demolition of non-heritage buildings is a controlled activity, whilst demolition of the Council scheduled Class II buildings in the District Plan is a discretionary activity; however the proposed demolition of buildings listed by HNZ is a non-complying activity. As a result, the proposal attracts non-complying activity status overall.
- (d) Other aspects of the proposal which trigger the need for resource consent relate to the construction phase, residential activity within an Entertainment Precinct, and the building envelope.⁸ These aspects trigger restricted discretionary or discretionary activity consent requirements, but as discussed the proposal attracts non-complying activity status overall.
4. The relatively low number of submissions received on an application of this scale (44), and of those the lower proportion which are opposed to the resource consent application (10, or less than a quarter), speaks for itself in terms of the potential which can be realised by this project.
5. After the application was lodged, HWCP made changes to the redevelopment proposal. These are reflected in a revised set of architectural plans, which were submitted to the Invercargill City Council (**Council**) on 11 February 2019.⁹ The main changes to the proposal are:
- (a) HWCP no longer proposes to retain heritage facades on Tay Street¹⁰ and Kelvin Street.¹¹ Instead, HWCP proposes to retain the Cambridge Arcade façade on Esk Street.
- (b) The Tay Street elevations have been amended so that they now present as less of a 'wall'. The heritage images on Tay Street have also been removed.
- (c) The carpark has been amended so that it sits centrally within the block; it has reduced site area but an additional floor added. A 'southern lights' screen has been added to the carpark building to act as a 'beacon of arrival' to Invercargill Central.

⁸ Summarised at section 5.2 of the AEE; see also paragraphs 4.3-4.7 of the section 42A report.

⁹ Buchan, *Invercargill Central / Resource Consent Amendment Design Statement*, dated 29 January 2019.

¹⁰ Fairweather building.

¹¹ Thompson building.

6. These changes were assessed by the relevant experts, with particular regard to whether the changes were within the scope of the application as lodged (and notified). In terms of the tests stipulated by the Environment Court in *Coull v Christchurch City Council*¹² it is my submission that the changes are within the scope of the application as notified for the following reasons:¹³
- (a) Fundamentally, the application remains an application for the re-development of the block, with a range of dining, retail, office, residential and other opportunities, as well as carparking.
 - (b) The areas of assessment impacted by the changes have been assessed by the relevant expert assessments, which conclude that:
 - (i) Heritage values: there is a neutral effect to the scale or intensity of the activity with regards to heritage values.¹⁴
 - (ii) Visual/urban design: the overall bulk and mass of the development is similar to or less than the originally proposed plans.¹⁵
 - (iii) Traffic and carparking: these have been reassessed by Abley. Traffic generation has decreased slightly,¹⁶ and carparking remains acceptable.¹⁷
 - (c) Planning assessment concludes that there is no effect on plan provisions from what was originally proposed, and that no additional submissions would result if the application had been notified with the design as proposed now - there are no new

¹² *Coull v Christchurch City Council* EnvC Christchurch C77/06, 14 June 2006. The Court concluded that three tests should be applied when considering whether an application amendment is within jurisdiction:

- (a) Does it increase the scale or intensity of the activity?
- (b) Does it exacerbate or mitigate the impacts of the activity, both in terms of adverse effects and in terms of the Plan and other superior documents?
- (c) Would parties who have not made submissions have done so if they were aware of the change?

¹³ See also letter from Holland Beckett dated 11 February 2019, and paragraphs 7.1-7.5 of the section 42A report.

¹⁴ See the Heritage Properties Assessment of Change letter dated 1 February 2019, and page 3 of the RFI Response from Bonisch Consultants.

¹⁵ Page 2 of the RFI Response – Bonisch Consultants, and the mass adjustment images on pages 19-22 of the Resource Consent Amendment.

¹⁶ Compare 1413 trip generations in the Abley Amended ITA Report at page 24, to 1522 trip generations in the initial Abley ITA Report at page 23.

