

IN THE MATTER OF the Resource Management Act 1991 (“**RMA**”)

AND

IN THE MATTER OF an application by the Church of Jesus Christ of Latter-day Saints Trust Board to demolish the Block Plant building

OPENING LEGAL SUBMISSIONS ON BEHALF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS TRUST BOARD

1. INTRODUCTION

1.1. These submissions:

- (a) Introduce the application and the evidence;
- (b) Provide some relevant background;
- (c) Set out the statutory framework for consideration and determination of the application and summarise the assessment that has been carried out under this framework; and
- (d) Briefly discuss some issues arising from the evidence that has been filed.

A response to any issues that arise during the hearing will be provided in reply in the normal way.

2. THE APPLICATION

Background to the application

- 2.1. The Church of Jesus Christ of Latter-day Saints (**Church**) has owned large tracts of land in the Temple View area since 1949. The primary purpose for the acquisition was to establish the Hamilton New Zealand Temple, which opened in April 1958. The Church also opened the Church College of New Zealand (**Church College**), a co-educational, boarding and day student, high school at Temple View, in 1958. Over time, a residential community has established at Temple View, particularly on the western side of Tuhikaramea Road.
- 2.2. As educational opportunities in New Zealand improved with time, an announcement was made in 2006 that the school would close in 2009. The Church then undertook a comprehensive masterplanning exercise for its land at Temple View. This project included architectural, engineering, planning, landscape and historic heritage inputs. The masterplan is now being implemented via a series of resource consents, including three consents for Comprehensive Development Plans (or **CDPs**) that were obtained between September 2016 and July 2018. All three CDP areas are in various stages of development. Substantial earthworks have taken place on the balance of the site.

The Block Plant building

- 2.3. The application seeks consent for the removal of the Block Plant building. The Block Plant building was erected in 1956. It was constructed around a Columbian block making machine, which produced the white-washed blockwork that was already an established characteristic of the Church College campus.¹ The blocks were used for the development at Temple View, including the Temple, and also for Church projects elsewhere in New Zealand and the Pacific, including Samoa and Tonga.²
- 2.4. However, the block-making function of the Block Plant building was short-lived. After 10 years of production, in 1965, the block-making operation ceased on the site.³ The block-making machinery was disestablished and sold. In the 55 years since, the Block Plant building has been used for a range of temporary itinerant uses, such as a

¹ Aalders, [30].

² Aalders, [29] and [32].

³ Aalders, [33].

gymnasium / weights training room, a bus shed, rugby changing rooms, and a generator room.⁴

- 2.5.** Following the closure of the Church College campus in 2009, it has been sporadically used for the storage of grounds maintenance vehicles and equipment.⁵ Those maintenance functions have now been transferred to alternative facilities and the Church is building a new maintenance facilities building south of the Temple that will service all of the Temple and Temple View Project grounds.
- 2.6.** The Block Plant building is now redundant to the needs of the Church, is in a state of disuse, and, as stated by Mr Aalders, its ongoing retention serves no useful purpose.⁶ It is also now somewhat of an eye-sore and detracts from the vision encapsulated in the Temple View masterplan. Mr Wild also notes that the original fabric of the Block Plant building has been altered over many years, rendering the values inherent within that physical fabric less significant than any (modest) associative values from a historic heritage perspective that may remain.⁷
- 2.7.** For those reasons and to align with the masterplanned vision for the Block Plant site as part of the residential neighbourhood consented under CDP1 and CDP2, the Church is seeking consent for the removal of the Block Plant building. Following requests by Hamilton City Council (**HCC**), the Church has sought expert advice regarding potential alternative reuses of the Block Plant building. The Church has provided comprehensive responses to those requests, both under s 92 of the RMA and in the Church's evidence.
- 2.8.** In summary, significant and expensive works would be required for any redevelopment, including seismic strengthening and structural upgrades, upgrades to services and further substantial changes to the exterior fabric of the building, before it could be reused for any of a range of purposes.
- 2.9.** The investigation by the Church's expert advisors demonstrates conclusively that the Block Plant building cannot viably be reused for such alternative activities, because the return or value of the repurposed building could not justify the significant costs involved. In those circumstances, confirmed by Mr Aalders in his evidence, alternative

⁴ Aalders, [33].

⁵ Aalders, [34].

⁶ Aalders, [36].

⁷ Wild, [20] and [58].

uses will not be pursued and the building would be left vacant and would inevitably fall into disrepair.⁸

Submissions received

2.10. The Trust Board has continued to engage with the community and neighbouring residents as its masterplan for the Temple View site has taken shape. As the masterplan for the site has developed over time, the Trust Board has been upfront with the community about its plans for the Block Plant site.

2.11. The application to remove the Block Plant building was publicly notified at the request of the Trust Board. A total of only 14 submissions were made on the application, with 13 of them in support. The concerns raised in the sole submission in opposition have been carefully addressed in the evidence for the Trust Board.

