

2 August 2017

Campbell Thomson
Dunedin City Council
Campbell.Thomson@dcc.govt.nz

Level 10
Otago House
477 Moray Place
Dunedin 9016

Private Bag 1959
Dunedin 9054
New Zealand

al.nz

Dear Campbell

Hotel on Moray – relevance of 2GP rules

- 1 The Applicant's expert planner has suggested¹ that some 2GP rules have overtaken rules in the Operative District Plan (**Operative Plan**). The commissioners hearing the application from NZ Horizon Hospitality Group Ltd have requested an opinion on whether any 2GP rules have overtaken operative rules.
- 2 We note that the 2GP is currently at the hearing of submissions stage. Whilst the 2GP objectives and policies can be given some weight the rules have no legal effect². However, there is the potential for 2GP rules to be "deemed operative" if there has been no submission in opposition to that rule meaning that any "previous" rule is inoperative³.

Advice

- 3 Any decision on the application of section 86F should be made by the commissioners after hearing planning evidence. We consider that that section 86F does not apply here to render relevant operative rules "inoperative". The relevant rules are in the Central Activity Zone and Townscape Overlay. These rules remain operative in our assessment.

Relevant plan provisions

- 4 The application is for "Commercial Residential Activity" under the Operative Plan and "visitor accommodation unit" under the 2GP, with a number of ancillary activities. The building itself will be large and there are a number of relevant rules and their performance standards that apply.

Operative Plan

- 5 The hotel site is within the Central Activity Zone, and the Townscape Precinct THO3. According to the AEE this means that control is reserved over the external design and appearance of buildings⁴.
- 6 The AEE identifies a number of rules that would apply "save for s86F"⁵. These are:
 - (a) 9.5.2(i) – no front or side yards – non-complying;
 - (b) 9.5.2(ii) – minimum building height 9m and maximum height 11m – restricted discretionary;

¹ Orally and page 10 of the AEE

² We note that the rules that the Environment Court ordered to have immediate legal effect are not relevant to this site.

³ Section 86F

⁴ Para 1.5 referencing Rule 13.7.2(1)

⁵ Para 11.2

- (c) 9.5.2(iii) – verandah required along Filleul St frontage – non-complying;
 - (d) 9.5.2(vi) – signs - non-complying; and
 - (e) 17.7.3 – earthworks limited – restricted discretionary.
- 7 Other rules are identified that will be complied with e.g. minimum car parking.
 - 8 These rules that start with a "9" relate to the "Central Activity Zone". They are not specific to being in a Townscape Precinct. To take the verandah rule as an example the related policy is to *"require verandas on premises within identified pedestrian frontages in the Central and Local Activity Zones"*⁶.
 - 9 You have reported that the Applicant's planner has suggested that the Townscape rule at 13.7.2(i) may have been overtaken by the 2GP.
 - 10 The relevant 2GP provisions on the "Commercial and Mixed Use Zones" and CBD remain subject to challenge.
 - 11 The relevant Townscape rule, being a controlled activity, has control reserved over the *"External design and appearance of the building, including building material and external colour."*⁷

Application of section 86F

- 12 The Applicant's planner's suggestion appears to be that because the 2GP does not have any heritage precinct in this area, and there is no submission for heritage protection to apply, that the 2GP rules have overtaken the Townscape and Heritage Overlay in the Operative Plan.
- 13 Whether or not section 86F applies is a question of fact to determine whether the new replaces the old. Therefore an assessment is required of the 2GP to determine which rules replace the Townscape rule and then whether that, or those, rule(s) are subject to challenge.
- 14 In this case the Townscape provisions apply to more than heritage. The Operative Plan provides for both "Townscape Precincts" and "Heritage Precincts". The relevant precinct in this situation relates to "Townscape" and not "Heritage". Chapter 13 of the Operative Plan is to cover both heritage and townscape values. All buildings are to be in keeping with the character of their particular precinct⁸ and consideration of pedestrian use is relevant⁹. The explanation to the policy for pedestrians is:

Within those parts of the central City precincts where pedestrian numbers are high, the needs of pedestrians need to be recognised. This can be achieved by creating and maintaining an environment compatible with pedestrians, for example by requiring the provision of verandahs on adjoining buildings, by excluding vehicle crossing places along identified shopping frontages and through the design of buildings, their edges and margins.

- 15 The explanation to the relevant precinct (North Princes Street / Moray Place / Exchange Townscape Precinct) in relation to Moray Place is:

⁶ Policy 9.3.7

⁷ Rule 13.7.2(a)

⁸ Policy 13.3.9

⁹ Policy 13.3.11

Within Moray Place, large landscaped areas become dominant. The building styles are more modern, with the exception of the Town Hall, but in general they do not detract from the quality of the area, being constructed in brick and/or sympathetic to the more historic buildings.

