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Emily Campbell
Pou Whakamahere Kaupapa Here
Hutt City Council
By email

Dear Emily

LEGAL REQUIREMENTS FOR LISTING A HERITAGE BUILDING OR STRUCTURE IN THE DISTRICT PLAN

1 You have sought advice on the legal requirements under the Resource Management Act 1991 (**RMA**) to recognise and protect buildings and structures of historic heritage in the Hutt City District Plan (**District Plan**). In particular, you have asked us to address the approach of Council seeking the owner's agreement to any District Plan listing of historic heritage (ie, the validity of listing based on whether the owner 'voluntarily' agrees). The context of this advice is to assist the current District Plan review process, which includes a heritage review being conducted by experts/specialists. This review is likely to result in recommended changes to the listed heritage in the District Plan.

2 The District Plan lists heritage buildings and structures (including areas containing buildings and structures) in the Chapter 14F Appendices. Listed buildings and structures are subject to rules, including a requirement for resource consent for demolition or relocation and some alterations.[1] Minor alterations, repairs, and redecoration, or internal works, are generally permitted.[2] We understand there are currently around 100 buildings/structures listed as historic heritage, as well as three historic heritage areas. Chapter 14E of the District Plan lists significant cultural resources and significant

[1] 14F 2.2 and 2.3 of the District Plan.

[2] 14F 2.1 of the District Plan.

archaeological sites, which are also 'historic heritage' in RMA terms.[3] Resource consent is required where any activity or site development is to occur on listed significant cultural or archaeological resources.[4]

3 We provided previous advice to Council on a similar topic on 3 November 2011. We have drawn on that advice as appropriate.

Summary

4 In summary, our views are:

4.1 In deciding whether to add\remove buildings from the list of historic heritage in the District Plan, Council must consider the statutory requirements for a plan change in the RMA, summarised in Appendix A to this advice. These relevantly include:

4.1.1 the requirement to recognise and provide for the protection of historic heritage from inappropriate subdivision, use, and development as a matter of national importance;[5]

4.1.2 whether the building or structure is listed on the New Zealand Heritage List/Rārangi Kōrero (**NZHL**);[6]

4.1.3 the requirement to give effect to any regional policy statement, in this case the Greater Wellington Regional Policy Statement (**RPS**).[7] Policy 21 sets out the criteria which must be applied to determine whether an item shall be identified in a district plan as a place, site or area with significant historic heritage values that contribute to an understanding and appreciation of history and culture.

4.2 The key consideration for Council should be whether the building or structure meets the threshold for inclusion in the historic heritage list, after applying the relevant criteria set out in Policy 21 of the RPS. That assessment should be based on expert advice.

4.3 We could not locate any case law stating that the listing of any specific heritage building or structure in the District Plan is *mandatory* for Council (ie, listing *must* be undertaken by Council). A common practice of councils is to list in the District Plan those buildings which are already listed on the NZHL given the

[3] Section 2 of the RMA definition of 'historic heritage' includes archaeological sites and sites of significance to Māori.

[4] 14E 2.2 of the District Plan.

[5] Sections 6(f) and 74(1)(b) of the RMA.

[6] Section 74(2)(b)(iia) of the RMA.

[7] Section 75(3)(c) of the RMA.

detailed heritage assessment usually involved in that NZHL listing. This is not a legal requirement, but rather is a matter of practice. However, often District Plan listings do not exactly match the NZHL listings.

4.4 Council adopting an approach of only listing a building or structure as historic heritage in the District Plan where the owner 'voluntarily' agrees to it, despite an assessment that it meets the criteria for inclusion in the list as historic heritage, would not comply with the requirements of the RMA. While many owners may not support or agree to additional heritage controls being placed on their land/buildings, Council is obliged to take into account matters of national importance and give effect to the RPS when undertaking a plan change.

4.5 The interests and preferences of an owner (as well as other considerations such as economic viability, public safety, and alternative uses of a building or structure) can be considered at the resource consent stage, should one be subsequently applied for after a building or structure is listed. An owner can also request the Environment Court to remove a heritage listing by demonstrating that the listing makes the building/structure incapable of reasonable use and places an unfair and unreasonable burden on them.[8]

5 We set out our detailed analysis below.

WHAT ARE THE LEGAL REQUIREMENTS?

6 There is substantial case law relating to heritage buildings and the appropriateness of protecting heritage through a District Plan. The primary means for giving effect to the recognition of historic heritage is to include items of historic heritage in the District Plan. The secondary step after identifying listed heritage items are the rules relating to what constraints are in place to protect that heritage. We understand your present question concerns a plan change to add or remove buildings from the heritage list.

