BEFORE THE INDEPENDENT COMMISSIONERS

IN THE MATTER OF:	An application for land use consent, pursuant to section 9(3) RMA for Partial Demolition and Additions and Alterations to All Saints Church
APPLICANT:	Wellington Diocesan Board of Trustees
CONSENT AUTHORITY:	Palmerston North City Council

LEGAL SUBMISSIONS FOR REPORTING OFFICERS, INCLUDING CORRECTIONS AND ADDITIONAL SUBMISSIONS GIVEN ORALLY

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21 January 2021

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LEGAL SUBMISSIONS FOR THE REPORTING OFFICERS

Introduction

1. It is important to begin the submissions by recognising the merit in the process that the applicant began in 2015 – committing to saving the All Saints Church. It is entirely fair to say that the Palmerston North community does not want to see the All Saints Church unused in the long-term, neglected, or indeed ultimately demolished. That would be an undesirable outcome for the entire community and national heritage protection. The benefits that would arise from elements of the Applicant's proposal are not taken for granted, and there is virtually no dispute that the strengthening works proposed by the Applicant is unequivocally a good thing.

2. With that said, these submissions do endorse the professional opinions and recommendation of the Council's s 42A reporting officers, including the recommendation that resource consent should be declined in this case.

3. Despite the benefits to the community that would be realised if consent were to be granted, the proposed demolition of the baptistery and the external additions are not favourably reported on. While the recommendations of experts are confidently given, they are not conclusions that were reached lightly, particularly given the positioning of the Applicant that if it fails to obtain consent for this design strengthening will not occur either.

4. The reporting officers do not, however, agree that demolition of the heritage building will be the natural or legal consequence of a decision to decline. They remain hopeful that something can be done to protect the church and its significant heritage values in a way that meets the Church's needs, even if that does require some compromise from the church as to essential elements of its design. The reporting officers take some comfort from the evidence as to the deep spiritual connection of the church community with the existing building.

5. At its heart, the analysis of this Application under s 104 RMA is not complicated, but one could be forgiven for thinking otherwise considering

various arguments made by the Applicant. The Commissioners are not, in our submission, required to grapple with the relationship between the church and civil government, the values that underpin democratic society, or indeed the Magna Carta.

6. Instead, the Application, together with submissions, and all expert evidence reveals a set of orthodox key issues requiring determination by Commissioners. The core issues include (with significant overlap):

   a. Whether the Applicant's proposal has been properly informed by assessment of alternatives and/or cost benefit analysis, as required by the RMA and relevant district plan policy.

   b. Consideration of the effects of the proposal on a nationally significant heritage building, including those effects which are both positive and negative. This involves consideration of the methodology utilised by the relevant witnesses, and consideration of the appropriateness of those effects.

   c. How the proposal sits with planning provisions. This involves considering provisions that are relevant to applications proposing alterations or demolition to buildings with identified heritage values, and consideration of how the relevant planning provisions speak to, and seek to reconcile, inherent tensions associated with that type of activity.

7. A primary challenge for the Commissioners in this case is that the series of orthodox key issues referred to above have been overwhelmed by evidence from the Applicant with a variable range of probative value and focus on the issues. This includes evidence and legal submissions from the Applicant which disagree with each other about how the evaluation should be performed. This will require the Commissioners to attentively consider the logic of relevant arguments, the weighting that should be given to various opinions, and whether various statements are of relevance at all. These submissions do not go into detail as to how the Commissioners should carry out that exercise in this case, trusting instead that the Commissioners are quite capable of carrying out this exercise.

8. These submissions will instead primarily focus on the core issues, testing the arguments advanced by the Applicant, and advising the Commissioners as to the correct approach to the decision-making task. The submissions also address questions and issues that have arisen over the course of the hearing to date.

The Relevance of Policy 1.4

9. Mr Maassen submitted to the Commissioners that Policy 1.4 is not relevant to the determination of this application. That explains why it received so little attention in Mr Maassen's submissions. The submission is wrong. Policy 1.4 is directly relevant to this application; indeed, Policy 1.4 is the most relevant planning provision in the District Plan, in the sense that it has the most direct relevance to resource consent decision making in cases involving partial demolition of heritage buildings. I agree with Mr Maassen that Policy 1.5 is also relevant, but I do not agree that it has more relevance to the task at hand.

10. It is self-evident by reading the policy that it is relevant. It relates to activities involving partial demolition and identifies those circumstances in which those activities "[…] may be appropriate", whereby those circumstances operate as a threshhold. The definition of demolition in the District Plan does not affect the relevance of this policy, as explained in the appendix to these submissions.

11. The Applicant has previously accepted the relevance of Policy 1.4, even though we submit the Applicant has never fully grappled with its significance, which has evidently led to problems in the way in which the Application has been put together:

    a. Schedule I of the Applicant's resource consent application identifies Policy 1.4 as relevant.

    b. By letter dated 27 October 2020 in response to a request for further information, Mr Soong stated "the Congregation accepted that Policy 1.4 needs to be addressed" and "we agree with your assessment that

the decision-maker would benefit from detailed evidence to address Policy 1.4".

c. Mr Forrest's Statement of Evidence appears to acknowledge the relevance of Policy 1.4, despite giving little devoted attention to its analysis or application.

12. These submissions treat Policy 1.4 as very important to, and highly influential on, the decision-making process. Discussion that ties back to Policy 1.4 and its interpretation is a feature of these submissions. The fact that we, on the day of the hearing, are getting such mixed messages about its fundamental relevance from the applicant is both concerning and revealing.

13. We do not submit that Policy 1.4 is the only plan provision that the Commissioners need to have regard to. To the contrary, the Reporting Officers approach, demonstrated through Mr O'Leary's report, demonstrates a thorough consideration and weighting exercise in relation to all relevant planning provisions, properly following judicial guidance as to how that process should be carried out.

14. What, precisely, Policy 1.4 means and requires is addressed in all major sections of these submissions.

Assessment of alternative locations or methods for undertaking the activity

The Issue

15. The issue addressed under this section of submissions is whether the applicant has met the requirements of Policy 1.4 of the District Plan, as buttressed by Schedule Four, cl 6(1)(a) of the RMA, to provide an assessment of alternatives. This is in the context of a matter of national importance under s 6(f), being the protection of a nationally important heritage building from inappropriate development.

16. In the context of this application, the expected alternatives assessment would comprise of alternative locations or methods for undertaking the demolition activity proposed in respect of baptistery walls. That is because

Policy 1.4, which engages the requirement for alternatives assessment, concerns proposals for partial demolition of heritage buildings – here, the partial demolition of the building is the demolition of the baptistery wall. Further, cl 6(1)(a) is engaged where it is likely that the activity will result in any significant adverse effect. In this case, the primary significant adverse effects are those effects on heritage values associated with the partial demolition of the baptistery wall and otherwise, the effects associated with the additions. We rely on the evidence of Ms Stevens and Dr Gjerde in relation to those effects.

17. Consequently, this section considers whether any failure by the applicant to meet the requirements of Policy 1.4 and Schedule 4 can be a factor going towards the decision the to grant or decline consent.

Legal principles concerning alternatives

18. As noted above, the requirement for the applicant to provide an assessment of alternatives along with its resource consent application arises from two sources:

a. Schedule 4, cl 6(1)(a) of the RMA; and

b. Policy 1.4 of the District Plan.

19. Applications for resource consent must be accompanieds by an Assessment of Environmental Effects ("AEE") prepared in accordance with Schedule 4, which sets out various mandatory requirements. Relevantly, cl 6 provides:

> **Information required in assessment of environmental effects**
>
> (1) An assessment of the activity's effects on the environment must include the following information:
>
> (a) if it is likely that the activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:
>
> …

> (2) A requirement to include information in the assessment of environmental effects is subject to the provisions of any policy statement or plan.

20. In terms of the requirement under subcl 1(a), the Applicant must describe any possible alternative locations or methods where it identifies that significant adverse effects are likely.

21. Subclause 2 is also relevant in this case, considering the provisions of the Palmerston North District Plan. That is because the requirements of subcl 1 to "describe" are enhanced by the policy requirements of Policy 1.4, in circumstances where the application concerns a partial demolition of a heritage building. Specifically, Policy 1.4 identifies limited circumstances where partial demolition may be appropriate, and requires that:

- It can be demonstrated that relocation or partial demolition will result in the overall retention of significant heritage values; and
- Decisions on resource consent applications for the relocation or partial demolition of a scheduled building or object are informed by a thorough analysis of the alternative options available, including social, cultural, economic and environmental costs and benefits.

