

BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991 (RMA)

AND

IN THE MATTER of Proposed Plan Change 9 to the Operative Hamilton
City District Plan

**OPENING LEGAL SUBMISSIONS OF COUNSEL FOR K'AUTE PASIFIKA
TRUST
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MAY IT PLEASE THE PANEL

Introduction

- 1 Plan Change 9 (Historic Heritage) has sought to update the District Planning Maps with Historic Heritage Areas (**HHA**). The K'aute Pasifika Trust (**Submitter**) was notified by Hamilton City Council (**HCC**) via a letter with an invitation to submit as a number of submissions proposed 220 Commerce Street (**Property**) to be included as a HHA, which is a commercial property, in the Business zone – Suburban Centre Core.

- 2 The HHA submissions received relating to this property include:
 - (a) 196 – Chow Hill: Architects Ltd (Brian Squair);
 - (b) 307 – Antanas Procuta;
 - (c) 452 – Laura Liane Kellaway;
 - (d) 471 – Margaret Louise Sale; and
 - (e) 472 – Margaret Louise Sale (on behalf of Frankton East Residents Group).

- 3 These legal submissions are to be read in conjunction with the Submitter's written Further Submission. The Submitter opposes the inclusion of its Property as an HHA and requests, if the HHA is supported, amendments to rules relating to HHA areas to allow for alterations/additions for cultural enhancement or cultural purposes to be a permitted activity.

- 4 In summary, the evidence and legal submissions for the Submitter demonstrate that:
 - (a) The assessment criteria and Historic Heritage qualities used by Mr Knott in his revised methodology do not align with or give effect to the assessment criteria and Historic Heritage qualities in the Waikato Regional Policy Statement or the Hamilton City Council Operative District Plan;

- (b) The Historic Heritage qualities and revised methodology reflect that of a ‘Special Character Overlay Area’;
- (c) The Property does not warrant Historic Heritage status against the revised methodology; and
- (d) Rules relating to cultural enhancement should be permitted.

Purpose of submissions

- 5 This submission raises three points:
- (a) The assessment criteria and methodology adopted to assess HHAs; and
 - (b) The assessment given to the Property; and
 - (c) Rules relating to cultural enhancement.

Assessment Criteria and methodology

- 6 As outlined in Dr McEwan’s evidence, the qualities afforded to historic heritage are described in the Resource Management Act 1991 (**RMA**),¹ which includes: “*historic sites, structures, places, and areas; ...*”² The Waikato Regional Policy Statement (**WRPS**) under the title “Historic and Cultural Heritage” then outlines the assessment criteria and qualities to be applied/considered for territorial authorities within the region. The WRPS states that when assessing historic and cultural heritage, regard shall be given to the following:³

Historic Qualities	
Associative Value	The place or area has a direct association with, or relationship to, a person, group, institution, event or activity that is of historical significance to Waikato or the nation.
Historical Pattern	The place or area is associated with broad patterns of local or national history, including development and settlement patterns, early or important transportation routes, social or economic trends and activities.

¹ Resource Management Act 1991, section 2.

² Resource Management Act 1991, section 2, and Part 1, Chapter 1.6, Waikato Regional Policy Statement.

³ Waikato Regional Policy Statement, Part 5.1 Appendices, APP7.

- 7 The WRPS names the quality and then describes the quality. The Historic Qualities in Appendix 8, Hamilton City Council Operative District Plan (**ODP**), at 8-1.2a(i) and (ii) are still outlined and retained as Associative Value and Historical Pattern. The description has been slightly amended in the ODP to include the words “historic”, “important ...places (replacing ‘broad places’)”.⁴ The ODP has taken a more stringent approach to Historic Heritage than the WRPS.
- 8 It is best practice to have the regional policy statement and district plan align. This includes the qualities, assessment criteria and types of historic heritage resources described in the RMA.⁵ The Panel should adopt Dr McEwan’s approach. There is no National Policy Statement to assist with the identification and assessment of historic heritage qualities, but as Dr McEwan points out in her evidence:⁶
- It is standard best practice around New Zealand for regional policy statements and district plans to align their heritage assessment criteria with both the qualities and types of historic heritage resources described in the RMA.
- 9 The protection of Historic Heritage is a matter of national importance⁷ and robustly assessed historic heritage resources should be protected from inappropriate subdivision, use and development. The Submitter is not opposed to protecting historic heritage in Hamilton, however, the assessment criteria for historic heritage areas needs to align and be drafted in accordance with the RMA, WRPS, and HCC’s definition of historic heritage qualities.
- 10 The position taken by Mr Knott, Mr Gu and Mr Miller, in identifying a different set of qualities and adopting new assessment criteria, is flawed,

⁴ As well as “Hamilton”, “Waikato”, “New Zealand” and “regional”, Hamilton City Council Operative Plan, Appendix 8, at 8-1.2.