7 We set out in Appendix A the mandatory considerations for a plan change[9] summarised by the Environment Court in *Colonial Vineyard v Marlborough District Council*[10], *Cabra Rural Developments Ltd v Auckland Council*[11], and more recently *Edens v Thames Coromandel District Council*[12]. Council must apply these considerations when deciding whether to list a building or structure as historic heritage in the District Plan.

8 Most relevantly when dealing with historic heritage, when deciding to change the District Plan to add or remove buildings, Council must:

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[8] Section 85 of the RMA.

[9] Noting that from 19 April 2017, district plans must also give effect to relevant national planning standards.

[10] *Colonial Vineyard v Marlborough District Council* [2014] NZEnvC 55 at [17], updating the summary from *Long Bay-Okura Great Park Society v North Shore City Council*, EnvC Auckland, 16/7/2008 A78/08 at [34].

[11] *Cabra Rural Developments Ltd v Auckland Council* [2018] NZEnvC 90 at [279].

[12] *Edens v Thames Coromandel District Council* [2020] NZEnvC 013, at [11].

8.1 act in accordance with Part 2 of the RMA, which requires[13] Council to recognise and provide for the protection of historic heritage from inappropriate subdivision, use, and development as a matter of national importance;[14]

8.2 have regard to any relevant entry on the NZHL;[15]

8.3 give effect to[16] the RPS.[17]

9 While a number of the provisions of the RPS are relevant to historic heritage,[18] Policy 21 is key to the question of whether a place should be listed in the District Plan as historic heritage. Policy 21 sets out the criteria which should be applied by Council to determine whether an item shall be identified as a place, site or area with significant historic heritage values that contribute to an understanding and appreciation of history and culture. Policy 21 seeks to ensure significant historic heritage resources are identified in a consistent way.[19] These criteria must be applied and assessed by Council in giving effect to the RPS.[20]

10 When determining whether to list a building as historic heritage in the District Plan, Council should consider all relevant statutory considerations and base any decision on the listing on an objective assessment of the heritage value of the place assessed against the relevant criteria from the RPS, taking into account any expert advice. Whether Council is satisfied that the building or structure meets the relevant RPS criteria for inclusion in the District Plan as historic heritage should be the primary focus.

IS A VOLUNTARY APPROACH TO LISTING PERMISSIBLE?

11 We could not locate any case law stating that the listing of any specific heritage building or structure is *mandatory* for Council (ie, listing must be undertaken by Council). A common practice of councils is to list in the District Plan those buildings which are listed on the NZHL given the detailed heritage assessment usually involved in that NZHL listing. This is

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[13] Noting caselaw commentary that section 6 matters can be likened to a duty upon Council: *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, [64]; *Environmental Defence Society v New Zealand King Salmon Company Limited* 17 (2014) ELRNZ 442 (SC).

[14] Sections 6(f) and 74(1)(b) of the RMA.

[15] Section 74(2)(b)(iia).

[16] As stated in *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [77]: "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it." See also *Port Otago Ltd v Environmental Defence Society Inc* [2021] NZCA 638.

[17] Section 75(3)(c) of the RMA.

[18] Policy 21 and 22, Table 2: Coastal environment, Objective 3, Table 5: Historic heritage, Objective 15, Methods 1, 2, 20 & 32 Also see policies 4, 6, 23, 25, 27, 30, 31, 36, 48, 49 & 53.

[19] Page 103 of the RPS.

[20] *Architectural Centre v Wellington City Council* [2017] NZEnvC 116, [29].

not a legal requirement, but is rather a matter of practice. However, often District Plan listings do not exactly match the NZHL listings.

12 There is no legal basis for Council to adopt a policy of only listing a heritage building in the District Plan where the owner agrees to that listing. The preference of the owner, and any effect of the listing on the value of the property, are not relevant considerations under the RMA when deciding whether a place has heritage values that warrant it being listed. Such considerations are not mentioned in the RPS criteria in Policy 21.

13 As the listing of a building in the District Plan places additional controls and constraints on what the owners can do with their building, it is unlikely that many building owners will 'volunteer' for their buildings to be subject to these additional controls by listing the building or structure. Most owners will avoid additional regulatory controls if possible. It is unlikely that only listing buildings and structures where the owners agree to the listing would therefore meet the Council's requirements of section 6(f) of the RMA or give effect to the RPS to achieve protection of historic heritage in the city of Lower Hutt.

14 The introduction of places onto the heritage list in the District Plan must be undertaken by Council on the basis of a robust assessment against the relevant criteria and the mandatory considerations relevant for a plan change.