22. For an application for a partial demolition to satisfy the policy, and therefore be regarded as a circumstance when partial demolition may be appropriate, both circumstances set out in the policy must be met. That is the significance of the word "*and*", which is a conjunction joining the requirements. If both requirements are not met, a proper interpretation of the Policy would dictate that partial demolition *will not be* appropriate to ensure the ongoing sustainable use of the building.

23. The policy requirement for a thorough analysis of alternatives presents a higher standard than the requirement under cl 6(1). Whereas cl 6(1) merely requires a description of alternative locations or methods, Policy 1.4 goes further and is specific to applications concerning partial demolition of heritage buildings. A thorough analysis of alternative options is required to be demonstrated by the Applicant, and this analysis must include social,

cultural, economic and environmental costs and benefits, in relation to those options.

24. The reference to 'thorough analysis' requires consideration of what a thorough analysis consists of. Ultimately, the question of whether the policy requirements and the underlying requirements of cl 6(1) are met is a matter of judgment for the Commissioners to determine, informed by all the evidence. Commissioners may also draw on their experience in these matters. Legal principles and professional best practice are a further source of guidance, and the following submissions are intended to guide the Commissioners' consideration.

25. There are a few preliminary points. First, in relation to Policy 1.4, The Oxford English Dictionary (Online version) defines "*thorough*" as "*Complete with regard to every detail; not superficial or partial*." This signals a high standard in terms of the information required.

26. Second, it is the Applicant's obligation to ensure the information is before the decision maker, to meet the requirements of the Policy. It is not the consent authority's role to advance detailed alternatives. Rather, a lack of detail in the Applicant's assessment of alternative options will simply signal that the assessment is not thorough.

27. Third, consideration by the commissioners as to whether the assessment of alternative options undertaken by the Applicant is sufficiently thorough is an interrogation into the process followed by the Applicant, but that does not mean that the information provided by a thorough assessment of alternatives has no relevance to the Commissioners' evaluation of the merits of the proposal. It does have relevance, as the Policy itself states, to *informing decisions* on resource consent applications.

28. As to the third submission above, it is settled law that alternatives may be had regard to in the evaluation of a resource consent application by virtue of s 104(1)(c) of the RMA.[1]

[1] *Meridian Energy Limited v Central Otago DC* [2010] NZRMA 477.

29. Further, in *TV3 Network Services Ltd v Waikato District Council,* Hammond J held in relation to alternatives: [2]

> As a matter of commonsense, a consideration of whether there are suitable alternatives strikes me as a fundamental planning concern.
> …
>
> It is simply that, when an objection is raised as to a matter being of "national importance" on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance.

30. The 2014 High Court decision in *Lambton Quay Properties Nominee Ltd v Wellington City Council*, known as the *Harcourts* case, considered the issue of alternatives assessment in the context of an application to demolish the Harcourts building in Wellington.[3] In considering the relationship between alternatives assessments in circumstances where s 6(f) matters are engaged, Collins J held: [4]

> [73] In this case s 6 of the Resource Management Act requires the consent authority to ensure heritage buildings are only demolished in appropriate circumstances. "Appropriate" in this context means the consent authority approves a demolition of a heritage building only when it is "proper" to do so. In my assessment this requires the consent authority to ensure its consideration of an application to demolish a heritage building is founded upon 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.

31. Upon referral back to the Environment Court for reconsideration, the existence of a reasonable alternative that avoided demolition of the Harcourts building was material, indeed determinative, of the Environment Court's judgment that granting consent for the building's demolition was

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2 *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360.
3 *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878.
4 At [73].

not a *fair, appropriate, or reasonable outcome*.[5] While recognising that the Policy of the Wellington City Council set different standards, the decisions illustrate the necessity of a robust alternatives assessment to inform the evaluation undertaken by the decision maker as to whether the proposal is appropriate.

32. In that sense, Mr Forrest is wrong when he declares at paragraph [43] that the alternatives assessment "*…is a procedural safeguard rather than a standard to measure the appropriateness of the Proposal itself*". A more accurate statement of the law is that requiring an assessment of alternatives is both a procedural safeguard and provides the decision maker with critical information necessary to measure the appropriateness of a proposal.

33. There are, of course, limits as to the procedural requirements that can be imposed on an applicant. Alternatives assessments generally do not require the Applicant to:

    a. Exclude alternatives *exhaustively and convincingly*.[6]

    b. Identify and assess *every possible* alternative with less effect. The Applicant's procedural obligation is to identify and assess non-suppositious or hypothetical options.

    c. Require an applicant to substantively demonstrate that it selected the best possible option.[7]

34. The assessment must, however, provide confidence to a decision maker that the applicant has turned its mind to alternatives (locations or methods) with reduced environmental effects compared to what it wants to do. The question of whether an applicant has appropriately identified non-suppositional/non-hypothetical alternatives depends on the context of the application. In the present case, *alternative options* under Policy 1.4

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5 *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZEnvC 229 at [138]–[142].

6 *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878 at [71].

7 *Meridian Energy Limited v Central Otago DC* [2010] NZRMA 477 at [118]–[120].

implicitly refers to alternatives to the proposed partial demolition that the applicant has proposed.

35. The identification of alternative options in this context will naturally and inevitably require an applicant to identify and assess options that are not optimal, from the Applicant's perspective. Thorough identification of alternatives is not merely a matter for the Applicant to unilaterally declare and refuse to detail or assess any option that requires compromise on expressions of its "needs". Such an approach is overly narrow, defeating the purpose of cl 6(1) RMA and the requirement of Policy 1.4.

36. Finally, good practice considerations are informative as to what constitutes a thorough assessment. The Parliamentary Commissioner for the Environment has suggested some good practice criteria in relation to AEE's, including the following advice: [8]

> **Prepare AEE in consultation with affected parties BEFORE plans are finalised.** It is important to be able to incorporate effective prevention, remedy, or mitigation of adverse effect into project plans. This means early consultation when there are still options open, such as alternative sites, layout on sites, and designs. Good AEE practice is *iterative*, involving repeated communication between the applicant and affected parties as the AEE and the project plans evolve.

37. Further, the Ministry for the Environment's *Guide to Preparing a Basic Assessment of Environmental Effects* states:

> If your proposal is likely to cause significant adverse effects which need to be addressed, you will need to look at alternative ways of going about it. This might raise other, more environmentally effective, ways of doing what you want to do – or it might identify this as the only way. Consider alternatives in the widest possible way.
>
> …

[8] Parliamentary Commissioner for the Environment *Assessment of Environmental Effects (AEE): administration by three Territorial Authorities* (August 1995), at 5.

> If alternatives do need to be considered, their identification and analysis should not aim to merely dispose of alternatives in favour of a decision that has already been made.

Summary

38. Policy 1.4 requires a thorough assessment of alternative options. Whether that has been achieved in this case in order to meet the policy requirements is a matter that the Commissioners need to determine, and it is of both procedural and substantive relevance. Some guidance as to what might qualify as a thorough assessment is provided in the paragraphs above.

39. The significance of the requirement for a thorough assessment is twofold:

    a. If it has not been done thoroughly, then it cannot be said that the limited criteria of Policy 1.4 have been met in relation to whether a partial demolition is appropriate; and

    b. If it has not been done thoroughly, it is open for the Commissioners to consider whether it has sufficient information to inform its evaluation as to whether the proposal is, in substance, appropriate.

40. The next section of these submissions contains a review and commentary as to whether the Applicant has met the requirement of Policy 1.4.

Review of Application

41. The Applicant did not provide a description of any possible alternative locations or methods for the activity in its application, and it did not satisfy Mr O'Leary that it included a thorough analysis of the alternative options available for the purposes of Policy 1.4. This is despite the requirement for an alternatives assessment to the demolition of the baptistery being clearly raised as a requirement by Mr O'Leary in a pre-applicationno meeting with the Applicant.