Section 42A report

2.12. The application has been the subject of careful consideration by HCC's reporting officer, Ms Lana Gooderham. Ms Gooderham issued a detailed s 92 request dated 11 February 2020, which was comprehensively responded to by the Trust Board in a letter from its consultant planners, Bloxam Burnett & Olliver, dated 18 May 2020. Heritage aspects of the application have also been peer reviewed by HCC's consultant heritage expert, Ms Wendy Turvey, and the costs estimate provided for the most recent alternative reuse option reviewed by a quantity surveyor at Rider Levett Bucknall.

2.13. Despite the comprehensive nature of the s 92 response, a further enquiry as to alternative reuse options was raised in the initial s 42A report prepared by Ms Gooderham on advice from Ms Turvey. Until that enquiry had been closed out, Ms Gooderham was unable to recommend approval for the application. Following a further round of detailed architectural, engineering, historic heritage, quantity surveying, valuation and planning analysis, the Trust Board provided a further response on 9 October 2020.

2.14. Following consideration of that further response, Ms Gooderham has recommended that consent be approved subject to conditions. The Trust Board supports that recommendation and, with a few minor exceptions, agrees to the conditions put forward in Ms Gooderham's report.

⁸ Aalders, [36].

Evidence for the hearing

2.15. The experienced and competent team of witnesses for the Trust Board are:

- (a) **Adam Aalders** – Mr Aalders is employed by the Church as the Temple View Project Director. He will be giving his evidence via Zoom as he is based in Sydney. His evidence explains the background to the Temple View Project and introduces the application.
- (b) **Elder Barry Garlick** – Elder Garlick is the Director of the Matthew Cowley Pacific Church History Centre, operated by the Trust Board at Temple View. His evidence will explain the background to the Centre, including the Church Museum, and the role it plays in recording the history of Church operations at Temple View, including the block-making activity.
- (c) **Michael Graham** – Mr Graham is a Director with Mansergh Graham Landscape Architects. His evidence outlines the urban and visual effects that would be associated with leaving the Block Plant building in situ, in the context of a fully developed site in accordance with the Temple View masterplan.
- (d) **Adam Wild** – Mr Wild is a Director of Archifact – architecture & conservation limited. His evidence addresses the historic heritage values of the Block Plant building, reviews the potential reuse options put forward in the evidence of others and also assesses the cumulative impacts of this application. He also responds to the submissions that discuss heritage matters.
- (e) **Ashley Gillard-Allen** – Mr Gillard-Allen is an architect and Director of Walker Community Architects. His evidence reviews the alternative reuse options identified by the Trust Board and HCC for the Block Plant building and outlines the concept designs for the three alternative reuse options considered – a commercial office development; residential apartments; and a Place of Assembly use consisting of a combination of a gymnasium and a mens' shed.
- (f) **Aaron Beer** – Mr Beer is a Technical Director – Structural Engineering with Beca. Mr Beer provides an overview of the investigations carried out by Beca into the Block Plant building. He comments on its status from a structural engineering perspective. He also comments on the alterations that would be required, and the challenges posed, by the alternative reuse options considered by the Trust Board.
- (g) **Douglas Saunders** – Mr Saunders is a Director with Telfer Young, based in Hamilton. Mr Saunders has assessed the market value of each of the

alternative reuse options alongside the cost estimates provided by Mr Chris Peel of CJM Consultants Ltd. His conclusion is that all three options are economically unviable.

- (h) **Leonard Gardner** – Mr Gardner is the CEO and a Director of Foster Construction Group. Mr Gardner is an experienced property developer with particular experience in Hamilton City and the Waikato Region. Mr Gardner confirms that a prudent developer would not entertain any of the three alternative reuse options.
- (i) **Christopher Dawson** – Mr Dawson is a Planning Project Manager with Bloxam Burnett & Olliver and has been involved with the Temple View Project since 2012. His evidence summarises the reasons for consent and his assessment of the application against the statutory framework. He also responds to the submissions and to matters raised in the s 42A report and discusses the proposed conditions of consent.

2.16. No expert evidence has been lodged on behalf of any submitters to challenge the assessments of the Trust Board’s witnesses. This is relevant to the extent that the Commissioners are required to weigh the concerns expressed by the lone submitter in opposition against the expert evidence to the contrary for the Trust Board.

3. STATUTORY FRAMEWORK FOR ASSESSMENT

Activity status

3.1. The reasons for which the application requires resource consent under the Hamilton City Operative District Plan (**ODP**) are outlined in the application, the s 42A report and the evidence on behalf of Mr Dawson for the Trust Board. The application falls to be assessed as a Discretionary activity overall under s 104B of the RMA.

Section 104

3.2. The application is required to be assessed against s 104 of the RMA. Under s 104(1), the Commissioners must, subject to Part 2 of the RMA, have regard to:

- (a) any actual and potential effects on the environments of allowing the proposed activity;⁹

⁹ RMA, s 104(1)(a).

- (b) any relevant provisions of any applicable planning documents, including regional policy statements and plans;¹⁰ and
- (c) any other matter considered relevant and reasonably necessary to determine the application for resource consent.¹¹

3.3. Under s 104B, the Commissioners may grant or refuse the application and may impose conditions in accordance with ss 108 and 108AA of the RMA.

