

BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 166

IN THE MATTER of an appeal under Clause 14 of the
First Schedule to the Resource
Management Act 1991 (**the Act**)

BETWEEN THE CHURCH OF JESUS CHRIST
OF LATTER DAY SAINTS TRUST
BOARD
(ENV-2014-AKL-000157)

Appellant

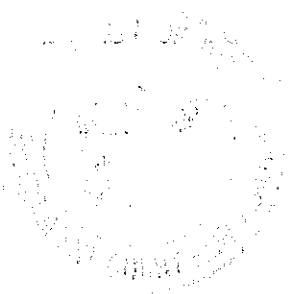
AND HAMILTON CITY COUNCIL
Respondent

Decision made on the papers

Court: Environment Judge M Harland

DECISION OF THE ENVIRONMENT COURT ON SCOPE

- A. The amendment sought to policy 19.2.3a and the inclusion of policy 19.2.3x are within the scope of the appellant's submissions and notice of appeal.**



REASONS FOR DECISION

Introduction

[1] This decision concerns whether or not an agreed amendment to Policy 19.2.3a and the inclusion of a new Policy 19.2.3x in the proposed Hamilton District Plan concerning the protection of heritage values of significant buildings (among other things) are within the scope of the appellant's appeal.

Background

[2] The operative Hamilton District Plan ("**the ODP**") had a five classification ranking system for heritage buildings.

[3] The proposed Hamilton District Plan ("**the PDP**") as notified provided for a two-tiered ranking approach to categorising heritage buildings.

[4] Heritage buildings are listed in Schedule 8A of the PDP and are ranked either A or B.

[5] The PDP provided for the demolition of all heritage buildings and structures listed in Schedule 8A as a non-complying activity.

[6] The appellant's submission on the PDP sought to reinstate the previous ranking system approach in the ODP and to amend the activity status for demolition of "lesser ranked buildings" to either a discretionary activity or restricted discretionary activity. The submission also raised the specific issue of the ranking of the David O McKay Building as a Category B building, and considered a non-complying activity status for the demolition of this building inappropriate.

[7] The Council, in its decision, retained the two-tiered ranking approach but amended the activity status for demolition of Category B buildings from non-complying to discretionary. As such, the David O McKay Building retained its Category B ranking, but the activity status for its demolition became discretionary.



[8] Rankings for historic buildings and structures listed in Schedule 8A have been established as follows:

Plan Ranking A: Historic places of highly significant heritage value include those assessed as being of outstanding or high value in relation to one or more criteria and are considered to be of outstanding or high heritage value locally, regionally or nationally.

Plan ranking B: Historic places of significant heritage value include those assessed as being of high or moderate value in relation to one or more of the heritage criteria and are considered to be of value locally or regionally.

[9] The appellant's appeal sought to reinstate the five classification rankings for heritage buildings in the ODP.

The jurisdictional issue

[10] The appellant has raised an issue concerning the policy framework relevant to any proposed demolition of a B ranked building or structure. In summary, there is a disconnection between the relevant policy (Policy 19.2.3a) and the activity status which applies to demolition of B ranked buildings and structures.

[11] Objective 19.2.3 states:

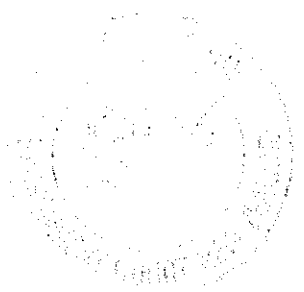
19.2.3 The heritage values of significant buildings, structures and their immediate surroundings are protected.

[12] Policy 19.2.3a then states as follows:

Demolition or relocation of buildings or structures in Schedule 8A shall be avoided.

[13] Schedule 8A includes both A ranked and B ranked buildings and structures. It does not distinguish between the two. Accordingly, the policy position is that demolition is to be avoided, regardless of ranking. The appellant's position is that whilst Policy 19.2.3a may be appropriate for demolition of A ranked buildings as a non-complying activity, it is not appropriate for demolition of B ranked buildings as a discretionary activity. The Council shares this view and is amendable to the relief which the appellant proposes, which is to:

- (a) Amend the existing policy to clarify that it applies to A ranked buildings; and



(b) Introduce a new policy which will apply to B ranked buildings.