¹⁷ Page 26 of the Abley Amended ITA Report.

issues raised as a result of the revised plans (effects on heritage, mass and activities within the Business 1 Zone remain the same).¹⁸

7. The section 42A report writer considers that the proposed changes are modest relative to the very large scale of the overall project, and that the effect of the changes are within the envelope of effects and matters generated by the application as lodged.¹⁹
8. HWCP's evidence proceeds on the basis of the proposal as amended by it. Christine McMillan, the planner for HWCP, also presents some supplementary evidence analysing the changes against the provisions of the District Plan, as sought by the Chairperson's Second Minute dated 14 March 2019.

The issues and the case for the applicant

9. The case for the applicant is that it is appropriate for resource consents to be granted. This is because although there will be a loss of heritage values, the District Plan does not seek to preserve heritage at all costs. Rather, the redevelopment that can be delivered speaks to those aspects of the District Plan which seek to maintain and reinforce the viability and vibrancy of Invercargill's city centre. For this reason, the proposal is entirely appropriate.
10. The most contentious issues before the Commissioners relate to the demolition of heritage buildings (HNZ listed and locally scheduled), and impacts associated with the demolition and construction activities which are necessarily of some duration.
11. I deal with these (and other issues relevant to the statutory framework) before turning to the legal issues which are relevant to determination of the applications, and finally submitters' cases.

Demolition of heritage buildings

12. On the application site, there are 20 heritage buildings in total. The 'jewel in the crown', being the HNZ listed Category 1 Bank of New South Wales (**BNSW**) building is retained. Beyond that,

¹⁸ Page 3 of the RFI Response – Bonisch Consultants.

¹⁹ Paragraph 7.4 of the section 42A report.

the heritage buildings are either partially or completely demolished, with key heritage retention being the retention of the following facades on Esk Street:

- (a) Coxhead's Building (31-35 Esk Street);
- (b) Cambridge Arcade Building (59-61 Esk Street);
- (c) Southland Times Building (67 Esk Street).

13. HWCP acknowledges this will result in a loss of heritage values. However, it contends that this is appropriate when the retention of key heritage facades, and the redevelopment of the site, is considered. Before exploring this in more detail in terms of the District Plan framework, it is useful to put the matter in context.
14. It appears to be an uncontested fact that most of the heritage buildings are in a state of disrepair. As Dr Cawte says in his evidence, some buildings have sections that have been sealed off for several decades suggesting that they have not been fit for purpose for an extended period of time. 31 Dee Street (Smith's building) has had its first floor sealed off since 1929.²⁰
15. Batchelar McDougall Consulting (**BMC**) undertook detailed seismic assessments for the Southland Times, Newburgh, and Lewis and Co buildings, and initial seismic assessments for all other buildings within the site area with the exception of the BNSW. Key findings of these assessments (with reference to Importance Level 2 buildings) were that:²¹
- (a) Only two buildings have New Building Standard (**NBS**) ratings of over 80% with these being the newer parts of the Southland Times buildings and 55 Esk Street (Starbucks/Lustys);
 - (b) Two buildings have NBS ratings of between 67-79% being MacDonald's building at 41 Esk Street and Kingsland's Shop at 26 Tay Street.
 - (c) Four buildings have an NBS of 34-66% - 4 Tay Street (carpark), 16 Tay Street (Hannahs), 32-36 Tay Street (Just Incredible) and 54 Tay Street (Caroline).

²⁰ Statement of Evidence of Hayden Cawte, paragraph 4.6.

²¹ AEE, pages 22-23, with reference to the reports by BMC.