“Subject to Part 2”

3.4. In case there is any doubt, the Court of Appeal has confirmed in *R J Davidson Family Trust v Marlborough District Council* that an assessment of the proposal must be made against Part 2 of the RMA.¹² That is a direct consequence of the inclusion of the words “subject to Part 2” in s 104(1), but also due to the nature of the obligations in Part 2 as “strong directions, to be borne in mind at every stage of the planning process”.¹³ We will return to Part 2 later.

4. EFFECTS OF THE APPLICATION: s 104(1)(a)

4.1. The actual and potential effects of the proposed activity on the environment are assessed in detail in the evidence for the Trust Board. These submissions summarise that assessment.

Effects on historic heritage

Historic heritage value of the Block Plant building

4.2. Mr Wild has undertaken an assessment of the historic heritage values of the Block Plant building in his evidence.¹⁴ His assessment reaches a similar conclusion on the overall heritage value of the Block Plant building to that contained in the ODP itself.

4.3. However, where Mr Wild differs in his assessment is in the source of that heritage value. Mr Wild’s conclusion is that the heritage value of the Block Plant building is derived *less* from the physical fabric of the Block Plant building and *more* with the

¹⁰ RMA, s 104(1)(b).

¹¹ RMA, s 104(1)(c).

¹² *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

¹³ *Davidson*, above n 12 at [51], citing *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].

¹⁴ Wild, [19].

concrete blocks that were produced from the machinery itself and the buildings they helped create.

- 4.4. Mr Wild says that the surviving concrete block buildings, most notably the Temple and the Mendenhall Library, serve as an enduring reminder of the contribution of the Block Plant building to the development of the Church in Hamilton and around New Zealand and the Pacific. For that reason, he concludes that the values inherent in the physical fabric of the vacant Block Plant building are less than the associative values linked to the building.¹⁵ He later goes on to conclude that whatever values that were inherent in the Block Plant building at the time of its construction have also been altered by changes to its physical fabric that have already occurred over many years.¹⁶

Cumulative effects on historic heritage values

- 4.5. Included within the definition of “effect” in s 3 of the RMA is any “cumulative effect which arises over time or in combination with other effects”. At the request of HCC, Mr Wild also provided an assessment of the cumulative impact of the removal of the Block Plant building with the other changes that have occurred in the Temple View area under the masterplan. Mr Wild emphasises in his evidence that it is important to understand the context and the receiving environment in which those effects are assessed.¹⁷ In addition, he says the original vision of the Church when it constructed the Church College campus in the early 1950s and the Envisaging Project (which led to the current masterplan) since 2009 are relevant factors to be considered.¹⁸
- 4.6. Mr Wild says that cumulative effects are more likely to arise when the receiving environment is sensitive to change. He says that the receiving environment in which the Block Plant building sits has “substantially shifted” the associative values of the Block Plant building.¹⁹ When viewed as part of a consented residential development (with no point of reference back to its role as part of the former Church College campus), he finds that the particular environs of the Block Plant building are **not** sensitive to change. (our emphasis)
- 4.7. Mr Wild also says that consideration of cumulative effects should include the positive cumulative effects of the Trust Board’s conservation work.²⁰ This includes the

¹⁵ Wild, [20].

¹⁶ Wild, [58].

¹⁷ Wild, [29].

¹⁸ Wild, [30].

¹⁹ Wild, [34].

²⁰ Wild, [35].

conservation and adaptive reuse of the Category B-listed buildings – the First House, the Mendenhall Library, the GR Biesinger Hall, the Kai Hall, and the comprehensive strengthening and conservation of the Category A-listed Temple. He notes that these works have been recognised by the New Zealand Institute of Architects, and that both separately and collectively, the conservation and upgrade works undertaken by the Trust Board have generated positive cumulative effects that ought to be weighed alongside any perceived adverse cumulative effects. Mr Wild concludes that the removal of the Block Plant building will not give rise to significant adverse cumulative effects for all those reasons.²¹

Mitigation

- 4.8.** Consistent with Mr Wild’s assessment that the associative values of the Block Plant building are higher than any values inherent in its physical fabric, the Trust Board has proposed mitigation in the form of conditions. The purpose of these conditions is to recognise those associative values, and to preserve them in a manner consistent with the Church’s overarching philosophy regarding the recording of its history.
- 4.9.** The conditions proposed in Mr Dawson’s evidence include:
- (a) A commemorative plinth to be established in the vicinity of the location of the Block Plant building at a location accessible to members of the public.²²
 - (b) An information interpretation sign in the proposed Rose Garden, to include information on the Block Plant and (potentially) information on other aspects of the former Church College campus.²³
 - (c) A detailed building record of the Block Plant building to be prepared by the Trust Board in accordance with Heritage New Zealand guidelines and permanently filed in the Church Museum archive.²⁴
- 4.10.** The Trust Board has also accepted a condition (at the request of HCC) to preserve two posters from the former gymnasium and place them in the Church Museum archive.²⁵ This is despite, as Mr Dawson notes, the questionable historic heritage

²¹ Wild, [36].

²² Dawson, Attachment 2, Condition 2.

²³ Dawson, Attachment 2, Condition 3.

²⁴ Dawson, Attachment 2, Conditions 4 and 5.