[14] The proposed amendments are set out below:

(a) Amend existing Policy 19.2.3a as follows:

Policy 19.2.3a

Demolition or relocation of buildings or structures ranked A in Schedule 8A shall be avoided.

(b) Add a new Policy 19.2.3x as follows:

Policy 19.2.3x

Demolition or relocation of buildings or structures ranked B in Schedule 8A should be discouraged.

[15] The appellant considers the proposed amendments are within scope of the Notice of Appeal.

[16] The Council is not satisfied that the proposed amendment to Policy 19.2.3a and the inclusion of the proposed new policy, Policy 19.2.3x are within the scope of the appeal and it is therefore not prepared to sign a consent memorandum which endorses the proposed changes. Nevertheless, the Council is supportive of such amendments being made to the PDP on the basis that the proposed changes are necessary to ensure that the rule and policy framework are consistent with the purpose of the Act.

Relevant law

[17] The central question to be determined is whether the proposed amendments are within the scope of the PDP as publically notified or as sought to be amended by the appellant's submission and Notice of Appeal.

[18] The scope of an appeal is bounded by the submission at one end and the notified plan at the other. In *Environmental Defence Society Incorporated v Otorohanga District Council*¹ Judge Kirkpatrick said:

A careful reading of the text of the relevant clauses in Schedule 1 shows how the submission and appeal process in relation to a proposed plan is confined in scope.² Submissions must be on the proposed plan and cannot

¹ [2014] NZEnvC 070.

² *Federated Farmers of New Zealand Inc v Mackenzie District Council* [2013] NZENVC 257 [24]-[51].



raise matters unrelated to what is proposed. If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought. The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but further submissions cannot introduce additional matters. The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of council must be in respect of identified provisions or matters. The Environment Court's role then is to hold a hearing into the provision or matter referred to and make its own decision on that.

[19] In *Re Vivid Holdings Limited*³ the Court determined that in order to start to establish jurisdiction, a submission must, first, raise a relevant resource management issue, and then any decision requested of the Court on appeal must be fairly and reasonably within the general scope of:

- (a) An original submission; or
- (b) The proposed plan as notified; or
- (c) Somewhere in between.

[20] The test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan changes. This will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.⁴

[21] Whether an amendment is fairly and reasonably raised in submissions is to be approached in a realistic workable fashion rather than from the perspective of legal nicety.⁵

[22] The fundamental principle is that the Court cannot permit a planning instrument to be amended without those potentially affected by it being given a real opportunity to comment on it, should they choose to do so.⁶

The submissions

[23] The appellant made the following submission in relation to Policy 19.2.2b:

³ [1999] NZRMA 468.

⁴ *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145.

⁵ *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145.

⁶ *Royal Forest and Bird Protection Society v Southland District Council* [1997] NZRMA 408.

23. Amend Policy 19.2.2b to read as follows:

The loss of heritage values associated with scheduled items shall be avoided to the fullest extent practicable.

[24] The appellant made the following submissions on the PDP in relation to Rule 19.3:

24. Rule 19.3 Activity Status Table

Rule 19.3 – Activity Table introduces a one size fits all classification for all demolition works irrespective of whether a heritage item has low or outstanding heritage value. The PDP advocates a black and white approach to demolition that fails to recognise that, in some circumstances, demolition is not only the best practicable option, but a better use of physical land resource. It also fails to recognise that, whilst the physical effects of demolition are no different between an A or a B ranked item, the resultant historic and cultural effects can be very different. The complexities of that situation need to be reflected in the activity classification and the heritage categories contained in the ODP are supported over those in the PDP in Appendix 8.

[25] The appellant sought the following relief:

- (1) Amend relevant sub-sections of Rule 19.3 – Activity Status as appropriate, to reflect the broader ranking systems described in submission point 22 (below) and as set out in the Appendix 2.3-1 of the ODP.
- (2) Amend Rule 19.3(i) so that demolition of lesser ranked buildings and structures are either a discretionary activity or restricted discretionary activity.

[26] In relation to the Assessment of Historic Buildings and Structures the appellant said:

32. Section 8-1.1 has categorised all built heritage into one of two classifications, being an A ranking or a B ranking. This is in contrast to 5 classification rankings under the operative District Plan, being A+, A, B, C and D. Under the operative plan, buildings such as the David O McKay Building were deemed of recognised heritage value and therefore given a Category C building ranking. The demolition of a Category C building is a discretionary activity under the operative plan.

