



Working with historic heritage and special character in New Zealand

New Zealand has a range of established historic heritage and special character despite being a young country. The ICOMOS New Zealand Charter (2010), supporting the conservation of places of cultural heritage value, provides that public decision makers have a responsibility to safeguard cultural heritage places for present and future generations. Part of the responsibility for safeguarding cultural heritage places falls under the Resource Management Act 1991 (RMA).

The protection of historic heritage and special character creates ongoing challenges for property owners and developers, including the significant, privately incurred costs of maintaining buildings and places.

This article highlights some of the key considerations when dealing with historic heritage and special character.

HISTORIC HERITAGE AND SPECIAL CHARACTER ARE DISTINCT CONCEPTS

From the outset, it is important that 'historic heritage' and 'special character' are recognised as distinct RMA concepts:

- 'Historic heritage' is protected by listing specific properties or buildings in the schedules of district plans. Historic heritage is one of the "matters of national importance" listed under s 6 of the RMA. Decision makers under the RMA therefore must "recognise and



Authors:

Daniel Minhinnick,
Partner, and Patrick Senior,
Senior Solicitor,
Russell McVeagh

provide for ... the protection of historic heritage from inappropriate subdivision, use, and development" (s 6(f)).

- On the other hand, 'special character' protects areas that have special values identified in district plans. Special character contributes to amenity value and decision makers under RMA, s 7(c) must "have particular regard to ... the maintenance and enhancement of amenity values". Several district and unitary councils around New Zealand, including Whangarei, Auckland, Hamilton, Wellington and Christchurch, protect special character in their district plans. In some of these cities, special character has been criticised for denying development opportunities and urban intensification.

The distinction under the RMA between historic heritage and special character is made clear in *Housing New Zealand Corp v Auckland Council* [2018] NZEnvC 186. Auckland Council proposed to include an historic heritage objective reciting s 6(f) of the RMA in the special character provisions. Housing New Zealand opposed the proposed objective. The Court concluded that it would not be appropriate to include the historic heritage objective in the special character provisions, given the distinction between the concepts in the purpose of the RMA.

The factors that a decision maker will take into account when determining whether to grant consent to modify or demolish historic heritage or a building within a special character area are generally specific to the particular planning provisions. However, there are several common issues that prospective applicants should consider and prepare for.

PUBLIC SAFETY IS A KEY CONSIDERATION

Public safety is a key consideration under the RMA (*Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878). However, it is reasonably uncommon for district plans to refer to health and safety, particularly in historic heritage chapters.

In circumstances where health and safety is not mentioned in the district plan, decision makers may have regard to Part 2 of the RMA, in accordance with *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283. The health and safety of people and communities sits in s 5 of the RMA and is therefore a core tenet of the definition of sustainable management.

The role of health and safety is set out in *Lambton Quay*. This case concerned the demolition of the heritage-listed Harcourts Building located on Lambton Quay, Wellington. The High Court, in allowing the appeal against the Environment Court's refusal of consent to demolish the Harcourts Building, reflected on the importance of public safety under the RMA and stated that "[p]ublic safety must always prevail" (at [88]). (The High Court remitted the decision to the Environment Court, which again refused resource consent for demolition.)

The importance of public safety in *Lambton Quay* was applied in *View West Ltd v Auckland Council* [2018] NZEnvC 237. *View West* was an application to demolish the St James Sunday School Hall (the Hall) on Esplanade

Road in Mount Eden, Auckland. The Hall had a Category B listing in the *Auckland Unitary Plan* ((Auckland Council, updated March 2020) at D17.1). In granting resource consent for demolition, the Environment Court stated that the protection of health and safety is a "primary element of sustainable management" (at [50]). However, the Environment Court stated that public safety is not in itself a veto over heritage and amenity values (at [52]).

Demonstrating a heritage building's risk to public health and safety can be an important factor supporting the grant of consent to modify or demolish.

ROLE OF ALTERNATIVES

The High Court in *Lambton Quay* considered that an assessment of alternatives to demolition was required under the historic heritage provisions of the *Wellington City District Plan* ((Wellington City Council, last amended 11 July 2012) at ch 20) and s 6 of the RMA. For context, the applicant in *Lambton Quay* analysed some 11 different alternatives to demolition. The Court stated that the relevant test was whether there was a reasonable alternative to demolition, and disagreed with the Environment Court's decision that required alternatives to be "exhaustively and convincingly excluded" (at [71], quoting the Environment Court summary in *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2013] NZEnvC 238 at [140]).