42. The application, once lodged, said this at page 11:

> There will be a loss of original fabric through the removal of the existing baptistery wall, including some memorial stained-glass

> windows, which will be removed and retained for re-use in the corridor of the new building to the west of the existing church. It is necessary to remove the baptistery wall to allow for strengthening to the tower and the creation of a new entrance to the street. This is partly in response to the constraints of the physical space in the existing 'West' Tower and porch entrances, which will be exacerbated following seismic upgrading, but primarily to establish a new and more direct, accessible invitation to the building from the street. Alternative direct entrances to the church to the west have been considered but none have been found to be feasible. The applicant's architect prepared sketches of a west porch entry whilst keeping the design intent of the original proposal to the fore. Having spent time attempting to find a workable option, the architect concluded that a west entrance just wouldn't work, both from a functional as well as an aesthetic point of view. It was concluded that even if an enlarged west porch opening could be found, it wouldn't provide the clear view shaft(s) through to the main interior space of the church. With boundary restrictions and circulation considerations, the canopy space to the front would also become less functional ("tight and messy").

43. Later in the AEE, where the Applicant speaks about its consultation with Heritage NZ at page 14, it says:

> Formal written comments from Heritage NZ on the consultation draft of the RCA are contained in a letter from Alison Dangerfield, dated 26 July 2018, and attached in Appendix H. Whilst the letter states that Heritage NZ supports the addition of the porch canopy (the new frontage), it questions the need to demolish the baptistery unless the applicant is "…entirely sure that there is no alternative possible solution…". As detailed in this AEE, the applicant is entirely sure that there is no alternative possible solution…" available to it that would avoid the removal of the baptistery.

44. Upon lodgement of the application, Mr O'Leary for the Council sought further information from the Applicant in accordance with s 92 RMA, by letter dated 20 November 2019. The letter included the following request:

> 5. Reference is made throughout the documents included in the application of previous design iterations, including an earlier design that was taken to consultation; and, options for a west porch entry, that were discarded. Can you please outline what these alternative options were, including what options were consulted on with parties.
>
> Note: it would be useful to demonstrate through further evidence why a west entry was considered to be an unworkable solution; and, understand see how previous designs have been "improved" in light of heritage considerations or issues raised as stated within the application.

45. The response to this request, provided on 15 January 2020, included an undated attachment (Appendix 3 to the letter), appearing to have been created to summarise the Applicant's exploration of various entrance options. The document, called "All Saints Church Entrance Options" ("**the Entrance Options Report**") states the "*goals*" of the Applicant in relation to the entrance, and then identifies and gives brief consideration to four different entrance options, saying:

> Of the options considered, the two narrow existing entrances are impracticable. It is possible to fashion an entrance on the east side, but this would compromise both the fabric of the building, and not meet use requirements for the next 50 years. Some adaptation of the building is necessary, with the best practical solution being an entrance from the baptistery. We conclude that this is realistically the only feasible solution, and the effects of the loss of the baptistery can be balanced by, for example, the opening of the interior of the church to people on the street and the relocation of the stained glass windows.

46. The substance and sufficiency of this report in terms of its assessment of entrance alternatives is the subject of a detailed critique by Ms Stevens at paragraphs 124–141 of her s 42A report. For various reasons given in that critique, Ms Stevens concludes by giving her opinion at paragraph 141 that the Applicant has not presented a thorough costs benefit analysis. Further

to reasons given by Ms Stevens, we make the following observations in relation to the Entrance Options Report:

a. It is not clear when it was prepared or who authored it.

b. No alternative entrance options were considered in relation to their relative impact on identified historic heritage values of the Church.

c. There is no indication in the report that any heritage advice was taken in relation to the relative effects of the options.

d. The Church's stated missions, vision, and goals which inform the assessment of options within the Report do not have regard to the protection of heritage values.[9]

e. The Report states, in relation to the entrance, that "…*it needs to be obvious, and needs to remove every obstacle that might deter someone from coming in. Any compromise to that goal is unacceptable*."[10] This demonstrates a severely narrow consideration of options, particularly (as noted by Ms Stevens) where the "*obstacles*" in this case refers to what the heritage experts agree is a particular feature of the building with high heritage values.

47. The approach of the Applicant in the Entrance Options Report is consistent with the design approach of the lead designer of the alteration, Mr Soong. Informing the design approach, Mr Soong says it was "… *all about connecting with people*"[11], and "*you can't have sanctuary and community engagement simultaneously*"[12], and "…*we want this building to have a path of least resistance. This is the opposite approach to encountering the brick walls of the baptistery*."[13]

48. Mr Soong then describes the "*key operational aspects*" of the design process, in which he declares that they "*pushed the possibilities wide*"[14].

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9 Page 3.
10 Page 4.
11 Statement of Evidence at paragraph 15.
12 At paragraph 16.
13 At paragraph 17.
14 At paragraph 21.

However, the stated key operational aspects are remarkably narrow about the operational design requirements for the new entrance, including "*direct level entry from the footpath*"[15], and "*direct forward entrance in the main building via the existing baptistery arches*".[16]

49. Mr Soong identifies that the key design elements for the alterations were settled by the Church in its 2015 concept.[17] Mr Dixon further explains that "*…a 100% agreement was reached in 2015 to strengthen and enhance, based around the design of Matt Soong… Acceptance of this occurred at the end of 2015.*"[18]

50. In settling on the 2015 concept design, the Applicant's evidence does not demonstrate that it had regard to heritage considerations in respect of the settled design or any potential alternatives. This may be because the Applicant and its congregational witnesses, in settling on the concept design, did not consider that heritage values of the baptistery and external building fabric should be held in high regard, as seen in the following examples. This is not intended as a criticism of the Applicant's representatives who hold these views of the building's values. It is simply a statement of what these views appear to be and how they informed the development of the options at the time, recognising the inherently subjective nature of the matter and therefore the need for expert opinion. Demonstrating this: ~~. For example:~~

a. Mr Soong regards the brick walls of the baptistery as a hindrance to good design;

b. Mr Dixon decries the "*external cladding of the building*" as being attributed with primary heritage value, which he considers to be "*reductionist and disrespectful*";

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15 At paragraph 22.
16 At paragraph 22.
17 ~~Statement of evidence at~~At paragraph 8.
18 Statement of Evidence at paragraph 5.

c. Ms Fordyce gives her opinion that "*over-attachment to the mere form of a building is a form of idolatry*";

d. Mr Neall's describes the exterior of the baptistery as "*unfriendly and fortress-like an almost add-on structure portraying poorly the Christian ethos. It is a significant barrier to access to the front of the Church*"; and

e. Mr Forrest borders on derision in pigeonholing the heritage experts engaged by the Council and Heritage NZ as "*fabric conservationists*", a characterisation strongly refuted by Mr Jacobs and indeed the Council's heritage expert.

51. Collectively, the Applicant's representatives appear to regard the loss of heritage fabric as one merely requiring a quantitative calculation of the percentage of the building fabric that will be 'lost', as opposed to consideration of how the proposal interacts with features of particular heritage significance.

52. The Applicant's decision to support the concept design founded on demolishing the baptistery pre-dated independent professional input from experts in heritage conservation. Independent expertise did not feature until Mr Brown and Mr Cogan were engaged by the Applicant in 2017.

53. For the Applicant, Mr Brown's evidence is complementary of its "*thorough analysis*" of the alternative options, and while he states that the "*preferred concept has been significantly revised*" because of professional input, ~~no~~ very few specifics are provided and it appears to be clear that alternatives to demolition of the baptistery were not, in fact, considered.

54. While Mr Brown's Heritage Impact Assessment states that "*through this design process several schemes and options have been considered*", the only specific option identified in that report (*at Appendix 5 "Options Assessment*") is a sketch of an alternative West Porch entrance. This is the option that Mr Soong is referring to in his evidence where he states "*At HNZ's request we developed workings using the West Porch as a main entrance to show that it would not be a viable option*."

55. Mr Cogan, on the other hand, is more transparent in his evidence about the rigidity of the concept design presented to him by the Applicant. While Mr Cogan refers to early advice that he gave the Applicant that the concept design "…*will struggle through any heritage assessments*", he then describes the "*design principles and form*" he subsequently received from the Applicant upon his instruction as "…*being essentially a fait accompli*." It should not be assumed that Mr Cogan's choice of language here was a mistake. Mr Cogan's evidence also does not demonstrate a thorough analysis of alternative options or claim that one has been done, beyond consideration of the West Porch option referred to above. Mr Cogan's oral presentation at the hearing shed little further light on this process.

