

BEFORE THE DUNEDIN CITY COUNCIL

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

a resource consent application by the Ministry of Health to demolish the former Cadbury Factory buildings for the purposes of constructing the New Dunedin Hospital, at 280 and 336 Cumberland Street, Dunedin. (LUC-2020-263)

OUTLINE OF OPENING LEGAL SUBMISSIONS

2 November 2020

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MAY IT PLEASE THE COMMISSIONER:

- 1 The Ministry of Health has applied for resource consent to demolish the former Cadbury factory buildings at 280 and 336 Cumberland Street as a precursor to the construction of the new Dunedin Hospital ("**NDH**") Inpatients Building on that site.
- 2 As set out in the application, the Cadbury factory facades facing Cumberland and Castle Streets are scheduled for heritage protection under the Dunedin City Second Generation District Plan ("**2GP**").¹ They are also featured as Category 2 items on the Heritage New Zealand Pouhere Taonga List.²
- 3 Due to the facades' heritage listing, the proposed demolition of these buildings is a non-complying activity under the 2GP. As noted in the application, the Officer's Report, and in the evidence of Mr Gimblett, both the classification and the supporting heritage provisions in the 2GP are operative as they apply to this activity.
- 4 As such (and as you will be well aware), if consent is to be granted, this activity must meet at least one of the threshold tests in section 104D of the Resource Management Act 1991 ("**RMA**"). That assessment and the standard assessment of this application under section 104 will be the primary focus of my submissions. I will also address you on Part 2 matters, noting that of course, you may well find that recourse to such matters is unnecessary in this case.

Evidence to be presented

- 5 In accordance with your direction, Mr Gimblett has prepared a short statement of evidence on specific planning matters relating to the Proposal. That statement was pre-circulated on 23 October 2020 and addresses:
 - (a) Consistency with the findings of the Officer's Report;
 - (b) The consultation undertaken with Heritage New Zealand Pouhere Taonga; and
 - (c) The set of conditions agreed between the applicant, the Council and Heritage New Zealand Pouhere Taonga.

¹ Dunedin City Second Generation District Plan (**2GP**), Appendix A1.1. B030.
² New Zealand Heritage List/Rārangī Kōrero, Category 2.

- 6 Mr Gimblett intends to present a short summary of this evidence to you, and will be available to answer any questions you may have.

A SHORT OVERVIEW OF THE PROPOSAL

- 7 Detailed descriptions of both the Proposal and the existing environment against which it is to be assessed are set out in the application and in the Officer's Report.³
- 8 Other than in relation to the proposed conditions, which Mr Gimblett will speak to, the Proposal remains as applied for. There is no real dispute that the facades in question have significant heritage value, be that for their contribution to the social and cultural history of the city and/or as a result of their own architectural merit. While there is some dispute about that between the heritage experts, in my submission, that dispute is of no moment.
- 9 Rather, what is important is that as protected facades with regional significance their demolition can only be contemplated in certain circumstances. In my submission and as I shall address you on shortly, those circumstances exist in this instance.

Submissions

- 10 The application was publicly notified on 8 July 2020. During the notification period, 5 submissions were received from the following persons:
- (a) Ted Daniels;
 - (b) Athol Parks;
 - (c) Allied Press;
 - (d) Southern District Health Board; and
 - (e) Heritage New Zealand Pouhere Taonga.
- 11 An additional late submission from the Otago Chamber of Commerce was also lodged. The Applicant has no objection to that submission forming part of your assessment.

³ *Cadburys Factory Demolition – Application for Resource Consent prepared for Ministry of Health, Boffa Miskell, 11 June 2020 at section 5; Report from Karen Bain, Dunedin City Council to Commissioner Gary Rae, Resource Consent Application LUC-2020-263, 9 October 2020 (Officer's Report) at [8]-[20].*

- 28 In that regard, the Applicant would draw your attention to the following matters.

The significant positive benefits associated with the NDH which can be realised if consent for this Proposal is granted.

- 29 As set out above, the 2GP policy framework directs you to consider the significant public benefit that demolition of these facades will allow for.
- 30 As Mr Gimblett acknowledges, there is no absolute guarantee of these benefits until such time as the NDH is actually built and remains operational. That is the case even where a resource consent for demolition is accompanied by an application for a new build. The extent to which these benefits should therefore be taken into account in your decision in this case is therefore one of probability of outcome. Not to put too fine a point on it – if you do not consider it likely that the hospital will progress then you must decline consent because you can give no weight to the public benefit side of the equation. If however you find it highly likely the hospital will progress then you may properly take into account the public benefit the evidence shows would accrue from that (including the material contained in the SDHB submission).
- 31 It is for that reason that the steps taken to date by the Applicant and the Crown with respect to progressing the NDH are set out in detail in response to the Council's Request for Further Information ("**RFI**").¹⁷ I do not intend to restate these in any detail, but simply note that a significant amount of money, time and public political commitment has been expended on this project. The Applicant owns a large area of land within the central city which it can only use for health purposes. We are now into the Preliminary Design phase, planning for the procurement of contractors is now well underway, and demolition of other buildings on site has begun. It is the Applicant's position that it is significantly more likely than not that the hospital will proceed on this site.
- 32 In terms of the significant positive benefits that then accrue, these too are addressed in both the application, Ms Bain's report and in the

¹⁷ *Response to Request for Further Information* - from Greenwood Roche and Boffa Miskell on behalf of the Ministry of Health to Campbell Thompson, dated 21 September 2020, (**RFI Memorandum**) at 1.3, Appendix A.