⁵ Statement of Evidence of Dr Ann McEwan, 28 April 2023, at para 7.

⁶ Statement of Evidence of Dr Ann McEwan, 28 April 2023, at para 7.

⁷ Resource Management Act 1991, section 6(f),

has no statutory basis, and is inconsistent with the WRPS, the wording in the HCCOP, other district plan approaches⁸ and the RMA.

- 11 The assessment criteria that Mr Knott originally used to identify an HHA area were based on two requirements (**Limbs**):⁹
- (a) the area being **representative** of a Heritage Theme; and
 - (b) that the area displayed **consistency** in physical and visual qualities.

[Emphasis added]

If both the Limbs were met, the area would then be considered as an HHA. The Submitter's property was not identified as an HHA in the original report completed by Mr Knott.

- 12 That original methodology has been revised, following a number of peer reviews and a revised methodology has emerged. This latest methodology applies Development Periods to the first and second Limbs of Mr Knott's assessment criteria. However, the revised methodology, which has two stages, still adopts qualities that are not in the RMA or the WRPS; those qualities being 'representative' and 'consistency' are then linked to Development Periods.¹⁰
- 13 Dr McEwan points out that using qualities such as 'representative' and 'consistency' departs significantly from the assessment criteria in the WRPS and RMA. *Representative* is a term used in the WPRS to describe architectural style or potential scientific data; as for example: *Architectural Qualities, Style or type: "the style of the building or structure is **representative** of a significant development period in the region or the nation..."* [emphasis added].¹¹ This description is only directed to the

⁸ As appendixes show in the Statement of Evidence of Dr Ann McEwan, 28 April 2023.

⁹ Statement of Evidence of Richard Knott, 14 April 2023, at para 28.

¹⁰ Statement of Evidence of Richard Knott, 14 April 2023, at para 50.

¹¹ Waikato Regional Policy Statement, Table 10A *Historic and cultural heritage assessment criteria*, Architectural Qualities, Style or type: "the style of the building or structure is **representative** of a significant development period in the region or the nation..." [emphasis added].

architectural qualities and not to historic qualities as discussed in Dr McEwan's evidence.¹²

- 14 The Historic Qualities in Appendix 8, Hamilton City Council Plan, at 8-1.2a(i) and (ii) is the description in the ODP. That description does not include the words: 'representative' and 'consistency'.¹³ Thus we have a situation whereby a plan change introduces qualities through a methodology that is inconsistent with the plan's own heritage assessment criteria. It is submitted that if the ODP was amended to reflect the revised methodology, it would become inconsistent with the WRPS and RMA.
- 15 Using qualities in a methodology/assessment criteria that are actually describing character and amenity detracts from the integrity of the District Plan in relation to Historic Heritage. *Representative* and *consistency* are qualities that derive from special character areas and can be seen as filling the gap for historic heritage as the majority of the historic heritage areas in PC 9 are arguably not significant enough to meet the threshold for scheduling under s 6(f) of the RMA.
- 16 Dr McEwan has provided examples of heritage area assessment criteria and methodology from other cities and notes that while they have been prepared in light of the Medium-Density Residential Standards they maintain a high threshold of significance to justify heritage scheduling.¹⁴ The methodology proposed here, that is more akin to character and amenity, paired with the comments in Mr Knott's evidence that the original methodology was developed in response to the National Policy Statement on Urban Development,¹⁵ which is a building intensification directive and not a heritage protection document, begs the question of the council's intent in regard to the methodology proposed and the number of HHAs that are being introduced.

¹² Statement of Evidence of Dr Ann McEwan, 28 April 2023, at para 10.

¹³ It is noted that 'represented' is used to explain the a quality, but it has not been considered as a 'quality'.

¹⁴ Statement of Evidence of Dr Ann McEwan, 28 April 2023, at para 13.

¹⁵ Statement of Evidence of Richard Knott, 14 April 2023, at para 52.