Under the proposed plan, the David O McKay Building has a B ranking, being an historic place of significant heritage value, and assessed as being of high or moderate value in relation to the heritage assessment criteria listed in section 8-1.2 of the plan. The demolition of a B ranked structure is a non-complying activity under the proposed District Plan.

In effect the David O McKay Building has been elevated from something of recognised heritage value



[27] As relief the appellant sought the following:

Amend Appendix 8-1.1 and Appendix 8 – 1.2 to enable a broader ranking system which more accurately reflects the breadth, diversity and significance of heritage buildings and structures.

Apply the new ranking system to the heritage buildings within the Church College site and other sites as appropriate. Specifically the Trust Board wishes the new ranking system to be applied to the following buildings:

H106 David O McKay Building

H107 G.R Beisinger Building

H108 Hamilton NZ Temple

H109 Wendell B Mendenhall Library

H133 First House/George Beisinger House

H134 Kai Hall

H135 Block Plant

The appeal

[28] In its Notice of Appeal the appellant sought:

Rule 19.3 Activity Status Table – Heritage Ranking System; Volume 2 - Appendix 8 – Section 8.1 – Classification System for Built Heritage.

14. Under the Operative Plan, buildings such as the David O McKay Building were deemed of "recognised heritage value" and therefore given a Category 'C' ranking. However under the Proposed District Plan, the David O McKay Building now has a 'B' ranking, being an "historic place of significant heritage value", and assessed as being of high or moderate value in relation to the heritage assessment criteria listed in section 8-1.2 of the Plan. In effect, the David O McKay Building has been elevated from something of "recognised heritage value" to something of "significant heritage value".

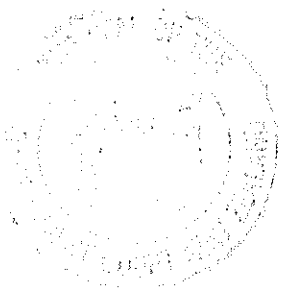
15. The Trust Board considers that the reduction of heritage categories from the five categories in the Operative District Plan to the two categories in the Proposed District Plan inflates the heritage value of the David O McKay building without any additional heritage assessment work being undertaken. The heritage categories contained in the Operative District Plan are preferred and the Trust Board considers that the David O McKay building should be ranked under the ODP heritage category as a C ranked building.

The Trust board seeks the following relief:

...

(d) Replace the two heritage categories contained in section 8-1.1 of Appendix 8: Heritage in the Decisions version of the PDP with the five heritage categories contained in Appendix 2.3-1 of the Operative District Plan along with the related heritage assessment criteria in that Appendix.

(e) Such further or other relief as is necessary in order to give effect to this appeal.



The appellant's submissions

[29] The appellant submitted that its submissions seek amendments to enable a broader ranking system which more accurately reflects the breadth, diversity and significance of heritage buildings and structures, as well as seeking to apply that ranking system to a number of specified buildings owned by the appellant. In essence, the submission is seeking to revert to the 5 classification rankings under the ODP so that the identified buildings can be considered for demolition on a discretionary basis.

[30] It submitted that it would also have been clear to the wider public that the appellant through its submission was challenging the classification system for heritage buildings overall and seeking a classification system and methodologies akin to those contained in the ODP. The submission is broad enough to put the public on notice that the policy basis for the new ranking system was under challenge by the appellant.

[31] The Notice of Appeal does not narrow the relief sought in the submission. It explicitly appeals the classification system for built heritage and states the appellant's preference for the approach to the heritage categories contained in the ODP.

[32] The relief pleaded at paragraph (d) refers to the 5 heritage categories contained in the ODP. Paragraph (e) of the relief, in seeking "such further or other relief as is necessary in order to give effect to the appeal" enables the possibility of additional or consequential changes needed in order to make sense of and give effect to the relief sought in the body of the appeal and submission.

[33] It submitted that a policy explanation and justification for the heritage classification and discretionary demolition rule falls into that category of relief able to be considered by the Court. The introduction of sensible policy provision explaining the rules is important in order to give the rules coherence and to assist the Council and applicants in understanding and implementing the district plan provisions. Given the discretionary status of Category B buildings, that explanation is in fact essential.



The Council's submissions

[34] The validity of the appellant's submission and/or Notice of Appeal is not disputed by the Council. However, the Council does not consider that the proposed relief was contemplated in either the appellant's submission and/or Notice of Appeal.