²⁵ Dawson, Attachment 2, Condition 6.

value inherent in the posters, especially when it is only the exterior fabric of the Block Plant building which is protected under the ODP.²⁶

- 4.11.** Ms Turvey for HCC says in her evidence that “demolition is a permanent adverse effect for which there is no mitigation”.²⁷ Mr Wild disagrees. He concludes that the conditions are a series of generally accepted mitigation measures.²⁸ Ms Turvey also says that “if demolition occurs, heritage values are irretrievably lost”.²⁹ Again, Mr Wild disagrees. He says that the measures promoted above offer some mitigation of that outcome.³⁰
- 4.12.** Notably, Ms Gooderham takes a more moderate view of the mitigation proposed than Ms Turvey. In her view, the conditions she put forward “accurately reflect the importance of the Block Plant Building”, while “noting that these measures are not able to fully mitigate the permanent loss of a heritage building”.³¹
- 4.13.** In our submission, on these aspects the evidence of Mr Wild, Mr Dawson and Ms Gooderham ought to be preferred over that provided by Ms Turvey in that regard.

Conclusion on heritage effects of removal of the Block Plant building

- 4.14.** Mr Wild has concluded that, overall, the Block Plant building has moderate historic heritage value, which mirrors the assessment in the ODP.³² In particular, he assesses the physical, aesthetic or architectural qualities of the building as “low”.³³ The most significant heritage value of the Block Plant building can be found in other buildings within the Temple View site and around New Zealand and the Pacific that used the concrete blocks produced from the plant, and not in the building itself.³⁴ Those associative values linked to the Block Plant building have been preserved through the significant remediation of a number of other historic Church buildings on the Temple View site, resulting in positive cumulative effects; and the remaining associative values that might be lost through removal will be mitigated through the proposed conditions

²⁶ Dawson, [124].

²⁷ Turvey, [3.1].

²⁸ Wild, [70].

²⁹ Turvey, [3.1].

³⁰ Wild, [70].

³¹ Supplementary s 42 Report, [49].

³² Wild, Heritage Impact Assessment, p 15.

³³ Wild, Heritage Impact Assessment, p 15.

³⁴ Wild, [17] and [18].

of consent.³⁵ Ultimately, he concludes that the effects of the proposal will be less than minor, and the proposal will result in an appropriate development of the site.³⁶

4.15. Mr Dawson agrees with Mr Wild's assessment at paragraphs 28 to 31 of his evidence in relation to his assessment of environmental effects under s 104(1)(a).

4.16. Ms Gooderham confirms that demolition of one heritage building within the Temple View area is unlikely to give rise to significant cumulative effects.³⁷ She also accepts there will be positive effects from "enabling the Trust Board to develop the subject site for residential purposes, thereby increasing housing stock and housing choice within Hamilton City".³⁸ Ms Gooderham's view on the environmental effects of the proposal is closely tied to what she says is the primary consideration, namely the economic implications of adaptive re-use, which are discussed further below.

Alternatives to removal

4.17. The evidence of Mr Aalders confirms that the Block Plant building serves no useful purpose for the Church going forward.³⁹ The application as lodged included an assessment of remediation and alternative reuse, as required by Assessment Criteria E1(h) and E13.⁴⁰

4.18. As mentioned above, and in response to requests by HCC for further information and comments in the initial s 42A report, the Trust Board has invested significant resources in exploring three alternatives to removal, and whether the reuse of the Block Plant building for those purposes would be economically viable. This was after consideration of the most potentially appropriate alternative uses, taking into account the objectives, policies and rules of the Temple View Zone and the already repurposed heritage buildings located elsewhere on the Temple View Project site.

4.19. Those investigations followed a detailed iterative process:

- (a) First, design drawings were provided by Walker Community Architects for each of the proposed uses, drawing on their knowledge of market requirements and minimum building standards.

³⁵ Wild, [17].

³⁶ Wild, [17].

³⁷ Initial s 42A report, [85].

³⁸ Initial s 42A report, [91].

³⁹ Aalders, [36].

⁴⁰ AEE, Table 7.1, p 17.

- (b) Those drawings were then assessed by Beca, one of (if not the) leading experts in the field of seismic strengthening, to determine the works required to bring the building up to the minimum acceptable percentage of New Building Standard (**NBS**), as well as the upgrades to services and other material that would be required.
- (c) The combined work of Walkers and Beca was then assessed by Chris Peel, a quantity surveyor from CJM Consultants Ltd, to estimate the cost of each alternative reuse option.
- (d) Douglas Saunders of Telfer Young then took those costings and assessed the market value of each option, based on decades of experience in valuing similar developments in the Hamilton and Waikato markets, finding that all are economically unviable (by significant margins in the millions, with shortfalls of between 33% and 50% of the total project cost).
- (e) Finally, Mr Wild assessed the impact of the alterations for each of the alternative reuse options on the remaining heritage values of the Block Plant building, finding that each of the options put forward would further erode the heritage values inherent within the physical fabric of the building.

4.20. In addition, the Trust Board has commissioned evidence from Leonard Gardner of Foster Construction Ltd for the purposes of this hearing. Mr Gardner concludes that the potential commercial risk of delivering any of the options far outweighs the potential commercial benefits that would result.⁴¹ In his opinion, it would not be viable or feasible to undertake any of the alternative forms of development identified.