56. Overall, what the Applicant's evidence in its totality reveals is that All Saints commenced this process in 2015 with an overly narrow focus on an entrance through the baptistery as a "*optimal*" entrance to meet its subjective needs, while undervaluing the heritage values of the external fabric of the church. In framing the design requirements in such a way that they could only be achieved by demolishing the baptistery, the Applicant has precluded itself, and its expert advisors, from carrying out any genuine open-minded assessment of alternative design options for the entrance and additional space which might better protect the heritage values of the building.

57. The Applicant's submissions and evidence on the relevance and significance of alternatives assessment is somewhat conflicted. The Applicant appears to maintain an argument that there are no alternatives to assess because only the application reflects exactly what they want to do. There are, however, alternatives. The Applicant's Entrance Options Reports is a meagre starting point, but at the very least identifies what *some* of those options could be. These are not "illusory" options, and we know this because the Applicant identified them. Indeed Mr Brown voiced his agreement in answer to questions that an entrance on the west side of the building is an alternative. The Applicant's protests and statements that those options are unworkable cannot be demonstrated by reference to any design or other information, but that does not mean that the options are

an illusion, that only means that the Applicant's has not carried out or indeed demonstrated a thoroughly analysis of those options.

Mr Forrest's Cost Benefit Analysis

58. By letter dated 27 October 2020, the Council wrote to the Church, identifying that it did not consider that Item 5 of the s 92 request from November 2019 had been met to its satisfaction by the Options Report provided. This letter followed further meetings between the parties over the course of the year. Mr O'Leary states that "… *It is presently unclear as to what extent realistic alternative options have been considered*…" and he asks for a thorough cost benefit analysis of the alternative options to be made available, saying that "*an assessment of different options including the one supported by the applicant will be essential for an understanding why other (less invasive options) have been dismissed.*"

59. The response from the Church on 28 October 2020 provided several reasons as to why Mr O'Leary's request was misguided and explained that the cost benefit assessment required by Policy 1.4 would be addressed through evidence.

60. This is presented in Mr Forrest's evidence. Mr Forrest begins from the premise that an assessment of costs and benefits is as "*a procedural safeguard rather than a standard to measure the appropriateness of the proposal itself*".[19] At paragraph 46, Mr Forrest says that he undertook the cost-benefit evaluation and that he developed the notional alternative, although at paragraph 54 he explains that the values framework uses in his cost benefit evaluation was developed with the assistance of CBAB and the Congregation.

61. The values document itself, at Appendix 1, and the evaluation of the "Alternatives" at Appendix 2, is, with respect, a tokenistic evaluation reflecting the Applicant's opinion as to the value of the process. Unsurprisingly, the values and evaluation provide further rationalisation what has long been, as described by Mr Cogan, a "fait accompli" and lacks

[19] Paragraph 43 and discussed further at paragraph 58.

in detail and depth of assessment. It is therefore not thorough. Demonstrating this:

a. The "values" against which the alternatives are judged by Mr Forrest are defined by the Applicant and overwhelmingly relate to the design objectives identified by the Church.

b. Of 25 values developed and rated by the Church, only one – "*Her-V3 – Preservation of most of the external fabric*" relates to the effects on the baptistery.

c. The value "Her-V32" is judged by Mr Forrest based on the percentage of external fabric that is retained, rather than the heritage values attributable to the fabric being lost, and the value does not correspond with any of the heritage values frameworks identified by the heritage experts.

d. There is no detail presented by Mr Forrest or any other witnesses as to the "notional" design for the side entrance option, and it is therefore impossible to verify with any independence whether the scores given to this option are reasonable or justifiable in comparison with the proposal. The comparative exercise is therefore not fair in respect of a side entrance option.

e. Economic, social, and cultural effects are either not considered at all (in the case of economic effects), or they are not considered with a broad enough lens as to those effects.

62. Ultimately, the evaluation presented in the evidence does not, and cannot, cure the absence of a 'thorough assessment', as required by Policy 1.4. This exercise undertaken by the Applicant has been flawed from the outset because the parameters that potential alternatives had to fall between were too narrow. Contrary to best practice and procedural requirements for a thorough assessment of alternatives, the process followed by the Applicant demonstrates a process aimed at disposal of alternatives in favour of a decision that had been made at an early stage.

63. The alternative option that stands out from the crowd of possible alternatives as one requiring further detailed assessment is the west side entrance option. Despite its identification as an alternative entrance in the Entrance Options Report, it has never been sufficiently detailed as an alternative option for an entrance to enable it to be subject to a thorough assessment. It is an option that would, prima facie, result in several advantages including in terms of fabric retention, preservation of heritage values, better accordance with relevant assessment criteria in terms of preserving the building façade, while achieving many of the Applicant's objectives.

64. In circumstances where (at least) this option is not thoroughly assessed by the Applicant, for reasons considered above, it may prove difficult for the Commissioners to conclude that the application represents an appropriate development in respect of a heritage building of national significance.

Objectives and Policies Assessment

65. Section 104(1)(b) of the RMA requires the Commissioners to have regard to relevant provisions of the District Plan in making their evaluation.

66. In a typical resource consent application, the Commissioners would have the benefit of a planning opinion as to the relevant provisions of the plans, how they should be interpreted, and how they should be applied in relation to the particulars of the proposal.

67. In this case, Mr O'Leary has performed that task and his opinions on those matters relevant to s 104(1)(b) are set out in his s 42A report. The relevant provisions are identified at Appendix 2, discussed at pages 14 – 17, and the proposal is then evaluated in respect of those provisions comprehensively and fairly throughout section 4 of his report.

68. The Applicant's planner Mr Forrest has not considered the application against the relevant policies with the same rigour. Mr Forrest's evidence does not contain a detailed analysis of the application against any of the most relevant planning provisions and in particular Policy 1.4. There is no clear statement, for example, of how Mr Forrest says Policy 1.4 should be

interpreted and applied. This is not to say that Mr Forrest's evidence does not refer to and discuss Policy 1.4, however, the specificity of analysis of the Policy required for this task has not been completed.

~~68.~~

69. Mr Forrest's evidence does, however, contain various statements misdirecting the Commissioners as to the law relating to the evaluative exercise, and includes an unorthodox reimagination of the local planning strategy in respect of heritage buildings. This section of the submissions is intended to realign the Commissioners as to the correct approach.

"Synthesised" approach to policy interpretation and application

70. Mr Forrest begins paragraph 40 by stating that "*the importance of scrupulous attention to detail in the interpretation of the Plan is evident from the approach I take in my evidence*." Mr Forrest then presents, a "synthesis" of the district plan strategy in a single paragraph that he says is intended to "… *Create a coherent vision of sustainability appropriate to the evaluative task*". While it is agreed that scrupulous attention to detail is important, Mr Forrest's synthesis is not a demonstration of this. The synthesis bears little resemblance to the detailed wording of the actual provisions intended to guide the exercise of the decision maker, providing instead the Applicant's gloss.

71. Note, for example, that the synthesis does not attempt to grapple with the requirements of Policy 1.4. It is otherwise difficult to identify any clear logic from the Applicant about Policy 1.4, including what it says about the Application if it is not met. Instead, the synthesis merely says:

> that is achieved by allowing the sector of the community that established the heritage building and place a fair opportunity to meet their largely self-determined future needs in an appropriate way, including partial demolition.

72. Mr O'Leary, on the other hand, provides a detailed analysis, as follows:

> 4.24 I make the following observations about this policy [Policy 1.4]:

> a. The policy relates to partial demolition and it is of particular relevance to the demolition of the baptistry and other insertions into the west wall of the building.
>
> b. This policy acknowledges the need for long term sustainable use of scheduled buildings and that partial demolition may be appropriate, and the policy then goes on to give direction as to the two circumstances where it may be appropriate.
>
> c. There are two limbs to this policy, both of which must be met to qualify (for the purposes of the policy) as a circumstance that may justify the partial demolition:
>
> > (i) that proposals demonstrates that the overall retention of significant heritage values; and
> >
> > (ii) that resource consent decisions are informed by a thorough analysis of the alternative options available, including social, cultural, economic and environmental costs and benefits. I consider this second item to be a fairly clear direction in terms of the information required to inform such decisions.

