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

LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

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Where did this project come from?

1. This application did not start with a blank sheet of paper. 5 star hotel projects in this city have some history.

2. The applicant team reflected long and hard on the failed Betterways Advisory Limited application LUC-2012-212. That application was for a 29 floor 5 star hotel plus apartments on 41 Wharf Street. The building was 97m tall adjacent to the Steamer Basin, comprising 215 hotel rooms and 164 apartments. The site was within an Industrial Zone that had no building height limit rule.

3. Non-complying activity resource consents were required for the land use (commercial residential accommodation). We (counsel and Mr Anderson) argued that the lack of any height limit in the Industrial Zone meant that building height was not a relevant issue, but only the appropriateness of the use of land. Furthermore, the spatial separation of the building from sensitive urban land uses meant that a tall building might be more acceptable than in the City centre. Neither proposition was accepted.

4. Despite acceptance that a 5 star hotel was needed in the City and would deliver significant positive effects[1], the *Betterways* project failed for three reasons:

    (a) The building was thought to be too tall (97m) in relation to the immediate environment and in the wider context of the City as a whole (Para 394).

    (b) The architecture did not achieve a high level of design excellence sufficient to mitigate the adverse effects of the building's height (paragraph 241).

    (c) It failed to achieve an adequate connection with the CBD. It was an "island" constrained by the main truck railway and a 4 lane arterial road (para 460).

5. What did we learn from this decision?

[1] Betterways decision, para 375-386.

(a) Dunedin continues to have an unmet need for a 5 star hotel in the City. The purpose of such a hotel is to support the vibrancy of Dunedin's central city.

(b) A site is required that could deliver excellent connectivity to the centre of the CBD, to support its function as the social, cultural, and economic heart of the City.

(c) The building mass must be very carefully arranged to minimise its bulk whilst still performing its necessary functions. The result had to be presented in an elegant package that would contribute positively to the City skyline.

6. The only available vacant site in the CBD with the necessary qualities happens to be a ground-level carpark owned by the Dunedin City Council. The Dunedin City Council has a long-held ambition to develop that site for a hotel.

7. NZ Horizon Hospitality Group Limited has secured the exclusive right to negotiate the purchase of the application site. But it is an express condition of that right that only a 5 star (or better) hotel may be constructed on that site. If Tony Tosswill cannot deliver such a hotel, the deal is off.

8. The applicant team has been consulting with the Council staff over the form of this development since late 2016. There has been an iterative process of design refinement until the urban design concerns raised have been resolved.

9. The building design has been progressively refined to remove all unnecessary bulk. The minimum GFA required to enable this project to proceed is 20,000m2. The required 20,000m2 GFA has been arranged as efficiently as possible. It is the applicant's case that a tall building form is to be preferred over a shorter structure because:

(a) It enables the quality needs of a 5 star hotel to be met.

(b) It makes a more elegant contribution to the City skyline than a rectilinear block form built to the site boundaries.

(c) A narrow structure adversely affects the views of fewer people in the York Place/Cargill Street area that a shorter but wider building.

10. No “fat” has been left in the project to be offered up as a negotiating pawn with submitters.

The Application

11. Resource consent is required under the operative District Plan only. The relevant rules have been correctly identified by Mr Bryce in his section 42A report.

Unbundling and applying section 104D

12. The 42A report recommends that application should have one overall activity status, defaulting to the highest level of activity status: (“non-complying”). This is called bundling.

13. The basic principle is that the effects of the development as a whole should be considered as a single package.

14. In *Locke v Avon Motor Lodge* it was accepted that in general there is no hybrid planning status for a proposal and the more stringent activity classification applies to the whole of the proposal where there are multiple consents involved. However the Court of Appeal has held that in some circumstances where the consent sought is a restricted discretionary or controlled activity, and the Council has limited discretion, then the Council may be able to deal with those parts of the application separately.[2]

15. *Southpark Corporation Limited v Auckland City Council* held that the approach in *Locke*, while generally applicable, may not be appropriate in the following circumstances: [3]

(a) one of the consents sought is classified as a controlled activity or a restricted discretionary activity; and

[2] *Locke v Avon Motor Lodge* (1973) 5 NZTPA 17
[3] *Southpark Corporation Limited v Auckland City Council* [2001] NZRMA 350 at [15]

(b) the scope of the consent authority's discretionary judgment in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and

(c) 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.