Applicant's RFI.¹⁸ It is the position of the Applicant, informed by expert evidence, that these benefits cannot be realised without demolition of these facades, and that those benefits outweigh the more than minor adverse effects on heritage values caused by their loss.

- 33 In particular, given their current parlous state, significant structural enhancement would be required in order for them to meet the Building Code requirements for hospitals. This would add extensive cost and challenge to the project. Perhaps more importantly however, even if it were technically possible, it would still unacceptably compromise both the clinical functionality of the Inpatients building and the wider NDH, as well as the ability for this project to deliver a coherent, high-quality urban design outcome for the city. As noted in the Applicant's RFI, the NDH is being designed in specific contemplation of the applicable outcomes sought in the 2GP for Dunedin's natural and physical environment. The ability for the project to achieve those outcomes would be compromised through the retention of these facades.

Heritage values

- 34 The Applicant acknowledges that the adverse heritage effects generated by the loss of these buildings are both more than minor and not realistically avoidable. It has nevertheless sought to mitigate the overall adverse effects through the proposed conditions of consent.
- 35 In short, the Applicant recognises the importance of this site to Dunedin and its history. The expert evidence has confirmed that there is no reasonable alternative to demolition; however, through the measures set out in the conditions, the Applicant commits to ensuring that the historical narrative of these buildings and this site is captured and maintained.

Other matters

- 36 Matters relating to the transport network and the demolition works have been addressed in detail in the application and the Officer's Report. As set out in Mr Gimblett's evidence, management plans are proposed to control these works and their impact on the surrounding

¹⁸ Officer's Report, at [150]; RFI Memorandum at Appendix A.

environment. The Council has accepted this approach through the agreed set of conditions.

PART 2

37 The requirement in section 104(1) to have regard to actual and potential effects on the environment and any relevant planning provisions is of course subject to Part 2 of the Act.

38 As the Panel will be aware, applying *R J Davidson Family Trust v Marlborough District Council*,¹⁹ in most cases any reference back to Part 2 is unlikely to add anything to an assessment where the relevant planning provisions will have been established in accordance with, and give effect to, Part 2. In particular, the Court of Appeal in that case noted:²⁰

It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases it will be more difficult. If it is clear that a plan has been prepared having regard to part 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has had regard to those policies in accordance with section 104(1) should be to implement those policies in evaluating a resource consent application. Reference to part 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies.

Equally, if it appears that the plan has not been prepared in a manner that appropriately reflects the provisions of part 2, that will be a case where the consent authority will be required to give emphasis to part 2.

39 There is no suggestion by Ms Bain or Mr Gimblett that the 2GP has not been prepared in a manner that appropriately reflects the provisions of Part 2.

40 The evidence of the experts before you confirms that on a "fair appraisal of the policies" in the 2GP, the appropriate response to this application is clear. Yes, demolition of these buildings will generate

¹⁹ *R J Davidson Family Trust v Marlborough District Council* [2019] NZCA 57.
²⁰ [2018] NZCA 316 at [74] and [75].

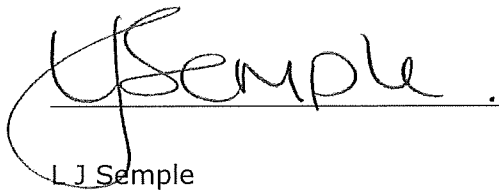
more than minor adverse effects on heritage values. However, the 2GP contemplates that, in exceptional circumstances, demolition of heritage items even where it carries these effects may be appropriate. This Proposal and the significant public benefit that it will allow fall squarely within those exceptional circumstances.

- 41 Noting also the conclusions of Ms Bain and Mr Gimblett regarding the wider objectives and policies of both the Regional Policy Statement and the 2GP, it is my submission that reference to Part 2 in this case will not add anything to your assessment. It would not, adopting the language of the Court of Appeal, justify an outcome contrary to the thrust of these policies. However, even if you determined that reference to Part 2 would in some way assist your assessment, it is also the opinion of Mr Gimblett and Ms Bain that the Proposal with the agreed conditions will achieve the purpose of the RMA.²¹

PROPOSED CONDITIONS

- 42 Mr Gimblett will address you on the proposed conditions of consent which were appended to his evidence. Beyond his comments, there is nothing further that the Applicant wishes to highlight but both Mr Gimblett and I are very happy to take any questions you may have.

DATED this 2nd day of November 2020



L J Sample

Counsel for Ministry of Health

²¹ Gimblett, EIC at [4.15]; Officers Report at [152].