4.21. No expert submitter evidence has been lodged challenging the Trust Board's own expert evidence on alternatives. Ms Gooderham is satisfied that alternative reuse of the Block Plant building is economically unfeasible.⁴²

4.22. That position is also supported by the case law on the topic, which is discussed below.

Case law

4.23. First, and as a matter of principle, it is generally accepted that alternatives to a proposed activity on an application for resource consent only need to be considered

⁴¹ Gardner, [11].

⁴² Initial s 42A report, [69], [75], [120], and [133]; and the supplementary s 42A report, [39], [43], [57], and [78]. This is despite the advice from River Levett Bucknall that, in their opinion some of the costs in the estimate provided for the Places of Assembly gynasium / mens' shed option may be overstated (see Appendix B to the supplementary s 42A report), although they conclude that any overestimation is of "minor significance in relation to the overall budget estimate".

where there an application is likely to result in a significant adverse effect on the environment.⁴³ There is no such finding here on the facts.

4.24. Consideration of alternatives to removal arises in this case only due to Assessment Criteria E1(h) and E13 in the ODP, which requires assessment of:

- (a) the extent to which the proposal “considers the opportunities for remediation and the costs and technical feasibility of remediation”,⁴⁴ and
- (b) in the case of removal, “whether it has been clearly demonstrated that demolition of any heritage building in Schedule 8A of Appendix 8 is necessary, considering alternatives for the refurbishment or re-use of the building, financial cost and technical feasibility”.

The threshold – “necessary”

4.25. As the High Court has previously held, in the context of s 171(1)(c) of the RMA, that “the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other”.⁴⁵ Whata J recognised that the “inbuilt flexibility of this definition enables [the decision maker] to apply a threshold assessment that is proportionate to the circumstances of the particular case...mandated by the broad thrust of the RMA to achieve sustainable management and the inherently polycentric nature of the assessments undertaken by [that decision-maker]”.⁴⁶

4.26. It is in that context that alternatives must be assessed, by reference to both their financial cost and technical feasibility.

4.27. That is a lower bar than the policy framework that applied in the *Harcourts Building* litigation.⁴⁷ In that litigation, the relevant policy required Wellington City Council to “discourage demolition...of listed buildings...while giving consideration to total demolition **only** where [Council] is convinced that there is **no** reasonable alternative to total demolition or relocation” (emphasis added).

⁴³ RMA, Sch 4, cl 6(1)(a). See also *Dumbar v Gore District Council* Planning Tribunal Wellington W189/96, 6 December 1996 at p 3; *Land Air Water Association v Waikato Regional Council* EnvC Auckland A110/01, 23 October 2001 at [74]; and *Progressive Enterprises Ltd v North Shore City Council* [2009] NZRMA 386 (EnvC) at [16].

⁴⁴ Vol 2, App 1, 1.3 Assessment Criteria, E1(h).

⁴⁵ *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [94].

⁴⁶ *Ibid* at [95], albeit in the context of the words “reasonably necessary”, where the addition of the word “reasonably” was held to “reasonably qualify” the term “necessary” to “allow some tolerance”.

⁴⁷ *Lambton Quay Properties Nominee v Wellington City Council* [2013] NZEnvC 238, [2014] NZRMA 39; [2014] NZHC 878, [2014] NZRMA 257; and following referral back to the Environment Court, [2014] NZEnvC 229.

Extent of any consideration of alternatives

4.28. However, even in the context of that policy, the High Court held that the Environment Court erred in holding that alternatives “had to be exhaustively and convincingly excluded”.⁴⁸ The High Court reached the same conclusion in relation to s 6(f), finding that the requirement to recognise and provide for “the protection of historic heritage from inappropriate subdivision and development” allowed demolition only when it is “proper” to do so, and that this required an assessment of “whether or not demolition is a balanced response that ensures all competing considerations are weighed, and the outcome is a fair, appropriate and reasonable outcome”.⁴⁹ Collins J went on to say:⁵⁰

Section 6 of the [RMA] does not mean a consent authority is required to “exhaustively and convincingly exclude” alternatives to demolition before granting resource consent to demolish a heritage building. The statutory requirement for a consent authority to recognise and provide for the protection of historic heritage is a less onerous obligation...

Hamilton East Community Trust

4.29. The same criterion, namely whether or not removal of a heritage building is “necessary”, was assessed in the Hamilton context in *Hamilton East Community Trust*.⁵¹ This decision is instructive for a number of reasons:

- (a) It pertained to the removal of a B-listed heritage building, Euphrasie House, on the northern side of Clyde Street in Hamilton East.
- (b) The applicant was a Church organisation. The Court held that, in considering whether demolition was necessary, “it would not be appropriate to have the same expectations...as one might have of a corporate entity engaged in property development and ownership”.⁵²
- (c) As indicated above, the assessment criteria against which the application was assessed were broadly similar to those before the Commissioners now.⁵³

⁴⁸ *Lambton Quay Nominee* (HC judgment), above n 47 at [78].

⁴⁹ *Ibid* at [73].

⁵⁰ *Ibid* at [74].