In *View West*, one principal alternative to demolition was raised by Auckland Council, but the applicant proved that alternative was not a realistic one. While the Environment Court was less sure of the relevance of alternatives in *View West*, the Court went on to consider the alternative proposal to determine whether the adverse effects of demolition could be avoided (at [99]).

Assessments of alternatives to demolition or modification of listed buildings are useful in supporting an application for resource consent, and applicants should retain records of any early feasibility studies.

Applicants should be mindful that a district plan may contain specific wording as to how alternatives should be assessed. If this is the case, applicants should take care in following those provisions closely. For example, rule D18.8.2.2(1)(a)(v) of the *Auckland Unitary Plan*, relating

to special character, requires an assessment of the cost of rehabilitation against the cost of a new building of the same size and quality – in other words, a ‘like-for-like’ replacement. This is problematic where the planned replacement building is not like-for-like, which is often the case. In these situations, it may be necessary to conduct a second mock-up design to show the decision maker that rehabilitation is not an economically viable alternative.

POSITIVE EFFECTS

The anticipated positive environmental effects of an application are important. When considering an application for resource consent, positive environmental effects may outweigh the adverse effects on heritage or special character (see for example, *Wellington Badminton Assoc Inc v Wellington City Council* [2011] NZEnvC 343). Typically, positive effects will include: the construction of the new building; economic benefits of the new building and the activities it will enable; and positive social effects arising from the particular use of a building (for example, construction of a hospital or school).

Decision makers may struggle to recognise the positive economic effects of a new building on a site if the applicant has only sought resource consent to demolish the existing historic building and has not sought consent for the new development. But it might make sense to only seek demolition consent to avoid the added expense of fully designing the future development of the site before the ability to demolish is known. One option to give decision makers certainty regarding future benefits is the use of bond conditions. A bond was proposed in *View West* to ensure that St James Church, located on the same site as the Hall, was strengthened and that the beneficial effects of this exercise could be realised. A bond was also proposed in *The Wellington Company Ltd v Save Erskine College Trust (No 3)* [2018] NZEnvC 59, again for strengthening a different building on the same site.

In *Panuku Development Ltd v Auckland Council* [2020] NZEnvC 24, Panuku sought resource consent to demolish existing buildings within the special character area (including the Universal Building) and to redevelop the site on Dominion Road, Auckland. The Environment Court agreed that the negative effects on the special character area would be mitigated by the positive effects realised from the site’s redevelopment. However, to give greater certainty that the positive effects would be realised, the

Court approved a condition requiring that demolition of the Universal Building must not occur until building consent applications had been approved for the corresponding part of the redevelopment (see [226]).

Decision makers may also find it difficult to ensure resource consents are implemented in a timely manner. This can be an important issue if the existing building poses an immediate safety risk (as in *View West*). Conditions can be used to expedite works (such as “as soon as reasonably practicable” wording – see for example, condition 6 attached to the judgment in *View West Ltd v Auckland Council* [2019] NZEnvC 15).

CONCLUSION

The Environment Court has recognised the difficulties in dealing with historic heritage (see *View West Limited v Auckland Council* [2018] NZEnvC 237 at [149]). Buildings in special character areas face the same challenges.

These challenges are an issue councils are looking to address. For example, in 2019, Auckland Council voted unanimously to increase its Regional Historic Heritage Fund from \$84,000 to \$500,000. While this may assist initial scoping work and heritage assessments, current heritage grant amounts pale in comparison to the amount required for strengthening or upgrading works on heritage properties.

Tensions continue between the protection of historic heritage and special character areas, the demand for urban development and the financial constraints on private landowners to maintain old buildings. Issues such as the importance of public safety and the treatment of alternatives are likely to remain prominent in subsequent applications relating to historic heritage.

Note: Russell McVeagh represented the applicant in *Panuku Developments Ltd v Auckland Council* [2020] NZEnvC 24. In a previous role, Patrick Senior was junior counsel for the applicant in *View West Ltd v Auckland Council* [2018] NZEnvC 237.