73. While interpretation of policy is not solely a matter for expert planning opinion, it is nevertheless submitted that Mr O'Leary's observations demonstrate a considered and accurate interpretation of the precise Policy phrasing. Mr O'Leary continues at paragraphs 4.25-4.27 to apply his interpretation to the material available in this case.

74. Mr O'Leary's exercise as a planner is not limited to Policy 1.4 alone, it is an exercise repeated in relation to all the relevant district Plan Provisions that inform his recommendation. This is consistent with good practice. Mr O'Leary ties off his assessment by considering his views in relation to the relevant objective that informs the policies (Objective 1), concluding (in the terminology of the objective), that the application would be contrary to the objective of ensuring that buildings of cultural heritage value are <u>appropriately</u> protected and preserved.

75. Further, at paragraph 4.100 (not reproduced here), Mr O'Leary provides his overall conclusions in relation to his analysis under s 104, illuminating the

weighting exercise that he undertook in making his conclusions, and demonstrating that he has followed the approach required by the Court of Appeal in *Davidson*.[20] Mr O'Leary states, in the language of *Davidson*:

> I have undertaken a fair appraisal of the relevant provisions, when read as a whole, noting that where provisions are expressed in more directive terms they have been given more weight than those that are phrased more generically.

76. In comparison to the evidence submitted by the Applicant, it is Mr O'Leary's logical and thorough planning assessment that best embodies the spirit of the Supreme Court's approach towards undertaking detailed analysis of policy provisions:[21]

> [129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

77. Mr Forrest's evidence justifies his synthesised approach on the basis that "*reconciliation*" of the provisions is necessary considering what he regards to be competing policy interests. The major flaw in this approach is that the Applicant jumps prematurely to the reconciliation task without first paying close attention to the wording of the relevant policies. Had this approach

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[20] *R J Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283 (CA).

[21] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] 1 NZLR 593 (SC).

been followed, it would be apparent that the claims of tension are overstated. Policy 1.4 is a perfect case study of this approach in practice. Beyond Mr O'Leary's accurate observations above, we make the following further observations:

a. Policy 1.4 is highly and directly relevant to the proposal, because its subject matter deals with '*partial demolition'*, including this resource consent;

b. It is phrased in such a way that drives directly at the 'tension' between competing interests, by expressly '*recognising*' that there will be circumstances in which the long-term sustainable use of a scheduled building will be *appropriate*;

c. The word "*appropriate*", in this context, gives precise local flavour to the language of "*appropriate*", consistent with its usage in Objective 1, and indeed s 6(f) of the RMA. I address this point further in the next section.

78. The other policies at 1.1–1.8 have undoubted relevance to the evaluative task, as do the Assessment Criteria identified and assessed by Mr O'Leary. None, however, have such case specific relevance as Policy 1.4. By the way that it is phrased, it is plainly intended that Policy 1.4 should be highly influential to decision makers in cases precisely like this. Therefore, the broadscale 'reconciliation' of competing policy directives undertaken by the Applicant is unnecessary and only serves to incorrectly dull the importance of Policy 1.4.

79. It is also difficult to understand the Mr Forrest's logic in relation to other specific provisions in the District Plan, and how they are said to apply. This is not helped by Mr Forrest's unavailability for expert conferencing. Relevant issues not addressed by Mr Forrest in relation to the s 104(1)(b) exercise include:

a. Whether he agrees that Mr O'Leary has identified the provisions that are relevant to the evaluation under s 104?

b. Does he agree with Mr O'Leary's interpretation of Policy 1.4, including as to its relevance, interpretation, application, and weighting?

c. What is his opinion in relation to assessment criteria at R17.7.2a and does he agree or disagree with Mr O'Leary's assessment of these at paragraphs 4.31 – 4.49?

d. Further to (c), what does Mr Forrest say about Assessment Criteria R17.7.2(e), and (h), which Mr O'Leary considered weighed strongly against the application?

Further Policy analysis

80. Mr Forrest for the Applicant includes in his evidence comments ~~makes some submissions~~ as to the meaning of the word 'appropriate', by reference to the Supreme Court's decision in *King Salmon*. Relying on *King Salmon,* Mr Forrest states that *"'inappropriate' is contextual to the values to be protected and the extent of protection".* Mr Forrest explains that 'inappropriate' in this case requires consideration of *"… a complex of social and cultural and environmental dimensions"*.

81. While is difficult to understand exactly what is meant by this 'complex', the outcome of the Applicant's approach results in its position in relation to values being somewhat askew, including the way in which the Applicant's witnesses rationalise their implementation of key policy 1.4 by 'balancing' negative effects on heritage values with what it describes as "positive enhancements". This is relevant to Mr Brown's Approach to assessing the proposal.

82. To begin this discussion, it is correct that the word 'inappropriate', and its inverse 'appropriate', are important. That is because the words appear in relevant provisions that the Commissioners must have regard to. These submissions provide further guidance as to what this means, considering the context of its usage. The phrase appears in three relevant provisions as follows:

a. Part 2 of the RMA, specifically section 6(f), requiring decision makers to *"recognise and provide for… the protection of historic heritage from inappropriate subdivision, use and development"*.

b. In the Palmerston North District Plan, Objective 1 at Chapter 17.3 references the word in the Palmerston North context *"to ensure that buildings and objects of cultural heritage value to Palmerston North are appropriately protected and conserved"*.

c. Policy 1.4 which, as discussed elsewhere in these submissions recognises that there are circumstances in which partial demolition *"… may be appropriate"* to ensure the long term sustainable use, before identifying those circumstances.

83. As above, the word "inappropriate" or its inverse appears at three different levels on the planning hierarchy. In relation to this hierarchy of planning documents and provisions, the Supreme Court observed that:[22]

> The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

84. Thus, while each provision referred to above utilises the word "*appropriate*" or *"inappropriate"* to express what appears to be a non-specific standard of protection, the inherent expectation is that specificity increases down the hierarchy of documents and provisions, all against the backdrop of the national bottom line established at s 6(f).

85. In terms of the meaning of inappropriate at the top of the hierarchy, under s 6(f), the majority held:

[22] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] 1 NZLR 593 (SC) at [14].

> [105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved.

86. Objective 1 in the District Plan provides increasing specificity, at least in terms of locality. Whereas s 6(f) sets the national standard, Objective 1 sets the local standard, whereby "appropriate" developments are therefore 'not inappropriate'. While s 6 refers generally to historic heritage, Objective 1 is concerned with buildings of cultural heritage value "…*to Palmerston North*." Otherwise, the use of the word 'appropriate' is consistent with s 6, within the frame of Palmerston North.

87. The context of what is *sought to be protected or preserved* by Objective 1 is given further meaning through the Policies that implement it. Policy 1.2 provides for the Council to follow a process of identifying and categorising those items or buildings with cultural heritage values to Palmerston North. The process of applying the policy requires the Council to schedule those buildings "…*according to their relative cultural heritage values, and having regard to any social, economic and environmental aspects of this decision…"*.

88. Following the listing process in the District Plan (ostensibly having regard to all the matters that the policy requires), the All Saints was identified as Category 1, meaning that it is a building with *"…outstanding cultural heritage value to the City.*" This is consistent with its significance on the national stage, as it is also recognised by the heritage experts that "…*as a Category 1 listed Historic Place, the church is recognised as having outstanding national significance and that is appropriate*."[23]

89. The requirement to schedule buildings under the Plan in accordance with the Policy 1.2 process illustrates that the standard of *appropriate* protection or conservation in the context of Objective 1 refers to the protection or conservation of those attributes or values which the building has been recognised as possessing.

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[23] Joint Witness Statement of Experts – Heritage Assessment, Annexure A.

90. As it happens, in this case there is a high degree of agreement between the heritage experts as to what heritage values the building possesses (excluding Mr Bowman who did not attend conferencing). The heritage experts have agreed that the heritage values expressed in Table 5 of Mr Brown's Heritage Impact Assessment are an "*appropriate baseline.*"[24]

91. We know, therefore, in terms of Objective 1 and s 6(f), what it is that is sought to be protected. It is a building with outstanding value to Palmerston North and New Zealand, possessing (as an appropriate baseline) the heritage values identified by the ITA, seven of which are rated by Mr Brown as having "*High*" significance. It is those specific values which form the particular feature of the environment (the building) which requires protection by Objective 1 and s 6(f).

