BEFORE THE COMMISSIONERS ON BEHALF OF THE DUNEDIN CITY COUNCIL

IN THE MATTER	Of Application for Resource Consent under s 88 of the Resource Management Act 1991
By	**NZ HORIZON HOSPITALITY GROUP LIMITED**
	LUC 2017-48 and SUB 2017-26

CLOSING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

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TRADE COMPETITION

1. Who is Misbeary Holdings? Misbeary Holdings is a vehicle of the owners of the Scenic Circle Dunedin hotels.

2. The Resource Management Act 1991 ('The Act') restricts trade competitors from making submissions on resource consent applications or plan changes. The Act also restricts the use of surrogate parties (section 308E). Misbeary Holdings is either a direct trade competitor, or a trade competitor's surrogate.

3. Misbeary Holdings owns a small piece of land off Smith Street which adjoins the Council's carpark. If the use of that property was adversely affected by this application, then Misbeary could raise that matter in a submission. However Mr Hardie's oral submission was explicit: "*we do not intend to raise any issues in relation to our own site*". This leaves you in a positon where Misbeary is only raising issues concerning general public amenity, which as a trade competitor is prohibited by the RMA.

4. Trade competition is controlled through Part 11A of the Act, which is titled "Act not to be used to oppose trade competitors." The following sections have particular relevance:

   (a) Section 96(2) states:

   (2) Any person may make a submission, but the person's right to make a submission is limited by section 308B if the person is a person A as defined in section 308A and the applicant is a person B as defined in section 308A.This provision ensures that trade competitor is restricted from making a submission on a resource consent application.

   (b) Section 308A identifies who will be classified as a trade competitor and a surrogate. In particular section 308A(a):

   *"**person A** means a person who is a trade competitor of person B."*

   (c) Section 308B(2) provides that person A may only make a submission if they are directly affected by an effect of the activity

to which the application relates. The following limbs must both be satisfied:

Person A may make the submission only if directly affected by an effect of the activity to which the application relates, that—

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

[emphasis added]

5. The Act does not define the terms *trade competitor* or *trade competition*. Guidance can be found in *General Distributors Limited* where the Court held:

"so, if we have two or more organisations striving to establish superiority over the other (s) in the buying and selling of (in this case) goods, then we have trade competition, and those organisations are trade competitors."[1]

6. Taking this approach it is clear that there is a connection between Scenic Circle and the Applicant as both parties are competing providers of visitor accommodation in Dunedin. Further, we have identified in articles produced by the Otago Daily Times several statements that disclose Scenic Circle's intention to purchase the land at Filluel Street.

"Mrs Hagaman yesterday launched stinging criticism of the council and its involvement with Mr Tosswill.

She said she advised the Council about Scenic's plans for a five star property more than three months ago and was surprised the Council entered into an exclusive deal with another developer."[2]

The article goes on to say:

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[1] *General Distributors Limited v Foodstuffs Promised Properties (Wellington) Limited* [2011] NZEnvC 212 at [14]

[2] Otago Daily Times, *Five-star hotel planned; site, height unclear,* Saturday 15 October 2016

"Asked if he knew Scenic Hotel was considering a five-star hotel for Dunedin, Mr Cull said he understood Scenic Hotel had a discussion with council chief executive Sue Bidrose about the Filleul St site after news surfaced about a proposed hotel on the site.

Dr Bidrose told them there was an offer on the site at market value.

If the offer did not eventuate, the site would be put on the open market."[3]

7. Further, we have identified within another article produced by the Otago Daily Times that Scenic Circle has concerns over having to compete with a five-star hotel within the Dunedin market.

"However, Scenic Hotel Group Lani Hagaman said there was still not enough year-round demand in Dunedin to justify two new hotels, and she was "cautious" about projections of growth.

Summer might be busy, but existing operators were still fighting each other for business during Dunedin's winter, and a five star hotel would only exacerbate that, she said."[4]

8. The articles not only identify that Scenic Hotel have a concern over competition for a visitor accommodation market but it is also evident that Scenic Circle has an interest in purchasing the site for a five star hotel themselves.

9. Are those ODT articles reliable? If the ODT was wrong, then it would have to have misunderstood and misquoted Mrs Hagaman, the Mayor, and Dr Bidrose without any of those three people seeking a retraction or correction. That is an inherently unlikely situation. You can rely on those articles for the propositions that:

   (a) Scenic Circle proposes its own 5 star hotel.