⁵¹ *Hamilton East Community Trust v Hamilton City Council* [2014] NZEnvC 220, (2014) 18 ELRNZ 189.

⁵² *Ibid* at [103].

⁵³ The key issue, under both the Operative District Plan that existed at the time and the PDP, which was a Decisions version at the time and remained subject to appeal, was whether demolition was necessary – Rule 2.3.5(a)(iii) and Assessment Criterion E5. E5 was ultimately deleted from the ODP, but a similar provision (E13) was retained in relation to Temple View.

- (d) The Court held that there was “supportable argument that the Church should be enabled to manage its own affairs in a way that is meaningful to its own mission and intent and that conserves its heritage relationship to the place”.⁵⁴
- (e) Finally, the Court found that “while the heritage values of Euphrasie House are certainly not to be dismissed, we do not see them as so strong or rare as to outweigh the imposition of the cost of strengthening and refurbishing it upon an owner which sees no viable use for it, and which has other quite logical plans for the site”.⁵⁵ In that context, removal was accepted as necessary.

“Incapable of reasonable use”

4.30. Finally, there is a line of cases decided under s 85(3) of the RMA which apply to land which has been rendered incapable of reasonable use by a provision in a plan. The seminal case is *Steven v Christchurch City Council*.⁵⁶ The Environment Court in that case held that costs to restore a nearly uninhabitable building that had been scheduled under the relevant district plan were an unreasonable burden on the owner; and that the particular circumstances of the land meant that there were “no other choices” but demolition, imposing an “all or nothing (binary) quality to the landowner’s options” and rendering it incapable of reasonable use.⁵⁷

4.31. In a recent decision of the Environment Court, the Court summarised a reasonable use as being one that:⁵⁸

- (a) “is permitted by the District Plan or can be achieved by a resource consent, so long as it is not a non-complying activity or will create significant effects on the environment to persons other than the applicant”; and
- (b) “is viable, but does not need to be the optimal or best use of the land”; and
- (c) “is open to the landowner to pursue, whether or not the landowner considers pursuit of that activity their preferred or best option”.

⁵⁴ Ibid at [111].

⁵⁵ Ibid at [112].

⁵⁶ *Steven v Christchurch City Council* [1998] NZRMA 289 (EnvC).

⁵⁷ Ibid at [39].

⁵⁸ *Redmond Retail Ltd v Ashburton District Council* [2020] NZEnvC 78 at [117]. Ironically, Ms Steven QC, who was the applicant in *Steven*, was counsel for the applicant. The Court distinguished *Steven* on the basis that there was a range of possible uses, with retail and commercial uses having “perhaps more potential than the others”.

Summary of applicable case law

4.32. In summary:

- (a) The key threshold is whether removal is “necessary”, taking into consideration alternatives for the refurbishment or reuse of the Block Plant building.
- (b) What is “necessary” must be proportionate to the circumstances of the case.
- (c) There is no requirement, whether under the ODP or the RMA, to exhaustively exclude or “clear out” alternatives. The obligation is less onerous than that.
- (d) The focus is on the viability of those alternatives, especially in light of the fact that this is a Church organisation and not a corporate property developer.

Application to the facts

4.33. When viewed against the above, the expert evidence for the Trust Board has demonstrated that removal of the Block Plant building is necessary. All three of the potential alternative reuses investigated by the Trust Board’s expert witnesses have been thoroughly examined and determined to be economically unviable. It would not be “fair, appropriate and reasonable” to require the Block Plant building to remain derelict and disused, in the absence of an alternative use that the Trust Board would otherwise operate, when the subject land could be put to far better use as part of the comprehensive masterplanned development for the Temple View site.

Other effects of the proposal

Positive effects from removal of the Block Plant building

4.34. On this latter point of the masterplanned development for the site, the evidence of Mr Aalders⁵⁹ and Mr Dawson⁶⁰ is that the land will be used to enable the construction of at least six residential allotments. Mr Dawson notes that those allotments will have a significantly higher level of streetscape integration than would have been achievable if the Block Plant building were to remain in situ.⁶¹ This is a positive effect, a point which is acknowledged by Ms Gooderham in her initial s 42A report.⁶²

⁵⁹ Aalders, [37].

⁶⁰ Dawson, [21], [61], [63], [90], [95], ad [127]. See also the Graphic Appendix of Michael Graham at p 1 and the Zone of Disturbance from the Block Plant.

⁶¹ Dawson, [21].

⁶² Initial s 42A report, [91].

Adverse visual and amenity effects from requiring the Block Plant building to remain

4.35. The evidence of Michael Graham also establishes that there will be adverse visual and urban amenity effects from requiring the Block Plant building to remain.⁶³ He says that the scale of the Block Plant building will be inconsistent with surrounding dwellings; is not aligned with the proposed road network or lot orientations; is not integrated into surrounding contours; and is not complementary to the consented character of the residential development.⁶⁴ Instead, he says the Block Plant building will appear conspicuous within the context of the wider site;⁶⁵ will create a sense of overlook within adjacent properties due to its relative height;⁶⁶ and will be a “readily identifiable, anomalous and unresponsive feature of the landscape”.⁶⁷ He concludes that retention of the Block Plant building will result in an overall reduction of the urban amenity of the site, and, in particular, the amenity of the surrounding residential development.⁶⁸

4.36. Mr Dawson confirms in his evidence that retention of the Block Plant building would effectively sterilise a portion of the Temple View Zone.⁶⁹ In his opinion, the resulting development would be less efficient and effective in delivering residential housing at a reasonable density and with a high standard of urban design.⁷⁰ Mr Dawson agrees with Mr Graham’s conclusions above in relation to the overall reduction in the quality of the urban environment if the Block Plant building is required to remain.