[35] In paragraph 24 of the appellant's submissions the appellant sought an amendment to Rule 19.3 so that demolition of lesser ranked buildings and structures is either a discretionary or restricted discretionary activity. As the Council's decision accepted this submission by amending the activity status for B ranked buildings from non-complying to discretionary, it is understood that the appellant did not wish to pursue this issue further in its Notice of Appeal.

[36] Neither the submission nor Notice of Appeal raised the matter of the policy framework which applies to "Buildings and Structures" (including Policy 19.2.3a), which is relevant to the activity status for the demolition or relocation of buildings in Schedule 8A. While the submission raised the matter of the general policy framework applying to "All Historic Heritage" by seeking amendments to Policy 19.2.2b, this relief was not carried through to its Notice of Appeal.

[37] It submitted that it is inappropriate to conflate relief sought in respect of the ranking system in schedule 8A with the policy framework which applies to the rules determining activity status for the demolition or relocation of heritage buildings.

[38] Any person reviewing the summary of submissions would have been put on notice that the submitter sought a return to the five-tier ranking system of heritage buildings and structures, a change to the activity status for demolition of buildings from non-complying to discretionary or restricted discretionary, and an amendment to Policy 19.2.2b only. The matter of the policy framework applying to demolition of heritage buildings was not raised.

[39] Furthermore the "general prayer for relief" which is stated at paragraph in (e) of the notice of appeal does not assist the appellant in providing scope for the proposed changes. Unless there is some relief sought in the appeal which raises the matter of the policy framework for the demolition or relocation of heritage

buildings, such a general statement cannot be interpreted to provide jurisdiction to make changes to those policies.

Discussion

[40] Neither the appellant's submissions nor the Notice of Appeal raised Policy 19.2.3a in the relief sought; however, the test is not about determining whether the policy is named in the submission or appeal documents, but whether the amendments sought are reasonably and fairly raised in the course of the submissions.⁷

[41] Although the submission did not specifically raise the amendment of Policy 19.2.3a, which states that demolition or relocation of buildings in Schedule 8A should be avoided, the grounds for the submission did raise the issue of demolition. The appellant essentially sought that 19.3 Rules - Activity Status Table be amended by making the demolition of heritage buildings ranked B, a restricted discretionary activity and not a non-complying activity.

[42] This submission point was accepted in part by the Council and demolition was made a discretionary activity in relation to B ranked buildings.

[43] When looking at the Notice of Appeal, the specific relief sought is narrower than the appellant's submissions in that the status of demolition as an activity is not referenced as part of the relief. The appellant did however set out the grounds for the appeal, and this included that the heritage categories contained in the ODP are preferred to those in the PDP.

[44] Both the ODP and the PDP set out the status of demolition activities in connection to the ranking systems. The PDP makes demolition of A ranked buildings a non-complying activity and B ranked buildings a discretionary activity.

[45] The amendment sought to Policy 19.2.3a and the inclusion of Policy 19.2.3x, which differentiate between the A and B rankings with the words "avoid" and "discouraged", recognises that there is a difference between the two categories which occurred as a result of the appellant's submissions.



[46] The Court is satisfied that the amendments sought are sufficiently inferential to the extent that other submitters would have been aware that the issue of ranking and the activity status of demolition relating to those rankings were in contention.

[47] It is fair and reasonable that as part of the relief sought in relation to the ranking system that the accompanying policies would be amended. The ranking system, the relative activity status of demolition and the policies in support are all interconnected. They do not operate in a vacuum. It is unlikely that an amendment would be made to one without parallel changes being made to the other.

[48] Nor is there any indication that the amendments sought would prejudice any party. The appellant sought that the ranking system reverts to that contained in the ODP. The parties have agreed that this is not to happen. The amendments made in the alternative to resolve this relief simply reflect the current position in the plan, which is that demolition in relation to A ranked buildings has a different activity status to those that are ranked B. It makes sense for the related policies to reflect this.

[49] Accordingly, the Court is satisfied that the amendments sought are within scope of the appellant's submissions and Notice of Appeal.

Decision

[50] The amendment sought to Policy 19.2.3a, and the inclusion of Policy 19.2.3x, are within the scope of the appellant's submissions and Notice of Appeal.

SIGNED at AUCKLAND this 22nd day of September 2015



M Harland
Environment Judge