16 The identified "Precinct Values" include¹⁰:

- Buildings are not set back from the street frontage, are substantial and monumental.
- Buildings on corners define the corner and face the intersection.
- Buildings occupy the full width of their site at the street frontage.
- Buildings incorporate design elements and skyline features such as a cornice, parapet, pediments, finials or equivalent features which provide visual interest at the top of the buildings.
- Ornaments are included as an integral part of the buildings' design.
- Buildings are clad with plaster, red brick, stone, concrete or materials giving similar visual effect.
- Brick and stone cladding is generally unpainted.
- Above-verandah facades have a solid appearance.
- Long facades are broken into vertical bays with windows arranged in groups.
- Facades are visually subdivided into a ground floor, fenestrated first floor and a capping element.
- Facade composition emphasises a vertical dimension.
- Windows are unpainted.
- Window layouts are symmetrical or rhythmical and are generally consistent with the proportioning of windows of heritage buildings of the precinct.
- Colour schemes are consistent with the buildings' architectural detail and colours are subdued.
- Signs are designed to integrate with the architecture of the building and the precinct, and are placed so as not to obscure architectural detailing.
- Signs at first floor level of facades are suspended perpendicular to them, so as to better address persons travelling down the street.
- The sides of buildings visible from the street have not been used as billboards and discreet signage has been applied where necessary.
- Verandahs are near continuous.
- A special feature has been made of entrance ways.
- Shop front glazing is not less than 30% of frontage at street level.

17 These values relate to the general townscape and are not restricted to heritage (although informed by heritage buildings). This means that the task of identifying replacement rules in the 2GP will not be limited to heritage.

18 Whilst the 2GP continues to map Heritage Precincts¹¹ it appears to us that some of the townscape provisions may have been incorporated in to other provisions that include identified "Pedestrian Frontage". The site in question is identified as a "Secondary Pedestrian Frontage" in the 2GP. Rules that apply in this identified area include a provision relating to building

¹⁰ At page 13:22

¹¹ Via Chapter 13

modulation¹². Building modulation relates to the external design of a building which is the effect the Townscape rule controls. Some of the secondary Pedestrian Frontage provisions of the 2GP are similar in purpose to the Operative Plan's Central Activity Zone. However it may be that these 2GP provisions are wider and also incorporate some aspects of the Townscape rule.

- 19 We do not agree that the absence of a rule can somehow overtake the Operative Plan. A rule in an operative plan is only treated as inoperative where there is a rule in a proposed plan to overtake it. In this case it seems that the Applicant's planner is arguing that there is no exact equivalent new rule and because of this absence the current operative rule should drop away.

2GP

- 20 Chapter 18 relates to the Commercial and Mixed Use Zones and the site is within the Central Business District Zone. Visitor accommodation is permitted if various performance criteria are met. If the criteria are not met then the activity is restricted discretionary. There are also performance standards for development activities that include the height of the building¹³. Urban design is a relevant assessment matter in secondary pedestrian frontage areas¹⁴.
- 21 There are many submissions on the Commercial and Mixed Use Zones provisions. These include a general request for a new strategic direction and a consequential amendment to rules to reflect the new strategic direction (Robert Tongue). There are submissions on height and other rules. Given the breadth of submissions and the inter-relationship of the rules with performance standards in our opinion none of the Commercial and Mixed Use Zones rules can be "deemed operative". This means that the Operative Plan applies for the application of Central Activity Zone rules.
- 22 The Applicant's planner has not identified provisions in the 2GP that have become operative to displace provisions in the Operative Plan. Instead the suggestion is that the heritage (rather than townscape) provisions of the Operative Plan are now inoperative. We do not accept this rationale. Rule 86F can only work when a new rule is beyond challenge and replaces an old rule.
- 23 Because there are 2GP controls over the building modulation, being a replacement for some of the Townscape provisions; and the 2GP control is not beyond challenge there is in our opinion no replacement rule.

Yours faithfully
Anderson Lloyd



Michael Garbett
Partner
d +64 3 467 7173
m +64 27 668 9752
e michael.garbett@al.nz



Rachel Brooking
Senior Associate
d +64 3 467 7183
m +64 27 334 4258
e rachel.brooking@al.nz

¹² Rule 18.3.6.3.a

¹³ 18.6.6.c and 18.6.6.2

¹⁴ 18.9.6