- (d) All other buildings have an NBS rating of 33% or less with the majority of buildings on site having an NBS of less than 20%. Apart from BNSW, *all* heritage buildings on the site are 33% or less, with only the Southland Times building and its neighbour at 63 Esk Street being above 20%.
16. These assessments do not appear to be in dispute.
17. Under the amendments to the Building Act 2004, introduced by the Building (Earthquake-prone Buildings) Amendment Act 2016, those buildings with an NBS rating of 33% or less are earthquake prone. The Council is also required, under that legislation, to identify potentially earthquake prone 'Priority' buildings within 5 years (as Invercargill is a medium risk area). The Council has identified all buildings on the application site as 'Priority' buildings and has issued EPB Notices in January 2019 (based on the engineering reports by BMC) for nearly all of the earthquake prone buildings identified. As such HWCP as building owners must either strengthen or demolish these earthquake-prone buildings within 12.5 years from the date of the EPB Notice.²² Landowners may apply for extensions of time for buildings listed by HNZ.
18. This is relevant context to this resource consent application. This is because, the EPB Notices, place both HWCP as landowner, and the Council as regulator under the Building Act 2004, on notice regarding the status of the buildings. This raises the prospect of health & safety concerns for HWCP as landowner, and potentially fast-tracks the Council's (as local administrator of the Building Act) to ensure the strengthening or demolition is planned and executed. In these scenarios, it is open to HWCP (and realistic) that it would choose not to tenant earthquake-prone buildings, and elect demolition over strengthening due to the general poor state of the earthquake prone buildings as the only practical outcome. It is also foreseeable (particularly given HNZ's position on this application) that HNZ would not force the strengthening of the Category II listed buildings and that resource consent for demolition would be forthcoming from the Council.
19. However this resource consent application presents an opportunity to retain and enhance key heritage facades on Esk Street. If the current trajectory of disrepair continued, it is entirely

²² Section 133AM of the Building Act 2004. In an area of medium seismic risk, the date is 12 years and 6 months for a priority building and 25 years for any other building, as measured from the date of the first EPB notice issued for the building or the part of the building.

possible that the medium or long term result would still be demolition but with continued decline of the CBD, no retention of heritage and absent an integrated redevelopment.

20. The position of HNZ is telling and directly relevant to the assessment of this application under the District Plan. It has filed a statement dated 18 March 2019 confirming that the amended application proposes amendments in relation to the Southland Times building that would address the concerns of HNZ described in its original submission. It has also stated that:
- (a) With regard to facade retention on Esk Street, its relief sought would be satisfied by the additional retention of the Cambridge Arcade façade; and
 - (b) The proposed amendments will result in an improved heritage outcome than that originally proposed.
21. Under rule 3.8.10 of the District Plan, which specifies assessment criteria for applications under rules 3.8.6-3.8.9, the results of consultation undertaken including any recommendations of HNZ, is directly relevant.²³ In my submission, a more positive endorsement could not be expected from HNZ.
22. Returning to the District Plan framework, Objective 1 is that 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, cues can be taken 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) It is clear from remaining objectives and policies that preservation of heritage is not sought at all costs. Policy 3 anticipates that an activity may avoid, *remedy or mitigate* the potential adverse effects of subdivision, use and development on heritage. Policy 5 (Active Management) looks to applicants to investigate and evaluate all reasonable means of restoration, adaption, reuse and relocation as alternatives to demolition. HWCP has done just this, as evidenced by the extensive expert input it has received from structural engineers, architects and heritage consultants. Reiterating, the untenanted general nature of all the first floors of most of the CBD development

²³ District Plan, rule 3.8.1(G)(b).

block, the low (less than 20% NBS) ratings for 65% of all the buildings in the entire block, and the very poor condition of these buildings makes it very difficult to strengthen to an acceptable level and cost.

- (b) For the Business 1 zone provisions, the zone statement is 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 application has considered amenity and good urban design with the assistance of Buchan.

23. In summary, it is my submission that this is an appropriate proposal and therefore it is acceptable for resource consent to be granted.

Demolition and construction activities

24. The length of the demolition and construction process has always been a paramount concern of HWCP for this project. The effects of demolition and construction activities on the amenity of the CBD are assessed as significant.²⁴ They are unavoidable given the scale of the project, but they are temporary. HWCP acknowledges that this is a major concern for a number of submitters. Accordingly, it has worked hard to see whether the initial estimated demolition and construction timeframe can be reduced. It has also actively considered how to address continued activation of Esk Street.
25. HWCP initially engaged Ryal Bush Transport to prepare a Demolition Management Plan.²⁵ The demolition phase of the development was originally expected to take up to 24 months.²⁶ Following lodgement of the resource consent application, HWCP also consulted a specialist demolition firm, Ward Group, on alternate ways to manage the demolition process to minimise disturbance to the surrounding businesses and the ongoing viability of the Esk Street shopping area during the process.²⁷ Through its experience and advice, HWCP determined that no road closures will be required during the demolition process other than while the Newburgh Building and potentially the Lewis and Co building are demolished. Primarily on

²⁴ AEE, page 46.