16. *Bayley v Manukau City Council* is authority for the proposition that where one of the activities for which consent is sought is a restricted discretionary activity, the approach in *Locke* may, or may not, be appropriate.[4] The following factors were significant in the Court's determination:

(a) The activity was split between Controlled activity and Restricted Discretionary. Only two aspects required RD activity consents. (Access arrangements and non-compliance with yard restriction of a minimum of 5m in business zone.)

(b) The argument was ultimately unsuccessful because the rule in the plan was relatively broad. "There could have been adverse effects on neighbours as a result of the offending structures being in the yard space which would not have occurred if the development as a whole had to be designed in a way which complied with the plan."[5]

(c) The Court considered the breach of the setback to be fundamental to the design of the building, affecting the controlled activity elements of the proposal.

17. This unbundling approach was successfully applied in *Body Corporate 97010 v Auckland City Council*.[6] Two kinds of resource consent were required, a controlled activity consent for the dwelling units in the zone and a discretionary activity because car parking was to be stacked. The Council's decision was upheld on the basis that they could consider the activities separately:

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[4] *Bayley v Manukau CC* [1998] NZRMA 513
[5] *Ibid* at p13-15
[6] *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513

"The effects of the car parking in this case were distinct in the sense that, unlike the staircases and decks in Bayley, the arrangements proposed for it had no consequential or flow-on effects on the matters being considered under the controlled activity application… There was in this case no overlap and therefore no need for an holistic approach."[7]

18. In *Urban Auckland v Auckland Council* the Court examined the relationship between an application for extension of a wharf, being a controlled activity, and storm water consent, being a restricted discretionary activity. The Court considered the two were connected because the discharge of storm water would be affected by the size of the wharf extension.[8] The Court held that the consents should have been bundled.

Evaluation of the current proposal

19. The reason why the bundling issue is important in the present case is because the Plan specifies that non-compliance with the permitted height condition of 11m is a restricted discretionary activity. The Council has therefore made a deliberate decision that breaches of that rule will not be required to pass the section 104D threshold test.

20. Nearly all the adverse effects that submitters complain about, and which have lead to the 42A report's recommendation, arise from the breach of the permitted height condition.

21. The rule breaches that lead to non-complying activity status are:

    (a) Rule 9.5.2(i): no front or side yards.

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

22. Nobody is contending that the breaches of those rules results in adverse effects on the environment that are more than minor. It needs to be remembered that the site is currently a vacant site, so the yard and veranda non-compliances exist already. They are part of the existing environment. Yet the section 42A report contends that section 104D is not passed. That outcome makes no intuitive sense.

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[7] Ibid at [22]
[8] *Urban Auckland v Auckland Council* [2015] NZHC 1382 at [90]

23. On the authorities cited, bundling might make sense if there were some connection between the height breach and the yard/veranda breaches. But there is no such connection.

24. The Evidence of Don Anderson goes into detail on the reasons for Non-compliance. He discusses each standard and states why there is no link to the height of the building:

    (a) Yards: Non-compliant due to obligations to provide vehicle access. The 42A report only identifies yard issues in relation to "Design and Street Frontage," rather than "Bulk and Location". Essentially, the 42A report has created the distinction between yard setback and height requirements already.

    (b) Verandah: The architect has now amended the initial design to incorporate a glass verandah to the podium.

    (c) Identified Pedestrian Frontage: This does not apply to 193 Moray Place.

    (d) Signs: The proposal will comply with the permitted signage conditions.

    (e) Loading and Access: The proposal will comply with the permitted loading and access conditions.

25. There is no connection between the boundary setback from the side yards and the height of the building. The side yards exist only because the applicant's design puts the perimeter traffic circulation road external to the building, not within the building. If the applicant extended the building at ground level by putting a roof over the road then the non-compliance would disappear and the restricted discretionary status of the building height would not be at issue. But it was felt that would be a worse result for neighbours to the north.

26. A cynical developer might restructure this application to overcome the problem in another way. A logical response to the 42A report and submissions is to simply agree to build to the side boundaries at ground level and install verandas over the traffic access/egress points. Rule 9.5.2(i) (no side yards permitted) does not require the whole building to

be built to the boundary, only at the ground level. Compliance with rules 9.5.2(i) and (iii) would thus be achieved, and the argument for bundling everything as "noncomplying" would disappear. Once a resource consent was then achieved, an application to vary that consent could be made under section 127 (a discretionary activity) to restore the open circulation road by setting the building back from the side boundaries. On that application the building height would not be a relevant issue. The issues would be limited the urban design consequences for the street frontage.