   (b) Is seeking a suitable site.

   (c) Would have been interested in this application site, which is adjacent to Misbeary's existing land, and is disappointed that it was offered to NZ Horizon Hospitality Limited.

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[3] Ibid
[4] Otago Daily Times, *Opinions Divided Over Hotel Proposal*, Tuesday 12th January 2016

10. You may infer that the underlying purpose of the Misbeary submission is to either retain a dominant position in the Dunedin market, or to protect a market opportunity for a 5 star hotel from being taken up by a competitor. This is exactly the type of trade competition the RMA is excluding from the submission process.

11. We can also turn to *General Distributors Limited* for where the onus of proof lies. That case involved a submission made by a competing supermarket chain which included submissions relating to plan integrity and that large scale retail activity was contrary to the Council Centres policies within the district plan. The submitter raised no issues concerning their own property. The following factors were significant in the Court's judgement:

    (a) It was up to the submitter to demonstrate that it is directly affected by an adverse effect on the environment created by the proposal and that such adverse effect did not relate to trade competition effects.[5]

    (b) When considering whether the effects related to trade competition the Court stated:

    > *"the degree of that effect can be a matter of debate, but as a matter of fact and common sense (to borrow a phrase from the Commerce Act 1986) no matter how you dress it up, that relates to (i.e. has a connection with) an effect of trade competition in s 308B terms."*[6]

12. The Court has taken a broad common sense approach to the definition of trade competition. No matter how you "dress it up", Misbeary's submission can be drawn back to its core purpose of trade competition, whether it be competition for visitor accommodation or the use of the site itself. The submitter has failed to raise any effect on their own site, so they have failed to satisfy the onus that they have any lawful status as a submitter.

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[5] *General Distributors Limited v Foodstuffs Promised Properties (Wellington) Limited* [2011] NZEnvC 212at [19]
[6] Ibid

HYBRID STATUS – UNBUNDLING

First Limb

13. There appears to be a general consensus that the approach provided within *Southpark* is the appropriate test to consider a hybrid application.[7] Further, Counsel for Kingsgate has also accepted that the first limb of this test has been satisfied.

14. I have discussed the second and third limbs of the *Southpark* test in detail below:

Second Limb

15. We refer to the second limb of the *Southpark Corp Ltd v Auckland City Council* which requires:

> *"The scope of the consent authority's discretionary judgement in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors."*[8]

16. In Counsel's submission for Kingsgate, it is suggested that this limb has not been satisfied and that a split would therefore be 'artificial'. To reach this conclusion the submitter has relied on several Rules within the plan. I have discussed these in detail below:

Rule 13.7.2

17. The Submitter suggests that Rule 13.7.2 exercises control in respect of the values listed within Moray place precinct values and given the wide list of considerations would be inconsistent with limb 2 of *Southpark to* bundle. .

18. The important point here is that rule 13.7.2:

    (a) Is a controlled activity rule. Consent cannot be declined on the strength of the townscape precinct values.

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[7] *Southpark Corp Ltd v Auckland City Council* A111/2000 at [15]
[8] Ibid

(b) Controls design and external design and appearance[9]. Assessment matters (i) and (ii) refer to the townscape precinct values and "the relationship of the building to the setting". Control is not reserved over height or boundary setback. Those controls are found in Chapter 9. So although the precinct values cover a range of matters, the scope of control is very limited.

Rule 9.5.2(ii)

19. Rule 9.5.2(ii) provides height thresholds, and pursuant to Rule 9.5.3, a failure to comply with the minimum or maximum height results in: *"The Council's discretion is restricted to the condition or conditions with which the activity fails to comply."* Nothing other than the adverse effects arising from the height breach are relevant. So in terms of the *Southpark* test, the scope of the consent authority's discretionary judgement in respect of one of the consents required is relatively restricted or confined.

20. The submitter directs us to the matters provided within section 9.9 *Assessment of Resource Consent Applications.* Section 9.9 is not a rule (compare rule 9.8 on the previous page of the Plan). Assessment matters are not compulsory elements of any District Plan (section 75(1) of the Act). Policies are implemented by rules, not assessment matters. So although assessment matters may be helpful, in this Plan they have no regulatory effect.