92. In the context of "*appropriate*" protection of identified values, Policy 1.4 appears again. Policy 1.4 is the policy that, in terms of the planning hierarchy under the RMA and King Salmon, has arguably the greatest *specificity* to the subject matter at hand. The word "*appropriate*" in Policy 1.4 is also heavily affected by its context. Where Objective 1 gives guidance and sets the tone for "*appropriate protection*", Policy 1.4 is consistent with it, implementing Objective 1 by expressly recognising that there are circumstances in which partial demolition "…*may be appropriate*", as the enumeration of the local standard. As discussed variously in these submissions, Policy 1.4 continues by prescribing, with greater specificity, what those circumstances are, including where:

- *It can be demonstrated that relocation or partial demolition will result in the overall retention of significant heritage values.*

93. Drawing on all the discussion above, the following key submissions are made in relation to this key part of the policy:

[24] Joint Witness Statement of Experts – Heritage Assessment, Annexure A.

a. "*significant heritage values*" refers to those significant heritage values which the building has been recognised as possessing.

b. "Retention" signals that the building is required to continue to possess those existing significant heritage values after the relocation or demolition. "Retention" in this context is a recognition that those values require protection from adverse effects. Retention is not about instilling values in a heritage building that do not currently exist;

c. The words "*overall retention*" do not allow for the loss of significant heritage values to be balanced against or compensated by "*positive enhancements*" to other values, in the manner supported by Mr Brown[25] and Mr Forrest, as though the protection of heritage values allows for some type of values trading. Such an interpretation is not consistent with the ethic of protection, or prevention, as a core element of sustainable management.

d. The word "*overall*" functions in this context as a recognition that partial demolition or relocation does not require the retention of absolutely all heritage values that are associated with a particular building. Significant heritage values must, however, be retained. Whether significant heritage values are retained is a matter for expert opinion and for evaluation by the Commissioners.

94. What the proper application of the policy tells us, is that an application for a partial demolition which is not able to demonstrate significant heritage values possessed by the building will be retained, should be regarded as inappropriate or *"not appropriate"*.

95. Note that this is a case where there is a consensus opinion of recognised heritage experts that the adverse effects will be significant.

Conservation Plan

96. The Commissioners sought clarification as to the relevance of the Conservation Plan to their decision. The Commissioners have since heard

[25] Joint Witness Statement of Experts – Heritage Assessment, Annexure A.

that the Conservation Plan has relevance because an assessment criterion in the District Plan makes it relevant. We agree with that.

97. Further, by way of observation, we also submit that the Conservation Plan could be regarded as a relevant other matter for the purposes of s 104(1)(c). In any case, however we get there, it is a relevant document that was submitted by the Applicant in support of its application.

98. Under the District Plan, the Conservation Plan is described as having a specific function that supports the role of District Plan Rules. Rule 17.7.2 relates to external alterations and additions. The Rule provides that:

> In determining whether to grant consent and what conditions to impose, if any, Council will, in addition to the City View objectives in Section 2 and Cultural and Natural Heritage objectives and policies, assess any application in terms of the following assessment criteria … The extent to which any proposed work is in keeping with any conservation plan for the building.

99. Thus, where a Conservation Plan exists the rule requires the Commissioners to understand the extent to which any proposed work is in keeping with the Conservation Plan. If the proposed external alterations and additions to the Schedule 1 building are not in keeping with a Conservation Plan that exists for the building, this can be a criterion that speaks against the appropriateness of the development.

100. In this case, the Council's witnesses Mr Bowman and Ms Stevens give evidence that the proposal is inconsistent with the Conservation Plan. They can answer questions about that, but for present purposes we simply refer to the following policy from the Conservation Plan:

Identified Threat	Policy No.	Policy	Priority
External additions			
5.2.2 a, b, g, l,	6.1.1.11	Where any external additions are contemplated for the church, these shall be located in such a manner that	Needed

		they do not impact on the heritage values of the church, including visibility of and views from and of the street elevation. They should comply with the ICOMOS NZ Charter, and other relevant guides.	

101. Mr Maassen argues at paragraph 252 that the Conservation Plan expressly contemplated the removal of the Baptistry wall, and that Mr Bowman has acknowledged that need as legitimate. This is not a fair reading of the Conservation Plan and would appear to be in direct conflict with the clearly expressed policy and priority identified above. It also demonstrates a misunderstanding as to the purpose of the Conservation Plan, as distinct from the resource consent application and what the Applicant's objectives were known to be. Mr Bowman will address this further.

~~101.~~102. The fact that the Conservation Plan has not been formally adopted by the Applicant, and is therefore essentially in draft form, has no bearing on its relevance here. The Conservation Plan has been commissioned, prepared and supplied by the Applicant through the application process. There is no distinction drawn in the District Plan as to status of a Conservation Plan.

Part 2 RMA

~~102.~~103. The Commissioners have asked whether this is a case in which we should have recourse to Part 2, or whether the plan is complete. There are two parts in answer to the query.

~~103.~~104. Firstly, w~~W~~e agree with Mr Maassen that the district plan is a complete expression of the relevant principles and that recourse to Part 2 is not necessary.

~~104.~~105. With that said, we note that *Davidson* is explicit that there is no barrier in Part 2, and therefore the Commissioners are free to have reference to it.

~~105.~~106. The real difference between Mr Maassen's submissions and these submissions is that we plainly disagree about what it is that the District Plan says, and how it should be applied.

107. In that context, reference to s 6(f) in Part 2 has a place in terms of considering the way in which the District Plan develops upon the standard of protecting historic heritage from inappropriate development. It is entirely proper for the Commissioners to refer to Part 2 and its principles in this way, as an aid to assist with understanding of relevant district plan policies which implement them.

108. Secondly, if it is the decision of the Commissioners that Policy 1.4 is not relevant to the application at hand, then this will be a clear case of a policy gap and therefore incompleteness of the district plan, in relation to partial demolition activities. If this interpretation is the finding of the Commissioners, then recourse to Part 2 is ~~in fact~~ necessary to take guidance on the key matters at issue.

~~106.~~

Encroachment into footpath

~~107.~~109. Despite agreement between the Reporting Officers and the Applicant about the relevance in s 104 terms of legal permission from the Council to occupy the road reserve with its building, the criticisms directed at the Reporting Officers for ~~daring to raise~~raising these questions are unwarranted.

~~108.~~110. Despite it being possible to seek a resource consent in the absence of a property right to occupy the land, it is unorthodox and comes as no

surprise that the question was raised. Additionally, Mr O'Leary is not "the Council" – he is an independent expert witness engaged by the Council who is trying to ensure that the right decision is made. This involves working with Applicants and asking questions determined to address the feasibility of implementing what is proposed.

~~109.~~111. Further, consideration of the environmental effects of the encroachment onto the footpath area is a valid resource management issue for the Commissioners to have regard to, in accordance with s 104. The encroachment into the footpath area and its effects, and the relationship between the encroachment and any relevant district plan provisions including assessment criteria are considerations that is it proper for the Reporting Officers to consider and report on.

~~110.~~112. It is in that context that Mr Van Bentum's views were sought and obtained. The views of Mr Van Bentum's predecessor Mr Lane, or the Council as an elected body, are of no direct relevance here. While the Applicant points to the $300,000 grant made by the Council as indicative of the Council's support for every detail of this proposal, including the encroachment, the reality is that in accepting that grant, the Applicant expressly acknowledged that:

> [N]othing in this agreement or relating to the provision of the grant will affect or influence the delivery of PNCC's statutory functions under the Resource Management Act 1991, the Building Act 2004, or any other act.

Risk of destruction

~~111.~~113. According to the Applicant's case, a decision to decline the resource consent would seal the fate of the All Saints Church which would then need to be demolished as a natural consequence. In oral submissions, Mr Maassen developed a submission that the Building Act would "trump" the Resource Management Act, such that if the All Saints Church were to subsequently seek a consent under the District Plan to entirely demolish the building, it would inevitably be granted to make way for any Building Act requirements.

~~112.~~114. The Reporting Officers do not agree that demolition is the inevitable consequence of decline, nor is Mr Maassen's submission correct.