27. The evidence for the Kingsgate hotel[9] suggests that a lower building would have been possible had the applicant built to its boundaries. There is an irony in this when one observes the Kingsgate's own building. But the answer to that is, no:

(a) The Kingsgate evidence misunderstands the functional needs of a 5 star hotel. A short, squat, rectilinear block was never a starter for a 5 star brand.

(b) Very little would be achieved in terms of gaining useable floor space by placing the perimeter access road within a building. Significant cost would be added

(c) An alternative design model, which would have no on-site traffic movements and the Hotel entrance directly off Moray Place was considered to be an inferior outcome and would likely require the acquisition of additional land for off-site parking.

(d) Thom Craig's determination to achieve a tall elegant form that contributes positively to the city's skyline rather than replicating the City's 1970s concrete office blocks would be undone.

[9] Mr McIndoe and Mr Taylor

Assessment Framework:

King Salmon and R J Davidson Family Trust

28. Since the *Betterways* decision the decision-making framework under section 104 has undergone major revision.

29. The Supreme Court has reminded decision makers of the importance of the hierarchy of statutory instruments prepared under the Act. We are now required to treat District Plans as embodying this community's expression of Part 2 of the Act.

30. The ability to resort directly to Part 2 of the Act is now limited. The Court has held that only where there has been invalidity, incomplete coverage, or uncertainty of meaning within the planning documents, then we should resort to Part 2 of the Act for clarification.[10]

31. There is no incompleteness or uncertainty in this case. Part 2 analysis is not required. So, when the Act speaks of social wellbeing (section 5) and amenity values (section 7), the meaning and relevance of those issues to Dunedin is to be found by a careful examination of the District Plan itself.

Assessing Landscape, Visual effects and Amenity

32. At common law and in planning law there is no right to the preservation of sun or a view. Legitimate expectations are derived from Plan provisions.

Case law application

33. *Anderson v East Coast Bays CC* provides that there is no absolute right to a view.[11] This was most recently cited in *Re Meridian Energy Ltd* which highlighted the importance of remembering two basic legal principles when dealing with landscape and visual amenity, these being:

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[10] *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38. This was recently affirmed in *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52. The High Court affirmed the Environment Court decision .We have provided the Environment Court decision in our case booklet as it provides a useful summary of the law.

[11] *Anderson v East Coast Bays CC* [1981] 8 NZTPA 35

"There is no right to a view. Even though we must have particular regard to the maintenance and enhancement of amenity values, this is not the same thing as saying there is a right to a view…… A landowner is permitted to use their land as they see fit, providing that the use of it does not breach any lawful requirement. It follows that the use of land by a neighbour in some circumstances can lawfully change an existing view."[12]

34. The Court went on to say at paragraph [113] of the *Meridian* decision that:

"An analysis of the District Plan provisions relating to landscape and visual amenity is also important because this is the framework against which local expectations about amenity must be measured".

35. Amenity is broadly defined within the RMA.[13] However, in our post-*King Salmon* and *Davidson* world, 'amenity' is refined by the features that have been identified as important within the District Plan.

36. *Duxton Hotel v Wellington City Council* was a challenge by the Duxton Hotel owners to a new hotel development in Wellington, where the height of the building would exceed the discretionary limit by 10.3m. The site was located directly across from Duxton hotel and would cause adverse effects in relation to existing views and shading. Understanding the relevant Plan amenity provisions in that case is important. A summary of the relevant plan provisions in the *Duxton* case are identified under topic headings below.

Views

(i) *Objective 12.2.2 Essential Area Amenity Values which provided "to maintain and enhance the amenity values of the central area and any nearby residential area".*

(ii) This was implemented by Policy 12.2.2.1 *"to ensure that activities are managed to avoid, remedy or mitigate adverse effects in the central area or on properties in the residential area".*

[12] *Re Meridian Energy* [2013] NZEnvc 59 at [112]
[13] "means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes."