21. Section 9.9 is applicable to 'any application.' It would be incorrect to suggest that all of those matters are relevant to breaches relating to height referred to in Rule 9.5.3. Assessment Matters are broadly drafted (remember they apply to non-complying activities too) but can only be applied to decisions under rule 9.5.2(ii) to the extent that they relate to the restricted discretion. They cannot widen the scope of a discretion once that has already been restricted by a rule.

22. Clarification on this can be found in *Aryburn Farms Estates Limited v Queenstown Lakes DC* which held that even though assessment matters may be broad, they must relate to matters over which the Council has

[9] Rule 13.7.2(i)(a).

restricted discretion.[10] The Court outlined three possible interpretations to the assessment matters:[11]

i. *" The consent authority is limited in its consideration of a restricted-discretionary activity to the specified assessment matters and the applicable provisions of the Act. This is essentially the approach taken by the Environment Court, but within the wider context of the Plan.*

ii. *The specified assessment matters and the applicable provisions of the Act, while mandatory, are not exhaustive. The consent authority is also entitled to have regard to any other matter provided it is an effect of the breach of the particular Site Standard at issue.*

iii. *The specified assessment matters relating to the particular Site Standard and the applicable provisions of the Act are mandatory, but not exhaustive. A breach of the Site Standard, in particular such a wide-ranging one as the "scale and nature of activities", is a trigger for a full evaluation of the merits."*

23. Ultimately, the Court held that the second interpretation was the most appropriate and dismissed the third approach as it would be inconsistent with the concept of restricted discretionary.[12] Essentially, assessment matters must be considered, but only in relation to the effect of a breach. In applying this approach, the assessment matters referred to in Rule 9.9 should only be relevant to the extent that they provide clarification on the height breach. This does not extend the scope of considerations.

24. Counsel for the Submitter seems to be implying that the broadly worded assessment matters extends the scope of relevant considerations. For example assessment matter 9.9.5 relates to "*the impact on amenity values in general.*" We accept that amenity values may be a relevant consideration, but only to the extent that amenity values are affected by the breach in height. To expand considerations beyond this would undermine the Restricted Discretionary status of the activity.

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[10] *Aryburn Farms Estates Limited v Queenstown Lakes DC* [2012] NZHC 735
[11] Ibid at [47]
[12] Ibid [48]-[50]

Third Limb

The effects of exercising the two consents would not overlap or have consequential or flow on effects on matters to be considered on the other application, but are distinct[13]

25. The third limb requires a finding of fact on the evidence. It is not a legal or a planning matter.

26. The only expert witness on the requirements of a hotel was Mr Harris, despite both Misbeary and the Kingsgate having access to suitable expertise should they have wanted to disagree with Mr Harris. Mr Harris explained very clearly the relationship between building height, views, and average daily room rate and the particular difficulty with achieving satisfactory ADRs in Dunedin. No matter how big the site might have been, the applicant's business model was always going to require a tall building offering excellent views from the hotel rooms. The side yard rule has got no relevance to the design of the building, which is driven by commercial consideraitons.

27. In the evidence presented by Mr Taylor he reached the conclusion that complying with the front and side yard requirements will have a significant effect on the overall mass and height of the building.[14] That is a guess. There is no way he can know that and offer it as an expert opinion. Nor has he acknowledged expert evidence to the contrary.

28. The disconnection is also evident within the expert conferencing document released on 14 August 2017. The parties, including Graeme McIndoe have provided the following statements (summary only):

    (a) The proposal provides an appropriate main entrance connection to the street and edge definition[15]; and

    (b) The street edge can include breaks for lanes and vehicles access and still retain successful street edge; [16] and

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[13] *Southpark* para 15.
[14] Evidence of Graeme Taylor at [22]
[15] Expert Caucusing document at [4]

(c) The alignment of the entry on Harrop Lane and the lowering of the lobby strengthen this connection with street and public realm.[17]

29. The experts have addressed boundary setback as a matter of continuous street edge which goes strictly to the assessment of streetscape amenity.

30. Further, the effects of height have been segregated in the experts conference report into a completely distinct set of considerations: *relationship and degree of fit with existing and anticipated setting*; *presence of nearby heritage buildings and relationships with these*; *shading of public realm*; *impact on view connections and visual dominance*.[18] This is consistent with the approach taken within the 42A Report, where issues concerning streetscape and height were segregated into separate areas of the report.