5. RELEVANT PLANNING PROVISIONS AND OTHER MATTERS: ss 104(1)(b) and (c)

Section 104(1)(b) – relevant planning provisions

5.1. Mr Dawson’s evidence addresses the relevant planning provisions in s 104(1)(b). In addition to the assessment criteria referred to above, Mr Dawson finds that the application is consistent with:

- (a) the objectives and policies of the National Policy Statement on Urban Development (**NPS-UD**);

⁶³ Graham, [15].

⁶⁴ Ibid.

⁶⁵ Graham, [16].

⁶⁶ Graham, [17].

⁶⁷ Graham, [18].

⁶⁸ Graham, [30] and [32].

⁶⁹ Dawson, [90].

⁷⁰ Ibid.

- (b) the Waikato Regional Policy Statement (**WRPS**), including the Vision and Strategy for the Waikato River / Te Ture Whaimana; and
- (c) the objectives and policies of the ODP as a whole.

5.2. The approach taken by Mr Dawson, looking at those objectives and policies on a “fair appraisal...as a whole” is consistent with case law, recently affirmed by the Court of Appeal in *Davidson*.⁷¹ In particular, Mr Dawson relies on Objectives 1, 4 and 6 and Policies 1 and 6 of the NPS-UD, which he notes have not yet been given effect to in either the WRPS or the ODP.⁷² As such, those objectives and policies should carry particular weight, being as they are the most recent national direction for urban development. He also relies in particular on Policies 19.2.1b and 19.2.2b of the ODP, which strongly encourage recording and recognition of historic heritage values where sites are to be removed or demolished; and ensuring that heritage values associated with scheduled items are not lost as a result of development, even where the items themselves may be.⁷³

5.3. Mr Dawson and Mr Wild find support for these policies in the comprehensive set of conditions put forward by the Trust Board to mitigate any loss of heritage value and to preserve the history of the site for future generations through the Church’s commitment to record-keeping and the operation of its Church Museum.⁷⁴ This is also supported by the significant refurbishment work already undertaken by the Church on other heritage buildings at Temple View.⁷⁵

5.4. In addition, Mr Dawson draws a distinction between the policy approaches for Schedule A-listed buildings in Policy 19.2.3a, which require that demolition of A-ranked buildings be “avoided”, with the more permissive language in Policy 19.2.3b in relation to B-ranked buildings like the Block Plant building, which in his opinion “reflects the fact that in some situations, relocation or demolition may be the only option for a B-ranked heritage building”.⁷⁶ This sits in stark contrast to the rather alarmist position taken by Ms Turvey that “from a heritage perspective, [she] cannot support the

⁷¹ *Davidson*, above n 12 at [73], applying *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].

⁷² Dawson, [64].

⁷³ Dawson, [78] and [79].

⁷⁴ Dawson, [79] and [92].

⁷⁵ Dawson, [80] and [81].

⁷⁶ Dawson, [84].

demolition of a Category B building”, seemingly ever.⁷⁷ That position is plainly inconsistent with the relevant planning framework.

- 5.5. Ms Gooderham has undertaken a careful analysis of the relevant planning provisions, and agrees with the conclusions reached by Mr Dawson. In particular, and departing (as she is entitled to do) from the advice of Ms Turvey, she concludes that the “[ODP] does provide for a distinction between A ranked and B ranked buildings”;⁷⁸ that “it is not reasonable to request that the applicant canvass every use”;⁷⁹ that “the [ODP] anticipates some form of heritage loss in very specific circumstances”;⁸⁰ and that:⁸¹

[t]aking a balanced approach and weighing up the economic costs associated with the adaptive re-use of the Block Plant [building] and the economic feasibility of this re-use, I form the view that the demolition...is a balanced response that is based on credible economic information.

- 5.6. Overall, she concludes that demolition of the Block Plant building is an acceptable and necessary response. Mr Dawson concurs.

Section 104(1)(c) – any other matters

- 5.7. Mr Dawson’s opinion is that there are no “other matters” of relevance to an assessment of the application.⁸² Ms Gooderham has assessed the application against other Council strategies and plans, as well as the Waikato-Tainui Environmental Plan, and concludes that the proposal is not inconsistent with any of that material, nor does it raise any fundamental issue that would otherwise prevent the grant of consent.

6. PART 2

- 6.1. As required under the Court of Appeal’s judgment in *Davidson* referred to above, Mr Dawson has undertaken an assessment of the proposal against Part 2 in his evidence. He considers that the application will provide for more effective development of the residential area of Temple View by enabling the construction of further housing in a manner consistent with the wider masterplanned development.⁸³ As a consequence,

⁷⁷ Turvey supplementary evidence, [3.1].