(iii) Further clarification was provided by Policy 12.2.2.6 *"protect the panoramic view from the public viewing point at the top of the cable car."*

(iv) The relevant central city view protection Rule 13.1.2.6 confirms the protection rule specifically protects only the view shafts identified in Appendix 5. (The proposal only affected 1 of the 25 possible view shafts, and it was agreed that it was only to a minor extent.)

[Emphasis added]

37. The significance of these provisions was that they identified nearby residential areas as being distinct from identified public views (and by plan definition, residential activity excludes hotel activities). Without specific protection within the Plan there was no obligation to protect *Duxton's* view from being built out.[14]

Shading

38. The Duxton Hotel was concerned about shading over 2-4 months of the year between 7am-9am in the lobby/entrance way. The relevant planning considerations were identified as:

(a) Policy 12.2.2.5 aims to protect sunlight to identified central area parks and *encourage* improved sunlight access to buildings and public spaces when new development occurs. [15].

(b) Encourage was defined as "*urging, inciting, recommending, advising or stimulating or permitting*."[16]

(c) The Court identified that the policy somewhat conflicts with the other rules in the plan which required 100% site coverage, a permitted height, and that setbacks are not required.

39. The Court held at [76] that sunlight access is not considered absolute or determinative of their decision:

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[14] *Duxton Hotel v Wellington City Council* W021/05 at [37].
[15] Ibid at [46]
[16] New Shorter Oxford Dictionary, Clarendon Press 1993, 814.

"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. Here the tower type proposal at 41.5 metres has an adverse shading effect but over a shorter period than the other options measured. The taller but narrower form of the proposal creates a longer but faster moving shadow than a 27 metre form across the site"[17]

40. There are echoes of the *Duxton* case in this application.

The Operative District Plan

41. The cases identified above show how important it is to analyse the District Plan to identify what attributes are important. The evidence of Don Anderson, has identified the values reflected in the *North Princes Street / Moray Place / Exchange Townscape* precinct, *Octagon Townscape Precinct* and surrounding Residential Zones which describe the existing townscape values associated with the precinct in which this application site sits.

North Princes Street/Moray Place/Exchange Townscape Precinct

42. The most significant precinct values in relation to height and size are:

(a) Buildings are not set back from the street frontage, are substantial and monumental.

(b) Buildings from the Octagon to Manse Street are between 12 m and 32 m in height.

43. In relation to height and size, Chapter 13 discusses the following:

"This trend continues with the lining of the northern end of Princes Street with many of Dunedin's largest and most noteworthy commercial buildings, including several leading examples deriving from the Modern Movement in architecture. More recent additions to this area of the precinct have continued its tradition as the high rise centre of Dunedin. The concentration of many of Dunedin's tallest buildings here establishes an urban quality unique in the City."[18]

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[17] *Duxton Hotel v Wellington City Council* W021/05 at [76].
[18] Rule 13.5.3, Operative Plan

And,

"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."[19]

44. Submitters have raised the proposition that the Hotel would be more appropriately located within the Princes Street portion of the precinct. This is an artificial distinction. The "value" identified in [41](b) above, does no more than identify the current construction of the buildings in that area. To segregate this section of the townscape precinct and suggest that it is a more appropriate location undermines the zoning of *North Princes Street / Moray Place / Exchange Townscape Precinct .* If the Plan intended these areas to be treated differently it would be represented through distinct height limits and separating zoning within plan. This is not what the plan intends.

Octagon Precinct Values

45. Rule 13.5.2 provides a description of the purpose and precinct values which the Plan aims to protect. The most significant are as follows:

    (a) The view of First Church spire from Moray Place looking down Harrop Street (i.e. when standing with your back to the application site).

    (b) Looking down Stuart Street towards the Octagon.

    (c) Looking at the Town Hall area from Filleul Street/St Andrew Street intersection.

    (d) The view of St Paul's Cathedral from the lane connecting Stuart Street with the Carnegie Centre.

    (e) Penetration of the maximum amount of sunshine possible.

    (f) Facade height of buildings is consistent with the buildings they are adjacent to.

[19] Ibid

(g) Rule 13.9.11 identifies that *"important views and vistas will be protected."*

46. This does not anticipate a blanket protection over the views to or from the Octagon or other landmark buildings. None of the important Octagon vistas are affected by this application. As in *Duxton,* we can draw a distinction between the views of the general public, and the views specifically protected in the Plan.