31. Where the effects resulting from Rule breaches can be dealt with separately, it is inappropriate to create connection between them. As the methodology of the expert witnesses have shown, matters of height and setbacks have been assessed under two distinct headings:

(a) Issues concerning set-back and boundary requirements relate to streetscape amenity; and

(b) Issues concerning height relate to view obstruction, shading, relationship of height to surrounding buildings and fit within the townscape.

32. Not one witness (expert or lay) has drawn any physical linkage between the adverse effect of the failure to build to the site boundary (to a maximum of 11m in height), and the adverse effects of the tower height. The most that is claimed is that this applicant would have designed a lower building had he not made provision for a circulation road around the perimeter of the site. Even if the claim were right (it isn't) speculation about the relative adverse effects of an alternative proposal does not

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[16] Ibid at [5]
[17] Ibid at [8]
[18] Ibid at [6]

mean that the various effects of the height this application overlap with the adverse effects of the yard and veranda non-compliances of this building. No-one has explained why those things cannot be reliably assessed separately.

33. *You may find that the Southpark* third test is satisfied. This is similar to the outcome in *Body Corporate 97010 v Auckland City Council*, where the Court noted that the Appellant's concern was with the height and bulk of the building, not its location on the site. We have the same situation here, where the submitter is assuming (wrongly) that complying with setback-requirements would reduce the height of the building.

PLAN INTERPRETATION

34. There has been considerable discussion on the relationship between Objective 9.2.3 and Policy 9.3.3. To reconcile apparent inconsistencies, it is necessary to construe the provisions of the plan in light of their plain and ordinary meaning, and where possible in light of their purposive interpretation. Only in cases of doubt should other relevant parts of the plan, such as Objectives and Policies be referred to.[19]

35. The High Court in *Nanden v Wellington CC,* set out the following "fundamental issues of policy" where there are competing interpretations of a plan available:[20]

    (a) It is desirable for an interpretation to be adopted which avoids absurdity or an anomalous outcome; and

    (b) It is also desirable for an interpretation to be adopted which is likely to be consistent with the expectation of property owners; and

    (c) Practicality of administration by the city council officers is also an important consideration.

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[19] *Queenstown lakes DC v McAuley* [1997] NZRMA 178 (HC)
[20] *Nanden v Wellington CC* [2000] NZRMA 562 (HC). This has subsequently been applied in in the Environment Court *Tuck v Westland DC* EnvC C130/01

36. The Policy 9.3.3 clearly goes further than Objective 9.2.3. The policy is to "enhance" amenity values, and plainly cannot implement an objective of the "avoid, remedy, or mitigate" formulation.

37. In *Duxton* the Court had to assess the weight to be placed on the Objective and Policies in relation to the sunlight and shading effects. The Objective provided for the 'maintenance and enhancement' of the amenity values, while the Policy "encouraged" sunlight access.[21] The Court held the following factors to be significant in their findings:

    (a) "*Any improvement to sunlight access is not considered absolute. Indeed a new building will inevitably create a new shadow and new building is expected in the Central Area. The policy appears to be more about promoting mitigation of potential effects by a range of techniques – such as those employed by the Applicant in this case, namely setbacks and raking.*" [22]

    (b) "*While encouragement may be given, new building work by its very nature does not improve sunlight access. And such is the case here. The policy should not be interpreted as to discourage new building. Here the tower type proposal at 41.5 metres has an adverse shading effect but over a shorter period than the other options measures. The taller but narrower form of the proposal creates a longer but faster moving shadow than a 27 metre form across the site*" [23]

38. Where a policy has provided wording that clearly and practically cannot be achieved, some relevant function should still be found. We suggest that a similar approach as to that taken in *Duxton* is appropriate, where Policy 9.3.3 cannot be interpreted to provide an absolute standard of 'enhance'. Within the explanation provided (although we accept that it does not form part of the policy itself) an extensive list of considerations is given, which by their very nature contradict with each other. It would be impossible to 'improve' all of these values at the same time.