15 There is a potential impact of Council choosing not to list a building/structure that meets the criteria for listing, but for the position of the landowner. If a place is not listed in the District Plan, but is historic heritage, then adverse heritage effects *could* be relevant to the determination of any resource consent application,[21] and depending on the circumstances section 6(f) of the RMA *might* also be considered.[22] However, no resource consent will be required under any heritage rules if the place is not listed, so it may be that activities such as demolition of a building (which is not listed but is historic heritage) would be permitted and would not require a resource consent. If a resource consent is required under other rules of the District Plan, discretion/control may be restricted to matters that do not include historic heritage, and/or the application might be required to be processed without notification. There is accordingly no guarantee that the effects of an activity on heritage values of an unlisted building will subsequently be considered, and accordingly demolition or an activity which might affect those heritage values is a real prospect.

16 This potential outcome highlights why a listing in the District Plan of those buildings and structures which meet the relevant criteria assists in achieving 'the protection of historic heritage from inappropriate subdivision, use, and development'.

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[21] For example, cases considering adverse effects to an area not listed as heritage in the district plan include: *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [354]; *Waterfront Watch Inc v Wellington City Council* [2012] NZEnvC 74, section 104(1)(a) of the RMA.

[22] See *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 as to when Part 2 might be relevant to a resource consent application.

17 Non-heritage matters raised by owners opposing a heritage listing might include public safety, alternative uses, feasibility, and economic cost. These matters could be relevant at the resource consent stage, depending on the applicable objectives and policies and circumstances of the place in question.[23]

18 It is also open to an affected owner to contend that the listing of the building/structure would make it incapable of reasonable use and place an unfair and unreasonable burden on them pursuant to section 85 of the RMA. That could be raised in their submission/appeal to the Environment Court on a plan change, or through an application to change the plan to the Environment Court under clause 21 of Schedule 1. It is for the owner to raise the point, and prove the basis for it before the Court, rather than for Council to pre-emptively determine that a heritage listing would meet that criteria as part of Council's decision whether that building warrants a heritage listing in technical terms.

19 In *Redmond Retail Ltd v Ashburton District Council* [2020] NZEnvC 78, the Environment Court recently found that section 85 of the RMA did not justify taking financial burden or commercial viability into account in considering an application to remove a heritage building from the district plan list. The Environment Court's decision was upheld on appeal in *Redmond Retail Ltd v Ashburton District Council* [2021] NZHC 2887. The High Court on appeal was satisfied that the Environment Court had properly acknowledged that the RMA requires the burden on a private landowner to be in proportion to the public benefit gained from the restriction imposed by a heritage listing in a district plan. The restriction applying under a heritage listing was not intended to be so great as to preclude reasonable use. Equally, the reasonable use does not need to be the landowner's preferred choice nor the best use of the land,[24] or provide the 'optimum financial return'.[25] Further, the High Court found that the high cost the owner might face in meeting Building Act 2004 or other requirements were not relevant to the test for 'incapable of reasonable use'.[26]

20 Let us know if you have any questions or you would like us to expand on any matter further.

Yours sincerely

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[23] *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878; *Tuscany Limited v Christchurch City Council* (2005) NZEnvC 99/205 [74]; economic considerations are within the scope of the purpose of the RMA, section 5.

[24] *Redmond Retail Ltd v Ashburton District Council* [2021] NZHC 2887, [49].

[25] *Landcorp Ltd v Auckland Council* [2012] NZEnvC 203, [68].

[26] *Redmond Retail Ltd v Ashburton District Council* [2021] NZHC 2887, [63]-[65].

APPENDIX A - THE PLAN CHANGE TEST

Extract from *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55, [17]

A. General requirements

1. A district plan (change) should be designed to accord with — and assist the territorial authority to carry out — its functions so as to achieve the purpose of the Act.

2. The district plan (change) must also be prepared in accordance with any regulation (there are none at present) and any direction given by the Minister for the Environment.

3. When preparing its district plan (change) the territorial authority must give effect to any national policy statement or New Zealand Coastal Policy Statement.

4. When preparing its district plan (change) the territorial authority shall:

(a) have regard to any proposed regional policy statement;

(b) give effect to any operative regional policy statement.

5. In relation to regional plans:

(a) the district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order; and

(b) must have regard to any proposed regional plan on any matter of regional significance etc.

6. When preparing its district plan (change) the territorial authority must also:

• have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities;

• take into account any relevant planning document recognised by an iwi authority; and

• not have regard to trade competition or the effects of trade competition;

7. The formal requirement is that a district plan (change) must also state its objectives, policies and the rules (if any) and may state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to implement the objectives, and the rules (if any) are to implement the policies;

10. Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district plan taking into account:

(i) the benefits and costs of the proposed policies and methods (including rules); and

(ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods; and

(iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.

D. Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment.

12. Rules have the force of regulations.

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive than those under the Building Act 2004.

14. There are special provisions for rules about contaminated land.

15. There must be no blanket rules about felling of trees in any urban environment.

E. Other statues:

16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)

17. On appeal the Environment Court must have regard to one additional matter — the decision of the territorial authority.