47. We must also acknowledge that the Octagon precinct values identify the need to allow the maximum amount of sunshine "as possible". As previously stated this is not a rule within the plan, but a value that must be considered amongst the various other considerations. The adverse effects of shading on the users of the Octagon have been discussed in detail in the evidence of Kurt Bowen and Chris Wilkinson.

Comparisons with other Precincts

48. There are several other precincts that identify specific height and view values. Important views are set out quite comprehensively throughout the precincts. I have outlined similar values below:

(a) South Princess Street Townscape Precinct:

(i) Buildings are two to three storey and between 9 m and 11 m in height.

(b) Crawford Street Townscape Precinct:

(i) New buildings shall be of similar height to those presently in the precinct.

(ii) Views out of the precinct to Queen's Gardens and the backdrop of Mount Cargill offer a welcome respite from this densely built up commercial/light industrial area.

(c) George Street Commercial Heritage Precinct:

(i) Buildings are two to three storey and between 9 m and 11 m in height.

(ii) Views and vistas from George Street out to Mount Cargill and the rural backdrop

(d) Lower Princes Street Heritage Precinct:

(i) The height of buildings averages around 12 m to 14 m, but not less than 9 m.

(ii) Views and linkages provided by the precinct between the Octagon and the Railway Station.

(e) Vogel Street Heritage Precinct:

(i) Buildings are generally large scale, varying in height from one to three storey, however, any single storey building is 7 m to 8 m in height. This creates a canyon effect.

(ii) Views out of the precinct to Queens Gardens and Mount Cargill.

(f) Campus Heritage Precinct:

(i) The views of the buildings from both within and outside the Precinct.

(g) Anzac Square/Railway Station Heritage Precinct

(i) The view of the First Church spire.

(h) High Street Heritage Precinct

(i) The view down into the Exchange and out to the harbour is an important aspect of the character of the precinct. Also note, that this is within the description but is not reflected in the "values".

49. None of the specified views are adversely affected by this application.

Central Activity Zone

50. The Introduction statement emphasises the economic and social importance of the Inner City Area to the wellbeing of the City. There is specific recognition of the views of skylines and rural areas from within the Inner City, and the presence of amenity open space, particularly the Octagon. There is no mention of sun or views of the harbour or heritage buildings

51. The issues and objectives have their principal focus in protecting the vibrancy of City centre as a "people place"[20].

52. Policy 9.3.3 and 9.3.10 address amenity values. The former seeks the enhancement of amenity values, whereas the latter acknowledges that people living in the Activity Zones cannot expect the same level of amenity as in the residential zones.

[20] See Issue 9.1.1, objective 9.2.1, objective 9.2.5.

53. Policy 9.3.3 does require consideration of "admission of sunlight" as a means to make amenity values in the Central Activity Zone "enjoyable for people".

54. The policies are implemented by the Central Activity Zone rules, which do not permit side yards. Side yards are typically required to protect solar access.

55. Bringing all of these things together tells us this about the Central Activity zone:

    (a) The Plan is not concerned with private amenity or private access to sunlight. A requirement to build to common side boundaries means that no cross-boundary sun into buildings is anticipated. That is why the applicant is not sympathetic to the Kingsgate's position. Kingsgate enjoys its sun across a vacant carpark site, and because it exceeds the height rule.

    (b) Sun access into public amenity open space is an issue, and is to be maintained in the Octagon "where possible".

    (c) The over-arching goal of the Central Activity zone is the promotion of the City centre as a vibrant people place that is the social and economic heart of the City. In achieving that goal, it may not always "be possible" to maintain all existing direct sunshine hours.

Residential 4 Zones

56. The site is bounded to the north-west by the Residential 4 zone.

57. None of the properties on the south side of York Place in the vicinity of the site are used for residential purposes.

58. The witnesses are agreed that shading within this zone is not a significant issue, because the hotel is on the south side.

59. Generic residential amenity values for all of the residential zones are set out in policy 8.3.1.

60. The Residential 4 zone description explains that this zone:

(a) Is under commercial development pressure.

(b) Has a high site coverage (60%).

(c) Very little space between buildings.

(d) Has intense building development.

61. What is interesting is what the residential zone provisions do NOT say. There is no suggestion, anywhere, that views of the City, heritage buildings, or of the harbour are residential amenity values that require protection.