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[21] *Duxton Hotel Wellington v The Wellington City Council* W 21/2005 at [73]-74]
[22] Ibid at [76]
[23] Ibid at [78]

39. Policy 9.3.3 should be read as closely as possible to the plain interpretation of the words. A practical and implementable interpretation would be to recognise that all values identified within explanation of policy 9.3.3 cannot be 'improved', instead the focus should be on promoting mitigation of effects so that amenity values are enhanced compared with the absence of appropriate mitigation. That would fit more comfortably with the drafting of objective 9.2.3. A good example of how this may be done is found within *Duxton.*

SECTION 86F

40. The 42A report relies on the proposal being a Non-Complying activity to dismiss the relevance of Section 86F:

> *"While I understand the central thrust of what the Applicant has raised within the application, given that the proposal is a non-complying activity, Council's discretion relating to matters such as colours and materials is not limited, so I consider there is an inherent weakness to this argument."*

41. The Report goes on to say:

> *"This means that Rule 13.7.2(i) is still operative, however, the heritage values listed under the matters of control under operative Townscape Rule 13.7.2(i) are likely to have less relevance (given that the heritage focus now shifts to properties contained within commercial heritage precincts identified under the proposed 2GP.*
>
> *As a consequence Section 86F of the RMA could apply to the proposal, but again, may be of limited assistance here given that the proposal is for a non-complying activity, and discretion is not limited or confined to."*

42. As we have outlined in detail, we do not agree that the whole proposal should be assessed as a Non-Complying activity. Matters concerning height are restricted under Section 104C.

43. Don Anderson explained that Section 86F applies because the Chapter 13 townscape precinct overlay within Operative Plan is not a method that

finds equivalent expression in the 2GP. There have been no submissions made seeking to re-introduce the townscape precincts and the accompanying chapter 13 provisions, so it is evident that regardless of how the 2GP rules end up being drafted, the heritage provisions will not apply to this site. Mr Bryce seems to agree with that.

44. Instead, the 2GP will operate under a different policy and heritage overlay method that identifies specific heritage buildings and precincts that will have protections placed over them. No such protections will be placed over this site, nor do any submissions seek to change that.

45. We can therefore be certain that the moment that the Council releases its decisions on submissions, the townscape precinct and the application of rule ~~12.7.2~~ 13.7.2 will expire and will not be replaced by equivalent provisions.

46. Are maps rules? Maps are not called rules, but they do define the locations at which rules apply and so they have the force of rules. Maps and the rules that apply to them make no sense without each other. That is why Mr Anderson offered the opinion that section 86F applies, because the townscape precinct that applied to this site is being replaced by heritage precinct that will NOT apply to this site. He says that section 86F requires you to confront that reality now.

Second Generation Plan

47. Mr Bryce's 42A report identified the following key policy from the 2GP::

> *Policy 2.4.1.4 Identify and protect key aspects of the visual relationship between the city and its natural environment or heritage buildings and landmarks through rules that:*
>
> *a. restrict the height of buildings along the harbourside to maintain views from the central city and Dunedin's inner hill suburbs across the upper harbour toward the Otago Peninsula; and*
>
> *b. manage the height of buildings in the CBD to maintain a primarily low-rise heritage cityscape.*

48. This is a process policy that explains how the 2GP zones are structured. This is apparent from the opening words of policy 2.4.1.4- "identify and protect key aspects… ". Chapter 2 has no methods to implement its policies, those methods are found in other chapters. It is apparent that not all visual relationships between the city and heritage buildings are to be protected, nor is the cityscape to be an exclusively low rise cityscape. So, what "key aspects" have been identified and protected?

> Objective 2.4.2: Heritage:
>
> *"Dunedin's heritage is central to its identity and is protected and celebrated as a core value of the city, through the retention of important heritage items, and the maintenance and active use of built heritage."*
>
> Policy 2.4.2.2:
>
> *Identify in a schedule (Appendix A.1.1) important heritage sites that have significant heritage values and use rules to manage development on these sites in way that maintains important heritage values. Identify these sites based on the following factors:*
>
> *(a) Importance as part of the relationship between two or more heritage buildings and adding value to the overall heritage value of the group; or*
>
> *(b) Importance in providing a foreground to, and views of, key heritage buildings or groups of buildings; or*
>
> *(c) Significant heritage values in their own right in terms of criteria outlined in Policy 2.4.2.1.*
>
> [Emphasis added]

49. Chapter 13 contains the policy framework in relation to heritage in the 2GP. The chapter 13 objectives and policies apply only to:

(a) Heritage precincts (the site is not in one)

(b) Heritage buildings and structures (the site does not have one).

(c) Heritage sites (the site is not one).

(d) Archeological sites (the site is not one).