~~113.~~115. It is simply unwise and unhelpful to this process to speculate about what will become of the All Saints Church if consent is declined. The only bankable legal submission that can be made is that if resource consent is declined, the existing environment will continue to be the existing environment, and that includes as to the current condition of the All Saints Church.

~~114.~~116. Although the Church's representatives are expressing an unimpeachable ~~-~~view that no other proposals will be considered, there is no accounting for how those views might evolve over time. It would not be good practice to interpret those assertions as evidence that the building will be demolished. The fact that the clock might be ticking on the Church, owing to its earthquake prone status, does not mean that we can predict its fate or that it is appropriate to try in this forum. Decision making based on speculative fear of an eventual outcome would not be conducive to a sustainable outcome.

~~115.~~117. If we were to speculate, we could just as easily predict that the views of the Church may well evolve in relation to their willingness to consider alternative entrance locations and/or external alteration designs. Despite their adamance in this hearing that this will not occur (and which we do not question), Ms Fordyce noted herself in answering the Commissioners' questions that the importance of the current entrance design as part of the strengthening work was enthusiasm that developed over time.

~~116.~~118. The Reporting Officers find further comfort in hearing from Dr Neall as to the diversity of views among the Congregation, and from the views expressed in the 2015 document "*To Strengthen or Rebuild?".* While the report did recommend that the Church proceed with strengthening of the existing building that incorporated modification to the frontage, what is heartening from the report and the subsequent press releases from Dr Neall is the enthusiasm with which the CBAB threw its support behind the

strengthening works. Although modifications to the front were addressed in the report, the enthusiasm is not conditional upon demolition of the baptistry. Interestingly, the strengthening option that the CBAB chose to support was favoured partly because "… it retains the original exterior and interior of the Church most closely in appearance, hence retaining heritage values".[26]

~~117.~~119. Mr Maassen argues that the Building Act will trump the Resource Management Act. No authority is provided in support of this submission. Mr Maassen presented a hypothetical scenario as evidence of how this would work, in which the Applicant would be seeking a resource consent to demolish in circumstances where that demolition is apparently required under a Building Act notice. Mr Maassen postulated that no consent authority could decline a consent sought on that basis. We disagree.

~~118.~~120. No doubt, while the consent authority presented with a resource consent on this basis would need to consider that application on a case-by-case basis, the Applicant would inevitably still need to grapple with a full suite of policy requirements under the District Plan aimed at discouraging demolition, encouraging continued use, avoiding activities which could impair or destroy cultural heritage values, and so on. This would also include a requirement for the Applicant to present an assessment of alternative options with sufficient rigour. The Applicant has already undertaken that process in relation to the question of full demolition in preparing for this resource consent. In this alternatives assessment, the CBAB stated:

> "The Board surmises that gaining a resource consent for the demolition of a category 1 historic building is most unlikely, considering the Harcourt Building in Wellington as a precedent. Following such a path would be a lengthy, disruptive and fragmental process that has the potential to split the All Saints community. It would also expand a considerable sum on legal fees without contributing to the cost of the building. Furthermore, after such a lengthy process the costs of rebuilding a church in say 10 years time

[26] Statement of Evidence of Vincent Neall, Appendix A, page 25.

> will be considerably greater than at present. We find the demolition and rebuild option **unviable** in the current legislative framework for the preservation of a category 1 historic building.

~~119.~~121. We concur.

New Zealand Bill of Rights Act Considerations

~~120.~~122. Undoubtedly, the human rights and constitutional issues raised by the applicant are very interesting. A hearing panel convened under the RMA is not, however, the correct forum in which to discuss them.

~~121.~~123. Nor is there any need for them to be discussed here. Fundamentally, the Applicant fails to describe how a decision to decline resource consent by the Commissioners, should they do so, would in any way encroach upon the Applicant's right to religious freedom. As highlighted by the Applicant themselves at paragraph 178, the District Plan, in the explanation to Rule 17.7.2 (sometimes cited as R17.2.2 in the Applicant's submissions), explicitly notes it does not impose control on the manner of religious or liturgical practice. This is because the Rule is concerned only with the management of external design, appearance, and heritage effects, being considerations relevant to sustainable management, not because any tangential connection to liturgical practice should exempt an applicant from the provisions of the Plan.

~~122.~~124. At paragraph 169, the Applicant quotes the NZBORA formulation of the right to religious freedom, which reads:

> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

~~123.~~125. This right is simply not engaged, when the Applicant's proposal is dispassionately reviewed. The Commissioners, exercising their discretion to decline the application for resource consent (should they do so) in no way affects the above right. This is, and remains, a case about the heritage effects of the partial demolition of a Category 1 heritage building. The legal principles relevant here are so far from constitutional and human rights law

that the two fields could be described as 'non-overlapping magisteria'. They are utterly different realms of purpose.

~~124.~~126. This is not to say that these fields of law are always irrelevant to resource management law. Certain rights are explicitly recognised and provided for in the RMA – for example, the rights of Māori regarding their relationship with ancestral lands, waters, sites and other taonga, along with their other culture and traditions, are matters of national importance. New Zealand's fundamental constitutional document, the Treaty of Waitangi, must be taken into account by all persons exercising functions and powers under the RMA. In contrast, NZBORA, as an expression of rights at large, is not expressly incorporated into the RMA.

~~125.~~127. Even so, there may be provisions in the RMA susceptible to reinterpretation in accordance with the 'principle of legality' set out by Elias CJ in *Ngati Apa Ki Te Waipounamu Trust v R*,[27] but if there are, the Applicant provides no examples of them in their submissions. Nor does the applicant address the 'elephant in the room' relating to all NZBORA arguments – s 4 of that Act provides that other enactments are not overridden by virtue of being inconsistent with the rights in the NZBORA (not that any such inconsistencies have been identified here). Despite the applicant's assertion at paragraph 175 that the NZBORA is "higher law" in New Zealand, the NZBORA expressly yields to other unambiguously worded enactments.

~~126.~~128. At paragraph 177 the Applicant submits that Parliament's intention in protecting heritage from inappropriate development under the RMA was not to impose unreasonable control on the alteration of ecclesial spaces. While this is correct, insofar as Parliament did not intend local authorities to impose unreasonable controls on any spaces, declining resource consent in this case would not be unreasonable.

~~127.~~129. It appears that, in the A~~a~~pplicant's view, any exercise of a local authority's responsibilities under the RMA in relation to ecclesial spaces would be unreasonable. However, as stated in *Poutama Kaitiaki Charitable*

[27] *Ngati Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 at [82], quoted by the applicant at 175.

Trust v Taranaki Regional Council, "*the right to enjoy one's land is necessarily subject to lawful processes which govern and limit those rights*".[28] The provisions of the Resource Management Act and the Palmerston North District Plan impose lawful, reasonable restrictions on use and development of heritage buildings, and the applicant should not seek to escape them with spurious objections. Religious freedom rights, even if they were relevant, do not give religious institutions permission to be treated as a special case in regard to planning law. Again, quoting *Poutama Kaitiaki* – "*No NZBORA implications arise here*".[29]

Options for Decision

~~128.~~130. Ryan O'Leary recommended that consent should be declined. Mr O'Leary then suggested that if the panel considered it appropriate, there was good justification for consenting only the strengthening elements.

~~129.~~131. Mr~~y~~ Maassen strongly opposes the suggestion, describing it as unlawful. While in our submission, the point is not as clear as Mr Maassen submits it to be (indeed, we say it can be done and in fact it is done in resource consent decisions all the time, for example in the case of wind farm resource consents) there seems to be little point in putting legal arguments on the issue given the applicant's current position on it.

~~130.~~132. If the Applicant sees no value in a resource consent that allows for the strengthening works then as a practical consideration the Reporting Officers do not see sense in forcing it to have one, despite the benefits that it might actually provide to the Church, noting, as Mr Brown did, that it would impose no obligation on the Church to actually do the strengthening.

~~131.~~133. Our recommendation is that it is not considered as an option for the decision.

Mr Bowman's evidence

[28] *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [251].
[29] At [251].

~~132.~~134. A final matter must, unfortunately, be raised.