62. Although the complaints of Cargill Street residents about their views are understandable at a personal level, the Plan provisions do not provide any foundation for such complaints. In the post *King Salmon* world where direct resort to Part 2 of the Act is not available, it is the Plan's identification of amenity values that must prevail.

Summary of amenity issues

63. The Plan does recognise very specific valued views and places were sunlight should be maintained, where possible.

64. This proposal affects none of the specified views.

65. Private access to sunlight is irrelevant.

66. This proposal does adversely affect some public sunlight values, in particular, in the southern half of the Octagon between 2-4pm at winter solstice. Whether that adverse effect should be regarded as acceptable must be measured against other relevant policies.

Building Dominance

67. The Planner's evidence uses the terminology "dominance." This is an unhelpful term to use when discussing this proposal, because it does not feature in any relevant provisions of the District Plan.

68. The most recent case that discusses the term "dominance" is *Real Living (Properties) Ltd v Auckland Counci,l* where the Court discusses whether a proposal to construct a retirement village in residential Remuera was

considered to have adverse effects on amenity value.[21] The Court considered amenity issues relating to over shadowing, privacy and dominance[22].

69. The Court considered that dominance and scale are inter-related and driven by intensity of development. In that case, a large institutional-scale building around the edge of its site within an established residential area was central to what was meant by "dominance[23]".

70. What is apparent from the *Real Living* case is that the Court was using the word "dominance" as a form of short-hand for the combined adverse effects on the residential amenity expectations that were established by the Plan itself.

71. You should be very cautious about planning and urban design evidence that advance the idea that building "dominance" is a relevant adverse effect. An expert witness should explain what that term means in relation to the values that are derived from the District Plan itself. Dunedin's District Plan does not use the word "dominance" in the way that Mr Falconer and others have used the term. An expert witness' assessment should be couched in language that the Council has used in its Plan in order to be properly evaluated.

The 2GP

72. The 2GP has been notified and hearings have now commenced. Because there is no decision on submissions yet very limited weight can be given to the 2GP. Generally, the closer a proposed plan comes to its final content, the more regard is had to it. [24] This is consistent with the weight afforded to the 2GP within the Planner's Report.

73. The Planner also addressed the implications of section 86F. The purpose of this exercise was to identify that the provisions relating to heritage issuesin the Operative plan have not been carried through to the 2GP. There have been no submissions received against the

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[21] R*eal Living (Properties) Ltd v Auckland Council* [2016] NZEnvC 34
[22] Ibid at [26].
[23] Ibid at [41].
[24] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [9].

rezoning of the land (which does not have a heritage overlay). The values attached to the site in the 2GP are confined to streetscape issues.

74. However, we do agree with the advice at [337] and [341] that little weight should be attributed to the objective, policies under the 2GP.

Section 104D threshold test

75. The Planner's report assessed the proposal as a Non-Complying activity, as such, would be subject to S 104B and 104D of the RMA. As discussed in our bundling chapter the effects of the proposal in relation to height are to be assessed as a Restricted Discretionary Activity under Section 104C and should be excluded from the 104D assessment.

76. We have several concerns in relation to the section 42A report analysis. These issues have been separated into their respective plan headings.

Operative Plan

(a) The Planner has used the terminology "inconsistent" and "offends" interchangeably with the standard of "contrary." These words are not synonymous. We have outlined the legal position below.

2GP

(b) The Planner has used the correct terminology, however has misinterpreted Policy 2.4.1.4.b "*manage the height of buildings in the CBD to maintain a <u>primarily</u> low-rise heritage cityscape*." The use of the word "primarily" shows that the quality is not absolute, and is a question of proportion. The 42A report does not address what proportion is mean by "primarily" or whether it is tenable that development of a single site is of relevance to that policy. The opinion that this proposal is contrary to that policy is unsound because it does not address the right question.

(c) If our assessment above is correct, then the Planner is relying solely on Objective 18.2.3.1(d) "Building height reflects the general heights of the block; and an architecturally interesting

façade through building modulation and use of glazing." The proposal may be inconsistent with this policy; however it is not sufficient to fail the second gateway test of "contrary to the objectives and policies of the relevant plans."

s 104D(1)(b): Second Gateway

77. For a proposal to be contrary to a Plan's objectives and policies, an activity must be *more* than simply non-complying. It requires that the proposal is repugnant to the outcomes sought in the relevant policy framework. The High Court in *New Zealand Rail Ltd v Marlborough District Council* stated:[25]

> *"The Tribunal correctly I think, with respect, accepted that ("contrary to") should not be restrictively defined and that it contemplated being opposed to in nature, different to or opposite. The Oxford English Dictionary in its definition of "contrary" refers also to repugnant and antagonistic. The consideration of this question starts from the point that the proposal is already a non-complying activity but cannot, for that reason alone, be said to be contrary. "Contrary" therefore means something more than just non-complying*".