- 17 In our submission, including the qualities of ‘representative’ and ‘consistency’ in the assessment methodology for Historic Heritage Areas, as adopted by Mr Knott, affects the intent of protecting historic heritage resources under the RMA and as anticipated by the WRPS by enabling s7 matters to be protected as if they were s 6 matters.

Character and Amenity

- 18 As Dr McEwan discusses in her evidence, the qualities of ‘representative’ and ‘consistency’ are more akin to that of character and amenity¹⁶ which are considered section 7 “other matters” under the RMA,¹⁷ in contrast to section 6 of the RMA, where the protection of historic heritage is considered a matter of national importance.¹⁸ Adopting the revised methodology will effectively apply a Character and Amenity assessment to the evaluation of historic heritage.
- 19 In *Housing New Zealand Corporation v Auckland Council*¹⁹ the particular wording adopted by Auckland Council for its Special Character Areas Overlay in its regional policy statement was questioned due to the wording in this character zone referring to historic heritage values. The two considerations of special character areas versus historic heritage need to be balanced carefully and care should be taken on the level of significance towards whether it is a historic heritage area or a special character area as there is a clear distinction between both. The Court reworded and adopted some sections of the policy. The reworded and adopted policy from the Court on special character areas has been outlined below to show the Panel the close similarity in terminology between a Special Character Area to the wording adopted by Mr Knott’s revised methodology for HHAs:

¹⁶ Statement of Evidence of Dr Ann McEwan, 28 April 2023, at para 11.

¹⁷ Resource Management Act 1991, section 7.

¹⁸ Resource Management Act 1991, section 6,

¹⁹ *Housing New Zealand Corporation v Auckland Council* [2018] NZEnvC 186.

(a) B5.3. Special Character²⁰

B5.3.1. Objectives

(1) [Deleted]

(2) The **character and amenity values** of identified special character areas are maintained and enhanced.

B5.3.2. Policies

(1) Identify special character areas to maintain and enhance the **character and amenity values** of places that reflect patterns of settlement, development, building style and/or streetscape quality over time.

(2) Identify and evaluate special character areas considering the following factors:

(a) **physical and visual qualities:** groups of buildings, or the area, collectively reflect important **or representative aspects of architecture or design (building types or styles)**, and/or landscape or streetscape and urban patterns, or are distinctive for their aesthetic quality; and(b) legacy including historical: the area collectively reflects an important aspect, **or is representative**, of a significant period and pattern of community development within the region or locality.

(3) ...

[Emphasis added]

20 The Court then ensured the reasons for the policy were clear. Clearly there is a strong emphasis on ‘character’, which is not the same as historic heritage. It is important to note that while special character areas can exhibit historic importance they are not afforded protection under s6 of the RMA. It is not disputed that there are areas in Hamilton which may warrant protection based on character under s7 of the RMA, and if that is the case, qualities such as *representative* and *consistency* can be used. Below is a copy of the amended policy explanation given by the Court in *Housing New Zealand Corporation v Auckland Council*:

[258] ... Historic heritage values may underline the identification of special character areas and make a contribution to the character and amenity values of such areas, **but the special character areas are dealt with differently from significant historic heritage identified and protected**

²⁰ Auckland Utility Plan, Historic heritage and special character, B5.3 – the current wording is used and only slightly changed since the decision in *Housing New Zealand Corporation v Auckland Council* [2018] NZEnvC 186 at [256]-[257].

in terms of the separate policy framework for identifying and protecting Historic Heritage in B5.2. the attributes of the character and amenity values and the environmental quality of a special character area, including buildings and streetscape, might be derived from its historical legacy, without being historic heritage under section 6(f) of the RMA.

[Emphasis added]

- 21 As Dr McEwan points out in her evidence, the use of visual and physical descriptions to illustrate how physical characteristics within an area contribute to the qualities of 'representative' and 'consistency', is with respect, an incorrect methodology to be applying to historic heritage that then warrants protection in accordance with s6 of the RMA. "Streetscape Character" was discussed in *New Zealand Heavy Haulage Association Incorporated v Auckland Council*²¹ regarding concerns about the contribution made by that part of the building visible from the street to the special character and amenity of an area. The Court found that there were many buildings that had been restored but referenced the Victorian and Edwardian period with higher quality materials.²² Special Character in Auckland Council Plan Change 163 derived from streetscape, that is:²³

the street view that one obtains of the relationship of the buildings to one another; and in terms of their subdivision pattern, shape and like.