²⁵ Appendix E to the AEE.

²⁶ Section 4.4 of the AEE.

²⁷ RFI Response from Bonisch Consultants.

this basis, the total demolition timeframe is expected to be completed within approximately 1 year of the process starting.²⁸ Even that is conservative. Mr Cotton will confirm that demolition time is now expected to be in the order of 6-7 months, but HWCP needs to allow for some archaeology and possible contaminated soil. It is programming a start in July 2019 (subject to consent) and final completion by February 2020 (8 months total).

26. In January 2019, HWCP also appointed a Project Director to prepare and plan for the project, including particularly demolition and construction activities. Mr Cotton comes with a wealth of experience, having been involved with projects as large as a 480,000m² shopping mall in central China, and the Birkenhead Shopping Centre in Sydney which included 300 apartments and 900 carparks, and heritage building management during construction.²⁹ Mr Cotton has spent some time doing some pre-planning of demolition and construction activities in advance of a formal tender process, and is planning for a commencement to completion period of 3 and a half years.³⁰
27. Shortening the timeframe over which demolition and construction activities occur is but one step which HWCP has taken to address the impacts of those activities on third parties. It has confirmed that no road closures will be required during the demolition process other than while the Newburgh Building and potentially the Lewis and Co building are demolished, and that this will not exceed two weeks. Most existing street furniture on Esk Street will remain, and pedestrian and vehicular access will be retained for the majority of the project.³¹
28. Other changes include staging so that the first section to open will be the anchor tenant together with some Esk Street retail stores,³² providing food and beverage caravans and containers on the South side of Esk Street to ensure continuing activation of the street,³³ and actively committing to continual communication, a commitment which is secured by the proposed conditions of resource consent requiring Communication Plans as part of the Demolition Management Plan and Construction Management Plan.³⁴ Through these measures, HWCP aims to keep Esk Street activated throughout the project.

²⁸ RFI Response from Bonisch Consultants.

²⁹ Statement of Evidence of Geoff Cotton, paragraph 3.

³⁰ Statement of Evidence of Geoff Cotton, paragraph 58(d).

³¹ RFI Response from Bonisch Consultants, at pages 3-4.

³² Statement of Evidence of Geoff Cotton, paragraph 54.

³³ Statement of Evidence of Geoff Cotton, paragraph 58(a)(ii).

³⁴ Proposed conditions 8(g) and 15(a).

29. The steps which HWCP has taken to address this – by actively consulting contractors, appointing Mr Cotton, re-looking at demolition and construction phasing, and preparing a draft demolition and construction management plan – have already resulted in effects being minimised beyond what was originally proposed. The Commissioners should be confident that demolition and construction activities will be managed so as to minimise adverse effects.

Other issues relevant under the statutory framework

30. In terms of the relevant statutory directions under ss 104D and 104 RMA, which directly apply to these applications:
- (a) The applicant has tacitly acknowledged that the adverse effects of the proposal (at least in respect of heritage values) are more than minor, and would not pass the 'gateway' test in s 104D(1)(a) of the RMA. However, the applicant's evidence is that the proposal does pass the gateway test in s 104D(1)(b) of the RMA that the proposal is not contrary to the objectives and policies of the plan (in this case, the District Plan).³⁵
 - (b) In terms of further actual and potential effects on the environment of allowing the activity, there are significant but *temporary* adverse effects on amenity as a result of the demolition and construction process. There are *significant positive* effects on the environment of allowing the activity, including:
 - (i) Economic and employment benefits, as assessed by NZIER;
 - (ii) Securing the future of the BNSW and the retention of heritage facades on Esk Street;
 - (iii) Delivering the strategic vision of the Southland community under SoRDS and the District Plan.
 - (c) The statutory planning documents relevant to the proposal are the Southland Regional Policy Statement, and the District Plan. A detailed assessment shows that

³⁵ See page 64 of the AEE, paragraph 10.23 of the s 42A report and paragraph 8 Statement of Evidence of Christine McMillan.

the proposal is consistent with the relevant objectives and policies in those regional and district planning documents.³⁶