50. The Chapter 13 rules also apply only to those matters. The Chapter 13 provisions do not apply to this site.

51. The site is zoned Central Business District, and there is no submission to change that.

52. The CBD zone provisions are found in Chapter 18. The objectives and policies set out the basis for building height control (16m) for the site. The relevant objective is 18.2.3:

> *Land use and development maintains or enhances the amenity of the streetscape, including the visual and environmental amenity for pedestrians along identified pedestrian street frontages.*

53. Two policies are relevant:

> *Policy 18.2.3.1*
>
> *Require development to maintain or enhance streetscape amenity in all commercial and mixed use zones, by ensuring:*
>
> .....
>
> *d. building height reflects the general heights of the block; and*
>
> *e. an architecturally interesting façade through building modulation and use of glazing.*
>
> *Policy 18.2.3.3*
>
> *Require buildings in a secondary pedestrian street frontage to provide a good level of pedestrian amenity by:*
>
> *a. providing a regular frontage of buildings along the street, with limited interruptions for vehicle accesses;*
>
> *b. providing a clear and direct visual connection between the street and the building interior;*

c. providing an architecturally interesting façade and human scale design, through building modulation and consistent alignment of windows; and

e. providing shelter for pedestrians at pedestrian entrances.

54. The development activity status table is 18.3.6:

2. Performance standards that apply to all buildings and structures activities

a. Fire fighting

b. Height in relation to boundary

c. Maximum height

d. Number, location and design of ancillary signs

3. Performance standards that apply to all new buildings and additions and alterations to buildings

e. Minimum glazing and building modulation

f. Minimum ground floor to ceiling height

g. Pedestrian entrances

h. Verandahs

55. None of those standards raise any issues about building height in relation to heritage buildings.

56. The relevant height standard is 16m/4 stories. (Rule 18.6.6.2). Noncompliance is a restricted discretionary activity (rule 18.9)

10.	Height	a. Effects on streetscape amenity	*Relevant objectives and policies:* i. Objective 2.4.3 ii. Objective 18.2.3 i. Development maintains or enhances streetscape amenity by ensuring **building** height reflects the general heights of the block (Policy 18.2.3.1.d).

57. Interestingly, objective 2.4.3 is specified as relevant to height non-compliance (Vibrant CBD and Centres), NOT objective 2.4.1 (form and structure of urban environment), or objective 2.4.2 Heritage.

58. Rule 18.9.6.6 applies assessment matters for breaches of standards in a secondary pedestrian frontage.

a. Effects on streetscape amenity	*Relevant objectives and policies:* i. Objective 18.2.3 ii. **Buildings** provide a good level of pedestrian amenity by: 1. providing a regular frontage of **buildings** along the street, with limited interruptions for **vehicle accesses**; 2. providing a clear and direct visual connection between the street and the **building** interior; 3. providing an architecturally interesting **façade** and human scale design, through **building modulation** and consistent alignment of windows; and 4. providing shelter for pedestrians at pedestrian entrances (Policy 18.2.3.3). *Potential circumstances that may support a consent application include:* i. The design and size of the verandah still allows for the shelter of pedestrians from the weather. iv. The activities proposed at ground floor have a **customer-facing** function. v. The length of the total **building** frontage that will not meet this standard is short and the context of the **building** means any effects on streetscape amenity will be no more than minor. vi. It is proposed to only lease the space for a limited period of time, and the consent will be time-limited.

Conditions that may be imposed include:

i. Time limit on consent.

59. The pattern is the same. Noncompliance with the height limit does not raise heritage amenity values.

60. Only where sites are subject to a heritage zoning overlay are the external appearance of new buildings is controlled by the following rules:

    i. Building Colour (Rule 13.3.1); and

    ii. Materials and Design (Rule 13.3.2)

61. These rules provide standards concerning construction and design, their central purpose is to ensure that new developments are designed with reference and consistency to their surroundings.

62. So going right back to policy 2.4.1.4, what "key aspects of the visual relationship between the city and its heritage buildings" have been protected? We can say with absolute certainty that it is NOT the relationship between development of this site and the Cathedral and Town Hall. Those two buildings have been included in a heritage precinct and individually scheduled, this site has not. Non-compliance with the 16m height limit on this site raises only streetscape considerations. The "low rise heritage cityscape" is not a relevant consideration under the 2GP.

The Operative Plan

63. The site is part of the North Princes Street/Moray Place/Exchange Townscape Precinct in the operative Plan (13.5.3). The Townscape precinct identifies values relating to both heritage and townscape. The heritage values that correspond to building colour, materials, and design that are directed at heritage considerations are inoperative under section 86F.