- 22 Even though there were Victorian and Edwardian elements visible in the street the area was still considered to be an area of Special Character rather than Historic Heritage. Comparing the definition of streetscape that was used in a Special Character area against Mr Knott's revised methodology displays the blurred lines between Historic Heritage and Special Character in PC 9, raising issues with the revised methodology proposed.

²¹ *New Zealand Heavy Haulage Association Incorporated v Auckland Council* [2013] NZEnvC 145.

²² *New Zealand Heavy Haulage Association Incorporated v Auckland Council* [2013] NZEnvC 145 at [64-66].

²³ *New Zealand Heavy Haulage Association Incorporated v Auckland Council* [2013] NZEnvC 145 at [60].

The assessment given to the Property

- 23 It should be noted at this stage, that contrary to what Dr Gu states in his Statement of Rebuttal Evidence,²⁴ Dr McEwan agrees²⁵ that a methodology used for assessing residential areas for historic areas can be adopted for commercial areas.
- 24 Although it is not accepted that the revised methodology for determining historic heritage should be used, if the panel was to adopt the revised methodology produced by Mr Knott, the methodology should not be applied to Submitter's Property for the following reasons:
- (a) There has not been a detailed assessment of the HHA in this commercial area that would be comparable to the assessment undertaken from Victoria Street.²⁶ As Dr McEwan points out in her evidence, there is considerable material available in New Zealand to guide the assessment of heritage areas. New Zealand has adopted Historic Heritage into its legislation. In the absence of a substantive assessment provided by HCC it is submitted that there is not enough evidence for the Property to be considered as heritage.
 - (b) Within this proposed HHA area, 40 High Street, 223 Commerce Street, and 239A Commerce Street have been identified as individual Built Heritage items (subject to future hearings). Removing the HHA will not inhibit protecting the buildings within the area that warrant protection.
 - (c) Mr Knott in his evidence considers the proposed HHA to be "**representative** of the Late Victorian and Edwardian..."²⁷ [emphasis added]. As above, it is not agreed that 'representative' is a historic heritage quality, and further, Dr McEwan in her evidence is of the opinion that there is no evidence that this period (Late

²⁴ Statement of Rebuttal Evidence of Dr Kai Gu, 12 May 2023, at para 14.

²⁵ Statement of Evidence of Dr Ann McEwan, 28 April 2023, at para 11.

²⁶ Statement of Evidence of Dr Ann McEwan, 28 April 2023, at para 14.

²⁷ Statement of Evidence of Richard Knott, 14 April 2023, at para 34.

Victorian and Edwardian) is singularly important to the history of Frankton.²⁸

- (d) There has been modification and replacement of buildings within this HHA, as shown in Mr Knott's aerial view of the area.²⁹ This calls into question the extent to which the specified area can be said to embody representative Victorian and Edwardian qualities.

Rules relating to cultural enhancement

- 25 As outlined in the Further Submission, the Submitter seeks that rules relating to cultural enhancement or cultural purposes of a building be a permitted activity and not restricted by an underlying HHA overlay.
- 26 The Submitter has recently completed the construction of a fale, which is a part of a whole village concept, the first of its kind in New Zealand and underpinned by the values of the Pasifika community. In the future, the Submitter may also design and construct a similar concept at its Property in Commerce Street. It is important that we recognise that Hamilton now has a diverse range of cultural communities and that all cultures are able to give effect to matters that are important to them, rather than one culture being given the right to determine what is "character" or "heritage" and so freezing or impeding the recognition and aspirations of other cultures.
- 27 If this Property is considered by the Panel to merit scheduling as an HHA, the Submitter seeks rules that additions and alterations related to cultural enhancement or cultural purposes, be permitted under the district plan.

²⁸ Statement of Evidence of Dr Ann McEwan, 28 April 2023, at para 16.

²⁹ Statement of Evidence of Richard Knott, 14 April 2023, at para 48.

Conclusion

- 28 It is submitted that the evidence provided by Dr McEwan should be given attention and that there are qualities being used in the assessment of Historic Heritage that are more akin to Character and Amenity. The use of these qualities in the revised methodology creates an inconsistency between the RMA, WRPS, and ODP.
- 29 We accept that Historic Heritage, whether individual items or areas, that are of significance should be protected in Hamilton City. However, scheduling character areas as historic heritage, based upon a methodology that is not best practice and using assessment criteria that are not within the RMA, WRPS or ODP, undermines the integrity of the District Plan and undermines the items and areas that are truly of significant heritage value for the city.

Dated 17 May 2023



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