78. The Court of Appeal has held that non-complying activities are unlikely to find support in the objectives of the relevant policy framework and that they must be considered on their merits.[26]

79. In *Queenstown Central Ltd v Queenstown Lakes District Council,* [27] Fogarty J stated, when discussing the second gateway test, "[t]he activity must not be contrary to any of the objectives and policies". [28] He went on to state:[29]

> *"In my view, it was not the intention of Parliament that this gateway section should be used for finessing out qualifiers of one objective by looking at another objective, to reach some overall conclusion that viewed "as a whole" the objectives allowed retail activity of this size in the E1 and E2 zones."*

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25 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at. 80.
26 *Arrigato Investments Ltd v Auckland Regional Council* [2002] NZRMA 481 (CA).
27 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.
28 at [37].
29 at [39].

80. There are two approaches from the cases: the High Court's "*Queenstown Central*" approach, and the Court of Appeal's *Dye* approach. It is submitted that the *Dye* approach should be preferred. It enables the Court to take a holistic approach to the assessment of the application against all of the objectives and policies which is consistent with the drafting of the provision itself. As was observed by Judge Jackson:[30]

> *"Strictly Forgarty [sic] J's statement may have been obiter because "errors of law" found by Fogarty were (he said) sufficient to dispose of the appeals. In any event we respectfully prefer to follow the Court of Appeal in Dye where Tipping J wrote that the correct question was whether the application was consistent "on a fair appraisal of the objectives and policies as a whole". Otherwise we prefer not to lengthen this decision and simply refer to other decisions of the court: Cookson Road Character Preservation Society Inc v Rotorua District Council, Calveley & Anor v Kaipara District Council and Saddle Views Estate Ltd v Dunedin City Council."*
> *(footnotes omitted).*

81. You should appraise the objectives and policies as a whole when examining the application. [31] This is the orthodox approach under section 104D and has most recently been taken in *Clearwater Mussels Ltd v Marlborough District Council,* [32] and *R J Davidson Family Trust v Marlborough District Council.* [33]

82. The 42A report's approach to the threshold test is more consistent with *Queenstown Central* than it is with the Court of Appeal's decision in *Dye*. The 42A report has not attempted a "fair appraisal of the objectives and policies as a whole". It is submitted that the weight of relevant objectives and policies in both Plans is directed towards enhancing the social economic and social vibrancy of the City centre, which this application implements. For that reason, this application cannot fail the section 104D threshold test.

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30 *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [248].
31 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].
32 *Clearwater Mussels Ltd v Marlborough District Council* [2016] NZEnvC 21 at [242].
33 *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [248].

Conclusion

83. The District Plan's over-arching policy goal for the Central Activity zone is social and economic vibrancy. This project delivers on that goal in spades.

84. Height is the key compliance issue here. The evaluation of that issue should properly be completed under section 104C. It is a stand-alone issue.

85. At no time during pre-application consultation have concerns about the building's height been raised as an issue by the Council's urban design staff. Nor have Council staff members raised any concern about the potential for shading of other Council land (roads, the Octagon). As the owner of the application site, the Octagon, and the Regent Theatre, shading of the Octagon is an issue entirely within the control of the Council.

86. The only material adverse effect arising from the height of the building is shading a public place, and especially the Octagon. Shading of the Kingsgate is not an adverse effect that finds expression in the operative Plan provisions.

87. The building might have been made shorter if it was built to its boundaries in a perimeter-block form, but that would not meet the necessary commercial objectives for a 5 star hotel. Such a comparison is therefore fanciful.

88. The maximum extent of sunshine into the Octagon as is possible has been preserved, whilst still enabling a 5 start hotel to be established.

89. The economic evidence is that the benefits of the proposal to the vibrancy of the Central City will vastly outweigh the cost of the sunshine loss at mid-winter.

90. The achievement of sustainable management expressed in the operative Plan therefore favours granting consent.

P J Page

31 July 2017