64. We can identify the heritage values and the particular rules that replace them (and do not apply to the application site) as follows:[24]

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[24] These are also consistent with the values identified within the 42A Report at [49]

(a) The Value: *The quality and concentration of heritage architecture in the Exchange area* is replaced by Rule 13.3.2.1.

(b) The Value: *Building incorporate design elements and skyline features such as cornice, parapet, pediments, finials or equivalent features which provide visual interest at the top of the buildings* is replaced by Rule 13.3.2.

(c) The Value: *Ornaments are included as an integral part of the buildings' design* is replaced by Rule 13.3.2

(d) The Value: *Buildings are clad with plaster, red brick, stone, concrete or materials giving similar visual effect. Brick and stone is generally unpainted* is replaced by Rule 13.3.2.1.b

(e) The Value: *Window layouts are symmetrical or rhythmical and are generally consistent with the proportioning of windows of heritage buildings of the precinct* is replaced by Rule 13.3.2.

(f) The Value: *Colour schemes are consistent with the buildings architectural detail and colours are subdued* is replaced by Rule 13.3.1 & 2.

Summary

65. There will be no heritage overlay for this site in the 2GP. This means that the development performance standards that relate to Chapter 13 heritage matters (Rules 18.6.2 and 18.6.11) are treated as operative (in the sense that we know that they will not apply to the site) and the corresponding provisions in the Operative Plan, inoperative.

66. That is not to say that design is entirely irrelevant to any consent application under the Operative Plan, but rather design is only relevant in so far as it relates to the remaining townscape values specified for townscape precinct, or the considerations arising under the resource consents required under the chapter 9 provisions of the Operative Plan.

Restricted Discretionary Considerations

67. Where the breach of Rule 9.5.2(ii) is assessed, the Council's discretion is limited to the condition or conditions with which the activity fails to

comply. Upon taking this assessment, the panel may consider the adverse effects of the building's height on the remaining values identified within the Townscape precinct. However, as discussed within 64 (a)-(f) the values concerning 'heritage values' are no longer operative and should not apply to this assessment.

PERMITTED BASELINE

68. Within his evidence, Mr McIndoe has suggested that the plan provided by Kurt Bowen representing the effects of shading from a permitted building design does 'not represent a credible design'.[25] The basis for this is that a building constructed on the site would 'step up' from the lowest point and consequently have a lower roofline.

69. This analyses fails to recognise that Rule 9.5.2(ii)(b) provides a minimum height requirement of 9m along the length of the boundary. Essentially, the height of a building at 9m as shown on the design prepared by Kurt Bowen, not only represents a building that is non-fanciful, but is also a design that reflects the minimum height requirements stated within the Plan.

Section 104D

70. Only applies to decisions for rule breaches:

    (a) Rule 9.5.2(i): No front or side yards

    (b) Rule 9.5.2(iii): Continuous veranda required.

71. Nobody has advanced evidence that there are adverse effects that are more than minor in relation to those discreet issues.

72. If the Commissioners should elect to "bundle", then our opening submissions about the gateway tests apply. This application cannot be contrary to the objectives and policies of the Plan and Proposed Plan as a whole because of the policy focus on the vibrancy of the CBD.

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[25] Summary Evidence of Graeme Mcindoe at [16] - [19]

Section 104/104C discretion

Weight

73. Under Section 104(1)(b)(vi) the consent authority must have regard to both the Operative and Proposed District Plans. If relevant at all, we submit that less weight should be apportioned to the Operative Plan in relation to heritage considerations. The 2GP signals a major change in direction to which there is no going back.

74. This is not simply a 'technical' exercise as referred to in the 42A Report. Heritage values have been at the forefront of our discussions with the panel throughout the hearing and significantly, we can already look to the 2GP for guidance on how heritage provisions will apply to this site in the future. The answer is quite simply, they don't.

75. Even if Section 86F is not applicable we suggest that when undertaking the Section 104(1) assessment, considerable weight is given to the 2GP in relation to heritage matters. The plan has a clear new direction that is now beyond the point that it can be turned around.

76. The key policy goal of the CA Zone in the operative Plan is a vibrant CBD. This is even more strongly expressed as a strategic direction and relevant assessment matter in the 2GP. Those policies set up an inevitable tension with objectives and policies that seek to avoid remedy or mitigate adverse effects on amenity values.