- (d) Under s 104(1)(c) of the RMA, a number of matters are relevant and reasonably necessary to determine the application.³⁷ These include:
- (i) The proposal is consistent with SoRDS, which seeks completion of this project as one of five required to transform the CBD;³⁸ and
 - (ii) The proposal achieves many of the CBD rejuvenation goals in the Invercargill City Centre Retail Strategy – 2017 (**Strategy**). While heritage loss is not favourable in the heritage precinct, achieving both goals concurrently was not feasible given they are largely mutually exclusive and the general poor state of the building stock in the CBD block. The proposal is in keeping with the Urban Design Principles outlined in the Strategy.³⁹

31. Policy 1 of the District Plan for the Business 1 (Central Business District) Zone is to retain existing and encourage new commercial/retail activities in the Central Business District, and 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.**

32. This is an explicit signpost that the Council has other methods outside the District Plan to address the viability and vibrancy of Invercargill's City Centre. The 2018-2028 Long Term Plan further states:⁴⁰

³⁶ See pages 52-63 of the AEE, sections 8 to 10 of the s 42A report, and pages 8-10 of Statement of Evidence of Christine McMillan.

³⁷ See paragraph 11.0 of the s 42A report, and paragraphs 46-50 of Statement of Evidence of Christine McMillan.

³⁸ Paragraph 11.2 of the s 42A report, and paragraph 47 of Statement of Evidence of Christine McMillan.

³⁹ Paragraph 11.4 of the s 42A report, and paragraph 48 of Statement of Evidence of Christine McMillan.

⁴⁰ Page 263.

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).

33. In my submission this expresses the other methods Council has chosen outside of the District Plan. Therefore the Retail Strategy and SoRDS should be considered as part of the s 104 assessment as relevant and *reasonably necessary* matters under s 104(1)(c). On SoRDS in particular, the evidence of Tom Campbell, former chair of the SoRDS Governance Group, is that the HWCP proposal is a very important, perhaps the most important, component of achieving SoRDS's primary goal of attracting an additional 10,000 people to live in Southland.⁴¹
34. I do not propose to labour further the expert evidence, which has been pre-exchanged and read by the Commissioners, but rather focus on legal issues that arise for the Commissioners' consideration and initial response to some submitters' cases.

Relevance of Part 2 RMA - Davidson

35. The Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council*⁴² 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";

⁴¹ Statement of Evidence of Tom Campbell, paragraph 11.

⁴² 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.

- (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.
36. 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.
37. Thus, the relevance of Part 2 to the s 104 assessment will depend on the extent to which 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.
38. The District Plan clearly articulates the environmental outcomes sought in relation to heritage values and in my submission has a coherent set of policies designed to achieve clear heritage outcomes. However, within 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 (as already discussed) suggests 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.

39. For that reason, it is appropriate to consider Part 2 in terms of s 5 and 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.

H & J Smith Holdings Limited (H & J Smith)

40. H&J Smith has provided two expert statements of evidence.
41. It is not clear whether the planner for H&J Smith has actually read the evidence for HWCP which would appear to be an omission where an expert is preparing an impartial opinion and has an obligation to consider all relevant matters. In particular, Mr Vivian queries whether it is still proposed that the commencement of demolition is conditional on finding an anchor tenant or not,⁴³ and suggests amendments to proposed condition 7⁴⁴ notwithstanding that Ms McMillan has clearly suggested amending the same condition to reflect that the commencement of demolition is conditional on finding an anchor tenant. It is not clear whether Mr Vivian's recommendation is that consent should be granted subject to conditions, or declined.
42. Of the amendments which Mr Vivian has suggested to conditions, HWCP is happy to include the Communication Plan (as appears in conditions 8 and 15) in condition 13 relating to the Vacant Site Management Plan. On asbestos matters, Mr Cotton is taking advice from Asbestos Monitoring & Surveys NZ Limited. HWCP suggests that if condition 8(b) merits amendment, the condition could add "any asbestos discovered during the demolition of the buildings must be removed under the Health & Safety at Work (Asbestos) Regulations 2016".

⁴³ Statement of Evidence of Carey Vivian, paragraph 2.13.

