

**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

**OUTLINE OF OPENING ORAL SUBMISSIONS ON BEHALF OF THE
APPLICANT**

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The Evidence

1. Anthony Tosswill
 - (a) The triangle:
 - (i) Product quality to support a room rate to support a 5 star brand.
 - (ii) A project that is commercially viable.
 - (iii) A project that is consentable.
2. Ken Harris.
 - (a) What are the needs and benefits of a 5 star hotel in Dunedin?
3. Thom Craig
 - (a) Delivering on the brief. Why is the proposal the optimum mix of competing considerations?
4. Kurt Bowen
 - (a) Services
 - (b) Subdivision
 - (c) Simulations and shading.
5. Chris Wilkinson
 - (a) Challenges that face the Dunedin CBD in achieving the Council's goal of "vibrancy".
 - (b) Benefits of the development compared with the loss of sun for 2 hours at winter solstice.
6. Antoni Facey
 - (a) Traffic and parking
7. David Compton-Moen

- (a) Urban design assessment
- 8. Don Anderson
 - (a) Planning evaluation.

Unbundling and applying section 104D

- 9. This unbundling approach was successfully applied in *Body Corporate 97010 v Auckland City Council*.¹ 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:

*"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."*²

Evaluation of the current proposal

- 10. 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.
- 11. 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.
- 12. 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.

¹ *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513

² *Ibid* at [22]

13. 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.

Assessment Framework:

Assessing Landscape, Visual effects and Amenity

14. 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

15. The Court in *Re Meridian Energy Ltd*³ said at paragraph [113] 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".

16. Amenity is broadly defined within the RMA.⁴ 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.
17. *Duxton Hotel v Wellington City Council* was a challenge by the Duxton Hotel owners to an apartment 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.

³ *Re Meridian Energy* [2013] NZEnvc 59

⁴ "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."

18. Despite being a non-complying activity, without specific protection within the Plan there was no obligation to protect *Duxton's* view from being built out.⁵

Shading

19. The Duxton Hotel was concerned about shading over 2-4 months of the year between 7am-9am in the lobby/entrance way. The Court held at [76] that sunlight access is not considered absolute or determinative of their decision:

*"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"*⁶

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

The Operative District Plan

Central Activity Zone

21. 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
22. The issues and objectives have their principal focus in protecting the vibrancy of City centre as a "people place"⁷.
23. Policy 9.3.3 and 9.3.10 address amenity values. The former seeks the enhancement of amenity values, whereas the latter acknowledges that

⁵ *Duxton Hotel v Wellington City Council* W021/05 at [37].

⁶ *Duxton Hotel v Wellington City Council* W021/05 at [76].

⁷ See Issue 9.1.1, objective 9.2.1, objective 9.2.5.
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people living in the Activity Zones cannot expect the same level of amenity as in the residential zones.

24. 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”.
25. 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.
26. 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.

Summary of amenity issues

27. The Plan does recognise very specific valued views and places where sunlight should be maintained, where possible.
28. This proposal affects none of the specified views.
29. Private access to sunlight is given no weight.
30. 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.

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

31. 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.
32. 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 primarily 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 meant 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."

33. 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:⁸

"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".

34. 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.⁹
35. 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:¹⁰

"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."
(underlining added, footnotes omitted).

36. 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*.

⁸ *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 80.

⁹ *Arrigato Investments Ltd v Auckland Regional Council* [2002] NZRMA 481 (CA).

¹⁰ *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [248].

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.

Conclusion

37. At no time during the pre-application consultation process 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 (Town Hall, Regent Theatre, footpaths, roads, the Octagon). As the owner of the application site, the Octagon, and the Regent Theatre, shading is an issue entirely within the control of the Council in its corporate capacity.
38. 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 Plan provisions.
39. 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.
40. The maximum extent of sunshine into the Octagon as is possible has been preserved, whilst still enabling a 5 start hotel to be established. 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.
41. The District Plan’s over-arching policy goal for the Central Activity zone is social and economic vibrancy. That focus is even more strongly expressed through the Proposed District Plan’s Strategic Directions chapter and Chapter 18 objectives and policies.¹¹

¹¹ See for examples, the following 2GP provisions:
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42. This application is exactly the kind of CBD anchor project that both Plans are calling for to drive the vibrancy objective. This project delivers in spades.
43. The achievement of sustainable management expressed in the operative Plan and Proposed Plans favour granting consent.



P J Page

31 July 2017

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1. Objective 2.3.2 Centres Hierarchy and policies 2.3.2.1 and 2.3.2.2
 2. Objective 2.4.3 Vibrant CBD and Centres and policy 2.4.3.4
 3. Chapter 18 Introduction paragraph 2.
 4. 18.1.1.1 Central Business District (CBD) Zone description.
 5. Objective 18.2.1 (a), and policy 18.2.1.1