77. It is open for the Committee to conclude that a proposal that achieves the vibrancy policy goal can be justified despite adverse affects that are significant (more than minor test is not relevant). The weight to be attributed to the provisions of the Plans is entirely a matter for you to decide in the particular circumstances of this case.

What is not in dispute?

78. No submitter disputed that:

(a) Dunedin sorely needs a 5 star hotel.

(b) The Council has for decades been holding this site for such a purpose.

(c) The existing ground level carpark is a non-complying activity that fails to live up the Townscape Precinct values. That is the "existing environment."

(d) The site is ideally located for a 5 star hotel.

(e) The land use is permitted under both Plans.

(f) Tony Tosswill cannot purchase this site UNLESS he delivers a 5 star hotel.

(g) Excellent pedestrian connectivity with the Octagon will be available.

(h) There will likely be economic benefits to the CBD of some measure. People disagree on the extent.

79. In light of the experts' conference report we can now be confident that:

(a) The latest changes to the street edge provide an appropriate main entry connection to the street and activation along much of this edge (para 5 and 8).

(b) The architectural approach can allow new buildings to sit comfortably adjacent [or] close to heritage buildings (Para 7).

80. Despite by Carr's initial "fatal flaws", we now know that there are no traffic issues that cannot be appropriately managed.

What does that leave you to decide?

(a) Height.

(i) As a visual effect. Despite the experts agreeing that they knew what dominance means, your decision must be anchored on those visual values articulated in the Plan and Proposed Plan. Dominance does not find expression in either document. The closest we get is the 2GP assessment matter concerning the "general heights on the block".[26] Neither Plan contains any policy raising any expectation of the maintenance of private views of heritage buildings in the CBD, nor that the city skyline will forever remain entirely absent of new and tall buildings.

(ii) In relation to wind. There is nothing in the Plan or Proposed Plan articulating an acceptable standard for Dunedin. Should you adopt the standard from Wellington as a design criteria, then:

(1) You still have to be satisfied that it achieves a relevant policy outcome. No panning witness, not even Mr Taylor, advised that you should resort to Part 2 of the Act to cure some deficiency in the Plans.

(2) The condition must takes account of the existing wind environment and the effects of a compliant 11m building on the site.

(iii) In relation to sun reflection, there is no relevant policy framework to decide that reflected sunlight is an adverse effect on the environment. Access to sunlight is relevantly recorded as an amenity value to be enhanced.[27]

There is no relevant standard to apply or accepted methodology to determine whether reflected sunlight

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[26] Assessment matter 18.9(10).
[27] Operative Plan policy 9.3.3

should be regarded as acceptable. You may prohibit the use of mirror-finish surfaces; and you may require the applicant to show that the final glazing material specification adopts the best practicable option to reduce the incidence of sun reflection (effectively what condition 16 does).

(iv) Business case objections: Mssrs Lund and McKnight say the future is boutique heritage hotels. Good luck to them. No-one is stopping them. But then no-one is doing it either. On the basis of expert advice, Mr Tosswill's business model requires height to achieve adequate scale and average daily room rate to be viable. No expert says he is wrong.

(v) What can the applicant live with? Mr Falconer's recommendation is a maximum height of 45.6m above existing ground level. That metric isn't very helpful because the ground is sloping. We perceive he refers to level 13 of the orginal application plans, at 157.5m above datum (112.3 plus 45.6 equals 157.9m). The applicant cannot make that work.

The applicant CAN live with an absolute height limit of 168.38m entirely within the existing building envelope. This is achieved by:

a. Reallocation the tower heights to achieve equal heights again.

b. Internally reconfiguring the apartments to remove the need for lift access to the top level.

c. Abandoning the circle feature.

The applicant COULD live with 164.86m with some minor adjustment to the tower width (4m), which would be largely offset by making the tower walls straight. However

that would require a judgement to be formed that the slight addition width is a fair offset for one further level's reduction in height.

(b) Subjective debates about the quality of the architecture. This is akin to litigating the existence of God. There is no right answer capable of objective proof and everyone comes from a position of absolute faith in their own good taste and will never be convinced otherwise.

The only truly independent qualified expert with a track record in Dunedin architecture was retired architect Mr Norman Ledgerwood, whose opinion was that this is not in reality a high rise building (it would disappear in Wellington), and would be the best example of an early 21st century building in the City. You get the sense from Mr Ledgerwood's evidence that this is all much ado about nothing. I say go with Mr Ledgerwood.

18 November 2017

Counsel for NZ Horizon Hospitality Limited.