⁴⁴ Statement of Evidence of Carey Vivian, paragraph 3.15.

43. It is the economic statement of evidence from Ms Hampson exchanged for H& J Smith which is more detailed and instructive of the submitter's position, and has more tangible recommendations for HWCP and the Commissioners to consider. Notably, the statement clearly and unequivocally supports the project from a medium to long term economic perspective, stating:⁴⁵

The economic health of the CBD Core is at an all-time low. The rationale for the HWCP proposal is clearly supported by my assessment of economic data.

44. Rather, Ms Hampson's evidence criticises the application for not providing an economic assessment of the temporary and short term economic effects of the proposal on the CBD Core. HWCP's response to this is that:
- (a) The suggestion that HWCP should engage an economist to assess the short term impact of the demolition and construction period is overkill. HWCP has assessed that there will be significant effects on the amenity of the CBD during the redevelopment process.⁴⁶ In doing so it has looked at the *direct* impacts of the demolition and construction process, and how best to address these – i.e. road closures, shops remaining open, Esk Street remaining activated. This is a much more robust approach than trying to estimate, using a series of assumptions, what the *indirect* impacts will be.
 - (b) The economic evidence appears incomplete. It has had no regard to the workforce and jobs that will be created over the demolition and construction period. Any impact assessed by the witness in terms of loss of workers during that period is therefore likely to be overstated as a result. Furthermore, H & J Smiths is a sizeable department store which will remain a destination in its own right.
 - (c) The figures supplied in Appendix 3 to Ms Hampson's evidence illustrate that H & J Smiths is in great decline well before any CBD action from HWCP. Total CBD sales grew from \$307m in 2009 to \$373m in 2018, an increase of 21%. Total Invercargill

⁴⁵ Statement of Evidence of Natalie Hampson, paragraph 8.1.

⁴⁶ AEE, section 9.4.7.

City sales grew from \$551m in 2009 to \$725m in 2018, an increase of 31%. In the same period H&J Smiths sales went from \$22m to \$19m, a decrease of 13%.⁴⁷

- (d) The nub of the economic evidence perhaps sits within section 7 regarding projection of future sales and gross profit without and with the HWCP proposal. HWCP presumes that this then links through to the possible mitigation measure at paragraph 8.8(e) of “other forms of financial assistance”. If so, then this smacks of trade competition, and HWCP questions whether in fact the motivation for H& J Smith’s opposition to the project is related to the effects of trade competition once the development is complete and an anchor tenant is in place. HWCP’s concern is reasonably placed, with the submitter’s subsidiary H & J Smith Limited having had a s 274 notice to a Bunnings resource consent application struck out in August 2018 on the basis that it was a trade competitor and its submission had been made contrary to s 308B of the RMA.⁴⁸

45. For completeness, I respond to some of the other measures sought in the conclusion of Ms Hampson’s evidence (paragraph 8.8) as follows:

- (a) With respect to clause (a), HWCP does not accept that independent monitoring of compliance due to Council’s involvement in the project is warranted. It is not unusual for council controlled organisations to be consent holders, and the structure of HWCP with three directors (one Council) provides sufficient separation and independence from the Council as regulatory authority. In any event, there are limitations on who can be warranted enforcement officers under the RMA,⁴⁹ and this is unlikely to include external experts.
- (b) With respect to clause (d) requesting a bond, this is unreasonable and unnecessary. This project does not present risk factors in terms of either the applicant itself and/or the potential for the project to be left incomplete and pose long term health and safety or adverse amenity effects. The reverse is true if the city block in question is left as it is at present.

⁴⁷ Statement of Evidence of Natalie Hampson, Appendix 3.

⁴⁸ *Bunnings Limited v Queenstown Lakes District Council* [2018] NZEnvC 135.

⁴⁹ Section 38.

46. Mr Cotton is likely to respond in supplementary evidence to some of the other suggestions made in paragraph 8.8 such as the suggestion of demolishing, constructing and tenanted a site before starting the next site, which is only likely to lengthen any demolition and construction period.
47. Finally, HWCP refutes the call that there has no or little been consultation. Mr O'Donnell can confirm that meetings have been held from 2015 onwards, with Jason Smith attending, whilst Mr O'Donnell has presented to the H& J Smith board in late 2018 (with at least 4 other meetings on design).