⁷⁸ Supplementary s 42A report, [59].

⁷⁹ *Ibid*, [62].

⁸⁰ *Ibid*, [63].

⁸¹ *Ibid*, [69].

⁸² AEE, [11.1].

⁸³ Dawson, [94].

he finds that the application will better provide for the social, economic and cultural wellbeing of the Temple View community, while ensuring that none of the environmental bottom lines in ss 5(2)(a), (b) or (c) are breached.

6.2. Of particular relevance to the application to remove the Block Plant building is s 6(f) of the RMA, which (as discussed above) requires those who exercise powers under the RMA to recognise and provide for “the protection of historic heritage from inappropriate subdivision and development”. In considering this matter, it is important to keep in mind the guidance of the High Court in the *Harcourts Building* litigation that:

- (a) “Appropriate” in this context means that demolition can occur when it is “proper to do so”.⁸⁴ This is consistent with the later decision of the Court of Appeal in *Man O’War Station*, where it was held that the appropriateness of a particular activity will fall to be assessed against what is sought to be protected.⁸⁵
- (b) Whether demolition is appropriate must be founded on the basis of a “balanced response that ensures all competing considerations are weighed, and the outcome is a fair, appropriate and reasonable outcome”.⁸⁶ This approach is consistent with the sort of judgment that the Court of Appeal in *Davidson* has said remains relevant under Part 2 where there is no breach of a prescriptive policy or bottom line.⁸⁷

6.3. In our submission, the weight of the evidence put forward by the Trust Board establishes that it is both necessary and appropriate to remove the Block Plant building. Having weighed the competing considerations at play (as particularised under the relevant planning framework), demolition is a balanced response and constitutes an entirely fair, appropriate and reasonable outcome.

6.4. To the contrary, retention of the Block Plant Building in circumstances where any alternative reuse is economically unviable and so would not occur and the building would otherwise remain unused and deteriorating, would not result in the sustainable management of the underlying land and would, therefore, be contrary to Part 2. Removing the Block Plant building will instead allow the further development of a residential community, consistent with the overall masterplan for the area in a manner that will better achieve the purpose of sustainable management in s 5 of the RMA.

⁸⁴ *Lambton Quay Nominee* (HC judgment), above n 47 at [73].

⁸⁵ *Man O’War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121 at [101].

⁸⁶ *Lambton Quay Nominee* (HC judgment), above n 47 at [73].

⁸⁷ *Davidson*, above n 12 at [72].

7. PROPOSED CONDITIONS OF CONSENT

- 7.1.** The supplementary s 42A report attached a set of proposed conditions of consent. Those conditions are largely accepted, subject to some changes discussed in the evidence of Mr Dawson and annexed to his evidence as Attachment 2.

8. MATTERS RAISED IN SUBMISSIONS

- 8.1.** As indicated above, 13 of the 14 submissions lodged on the application are in support of the application for removal of the Block Plant building. Mr Dawson and Mr Wild place particular importance on the submission lodged by the Labour Missionaries, who the Commissioners will hear from later in the day. The Labour Missionaries were responsible for the construction (and operation) of the Block Plant building in the late 1950s, as well as other historic heritage buildings at the Temple View site, and so their views as to the remaining heritage values (or lack thereof) associated with the physical fabric of the building are particularly relevant.
- 8.2.** The submission in opposition by Ms McDonald raises only one ground of opposition: namely, adverse cumulative effects raised by the application. This has been comprehensively responded to in the expert evidence of Mr Wild, who finds that there have been positive cumulative effects from the retention of a number of significant historic heritage buildings at the Temple View site. Any further matters raised during Ms McDonald's presentation will be addressed in the usual way in reply.

9. CONCLUSION

- 9.1.** Based on the evidence produced, we submit that the application for removal of the Block Plant building should be approved. The evaluative process under s 104 should result in the exercise of the Commission's discretion to grant the proposal under s 104B, subject to the conditions as amended in the track change version attached to the evidence of Mr Dawson for the following reasons:
- (a) the actual and potential effects of the removal of the Block Plant building, after mitigation is taken into account, are less than minor;
 - (b) the Trust Board has already created positive cumulative effects through its retention and reuse of a number of historic heritage buildings on site, and the removal of this building, physically and contextually displaced as it is from the remainder of historic heritage on the site, will not result in any further adverse cumulative effects;

- (c) positive effects will result from the additional housing provided through the removal of the Block Plant building, in addition to the ability to more comprehensively and efficiently develop the subject land in accordance with the Trust Board's masterplan;
- (d) the application is consistent with the objectives and policies of the relevant planning provisions, including those relating to heritage; on a fair appraisal as a whole; and
- (e) the application will better achieve the purpose of sustainable management in s 5 of the RMA and will be consistent with s 6(f) of the RMA in relation to historic heritage.

9.2. The Trust Board is confident that, having heard all of the evidence, you will be in a position to grant consent to the removal of this application and on its behalf, we request that you do that.

DATED 3 December 2020



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Derek Nolan QC | Aidan Cameron

Counsel for the Church of Jesus Christ of Latter-day Saints Trust Board