Other submitters

48. Of other submitter evidence lodged:
- (a) HWCP acknowledges and is working to see whether the evidence for NZTA can be addressed regarding the access points onto and from SH1.
 - (b) It is doubtful that the submitters Duncan McKenzie and Bob Simpson can present expert opinion in support of submissions made in their own name. Put simply, expert evidence given by a submitter in pursuit of his own cause lacks the impartiality which must attach to expert evidence. If the Commissioners agree, then this affects the weight which can be placed upon the evidence.

Conditions

49. HWCP is largely in agreement with the conditions proposed in the section 42A report. It does seek some amendments, and those are reflected in a mark-up of the conditions which is attached to the Statement of Evidence of Christine McMillan at Appendix 2. The conditions to which changes are sought are also addressed in relevant evidence as follows:

Condition number	Relevant statements of evidence
Condition 3(a)	Christine McMillan – paragraph 78

Condition number	Relevant statements of evidence
(deletion of requirement for full structural survey of building where facades are to be retained)	
Condition 3(d) (deletion of requirement for detailing strengthening to façade or foundations)	Christine McMillan paragraph 79
Condition 3(g) (removal of requirement to re-point and leave brickwork unpainted)	Christine McMillan – paragraph 80 James Burgess – paragraph 142
Condition 5 (requirement for a heritage peer review)	Christine McMillan – paragraph 81
Condition 7 (change to requirement that demolition does not occur until HWCP has confirmed in writing to the Council that an unconditional agreement for an anchor tenant has been entered into).	Scott O’Donnell – paragraphs 22 and 23 Christine McMillan – paragraph 82
Condition 11 (working hours)	Geoff Cotton – paragraphs 65-67 Christine McMillan – paragraph 83
Condition 13(b) (addition of view ports to hoardings – agreed with NRG submitters)	Christine McMillan – paragraph 85
Condition 18 (working hours)	Geoff Cotton – paragraphs 65-67 Christine McMillan – paragraph 83
Conditions 20 (amended to exclude archaeological survey from earthworks definition)	Christine McMillan – paragraph 84

Condition number	Relevant statements of evidence
Condition 21 (amended to remove RAP and clarify info sent to Council for land contamination).	Christine McMillan – paragraph 84
Condition 22 (RAP removed from condition	Christine McMillan – paragraph 84
Condition 26 (change 2.5m to 2m)	Jay Baththana – paragraph 33-35 James Burgess – paragraph 142(c) Christine McMillan – paragraph 86
Condition 29 (all contractors vehicles to be parked on site – agreed with NRG submitters)	Christine McMillan – paragraph 85

Witnesses for the applicant

50. I will be calling 8 witnesses in support of the application:

- (a) Geoff Thompson
- (b) Scott O'Donnell
- (c) Tom Campbell
- (d) James Burgess
- (e) Hayden Cawte
- (f) Geoff Cotton
- (g) Jay Baththana
- (h) Christine McMillan

51. Hayden Cawte and James Burgess have a visual presentation to assist the Commissioners (and any submitters in attendance) with an overall view of the proposal in heritage and urban design terms.

52. Supplementary evidence from Christine McMillan is provided with these submissions analysing the changes against the provisions of the District Plan, and addressing conditions, as sought by the Chairperson's Second Minute dated 14 March 2019.
53. Further supplementary evidence may be provided at the hearing in response to new matters arising from the expert evidence received from submitters.
54. Graham McDougall and Andrew Marriott, directors of BMC, will also be in attendance on Tuesday morning to answer any questions which the Commissioners may have in relation to the BMC reports.
55. No doubt the Commissioners will undertake a site visit. HWCP would like to invite the Commissioners to view some of the heritage buildings from the inside, however would not wish to do so without the Commissioners being escorted by one of the structural engineers from BMC. This will merit some discussion at the hearing given the usual convention that Commissioners would not be accompanied by any witnesses.

DATED this 22nd day of March 2019



Vanessa Jane Hamm

Counsel for HWCP Management Limited