~~133.~~135. The Applicant's challenges to the professionalism of witnesses for other parties continues to be a disappointing aspect of its approach. It is recognised that the Commissioners have already made their views clear about Mr Bowman's continued involvement. Mr Bowman should be entitled to respond, so I make these submissions in an open forum, in the same manner in which the allegations of unprofessionalism were brought.

~~134.~~136. Mr Maassen submits that "the Council did not address that protest" raised by the Church against Mr Bowman's involvement. This is wrong. To the contrary, the Council strongly objected to the Church's "protest" by memorandum dated 20 November 2020, sent to Mr Maassen, ending as follows:

> If counsel for the Applicant truly considers there is good cause to challenge Mr Bowman's decision to act and his professional reputation, this should be directed to be addressed counsel-to-counsel as soon as possible. Unjustified attacks on a professional's reputation in an open hearing would be inappropriate for various reasons, not least because the Hearing Panel are not the correct arbiters of Mr Bowman's professional obligations.

~~135.~~137. Then, in Minute 2, Mr Chair concurred that it was a matter best addressed counsel-to-counsel.

~~136.~~138. The matter was not raised on a c~~C~~ounsel-to-c~~C~~ounsel basis, to Mr Bowman's unfortunate cost. Mr Maassen is wrong about what Mr Bowman was engaged to do by the Church, and he is wrong that Mr Bowman has acted inappropriately in any manner. The concerns about Mr Bowman should not have been raised openly. The concerns have no resource management purpose, serving only to publicly harm Mr Bowman's professional reputation.

21 January 2021

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Appendix to Legal Submissions for Reporting Officers

Definition of 'demolition'

1. The Palmerston North District Plan defines 'Demolition', saying that it:[30]

> Means the complete or partial destruction of a scheduled building or object, but excludes the partial destruction of a scheduled building which is associated with an approved external alteration or addition.
>
> With respect to scheduled heritage buildings, partial demolition does not include internal demolition work, or minor invasive or destructive testing.

2. There is no definition of either partial destruction or approved external alteration or addition.

3. In reviewing this, we more fully understand Mr Maassen's submission that Policy 1.4 does not apply. This submission is not correct, for reasons we outline, but due to the definition's confusing wording, misinterpretation is understandable.

4. Initially, we can peel away some extraneous detail in the definition we do have. The second clause, "*With respect to […] invasive or destructive testing*" does not apply here. The work proposed is external and highly visible, as it relates to the front-facing façade of the building. The proposal is also not related to any form of testing. This clause is only useful as part of the interpretive exercise here as to what the term 'partial demolition' might *include*. That is, as internal demolition work is expressly *not* partial demolition, removal/destruction of the external façade *could be* 'partial demolition'. This is not definitive, however.

[30] Palmerston North District Plan, Section 4, page 3.

5. Next, the exclusion in the second half of the first clause can also be excluded as not relevant to this case. This exception is, in fact, narrower than it might first appear. A sensible reading of this exception must only exclude exceedingly minor destructions from consideration as 'demolition' of some kind. For example, if to erect the proposed external canopy several bricks needed to be removed from the external building fabric, that might be captured in this exclusion. Further, if one were undertaking external alterations for the purpose of improving the structural integrity of the building and similar destructions needed to take place to secure those works, this would also likely be captured in the exclusion. This latter example takes its shape from an understanding of Policy 1.7 concerning specific alterations to aid building conservation while minimising loss of heritage values.

6. In both examples the exclusion makes sense, as the Policies designed to manage demolition, specifically policies 1.3 and 1.4, would otherwise be drawn into, and unnecessarily complicate, the consideration of an application where the demolition is largely ancillary (or in the case of proposals falling directly under Policy 1.7, is designed to preserve heritage values).

7. ~~It~~ The exception cannot be intended to capture this application, where the partial demolition is the centrepiece of, and logically antecedent to, the rest of the proposed external works. Avoidance of this outcome is the intent behind the inclusion of the condition that the external alterations and additions are 'approved'. If this interpretation were not correct, then even the most drastic example of 'partial demolition' – total demolition sparing only the front façade, or worse – would be captured by this exclusion, as inevitably an 'addition' of a new, more structurally sound building behind it would be part of the proposal to trigger the exclusion. An applicant could bulldoze almost their entire building and could claim that what they were doing was not 'demolition', so Policies governing 'demolition' would not apply.

8. We are then left with a quite short statement that can apply in this case: demolition "means the complete or partial destruction of a scheduled

building or object which is not an external alteration or addition". While providing little guidance, this nonetheless captures an application in which a prominent feature of the front façade of a scheduled building is being partially destroyed.

9. Deferring, as the above explanation inevitably does, to the character and degree of the change in question may not be a totally satisfying answer, and that is because the definition itself is inherently vague and does not provide definitive guidance as to the distinction between the categories of destruction activities and external alteration activities. This is an unusual case (perhaps not as unusual as it should be in District Plans) where the ordinary meaning and construction of the Policies and the Rules in Chapter 17 is arguably clearer without the defined term. This is ironic, as a definition of a term is supposed to clarify the meaning of terms used in district plan provisions.

10. As requested by the Commissioners, we have considered the material leading to Plan Change 13, the plan change relevant to section 17 of the Palmerston North District Plan. The Commissioners' decision on Plan Change 13 notes that:[31]

> The next issue is whether external alterations and additions to all other listed buildings and objects should be classified as restricted discretionary. In assessing this issue we are conscious that activity (which is not defined in section 4) sits between 'routine maintenance' and 'partial demolition' and that it applies only to the external components of a listed building or object. Given the narrow ambit of 'routine maintenance', potential alterations or additions may range from those which are minor in heritage terms to those which might have a significant effect on the heritage values of the building or object. In the context of these Plan provisions, we do not see any simple, or even practical, means of differentiating among the range of potential activities within this group.

[31] Hearing Panel Decision on Proposed Plan Change 13 to the Palmerston North District Plan, 10 December 2014, at 113.

11. It appears that the Commissioners considered that an activity could fall, depending on its facts, on a sliding scale of severity, from routine maintenance to partial demolition with external alterations and additions falling somewhere in between. While possibly instructive as to the intended contextual meaning of each of those terms, this quotation does not resolve the issue at hand here, and Commissioners seem to have foreseen the challenge of sharply delineating those categories.

12. It should also be noted that Policy 1.4 was added by consent order with Heritage New Zealand Pouhere Taonga, following an appeal from the PC 13 decision.

13. Nevertheless, this is an interpretive exercise where ascertaining the meaning of the demolition may require further extrinsic aids, in relation to its purpose, as sole reliance on the plain meaning of the text is insufficient. Section 5 of the Interpretation Act informs this approach, noting that the meaning of a term must be ascertained in the light of its purpose.

14. *King Salmon* provides that reference to Pt 2, or indeed any higher order policy provision or document, can be had to assist in a purposive interpretation, where that is required.[32] Further, *Davidson* makes clear that there is no barrier to reference to Pt 2 in resource consent decision making, including where it is necessary or even helpful to interpret relevant policy provisions.[33]

15. In the light of this, I refer to the discussion in my written submissions that addresses the hierarchical framework of relevant provisions including s 6(f), and Objective 1,[34] and submit that the interpretation that we have offered here is more consistent with that analysis, which demonstrates the lineage of Policy 1.4 in a way that makes its purpose clear. It is a Policy that affords better protection and conservation of heritage values in relation to

[32] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 (SC) at [88].
[33] *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283 (CA) at [76].
[34] At [80]–[95].

potentially major demolition proposals that could imperil those standards of appropriate protection, as they are here.

16. Conversely, by reference *to Powell v Dunedin City Council*, we can also determine what the purpose is not.[35] *Powell* is authority for the proposition that the interpretive exercise should avoid absurd outcomes.[36] The statement in that case is given in the context of avoiding absurd outcomes even when words having a clear meaning. It follows even more strongly that absurdity should be avoided in cases of ambiguous meaning, as we have here.

17. Some potentially absurd outcomes are referred to at Paragraph 7 of this Appendix. Besides the absurdity of the potential scenarios presented, a further absurd outcome would be that the suite of policies designed to appropriately protect and conserve heritage buildings was near silent on anything up to their near total demolition.

18. As an aside, Policy 1.5 does not fill the void created by this absurdity, because it relates to a different subject matter, being the continued use or adaptive reuse of scheduled buildings. While proposals for partial demolition may be consistent with the continued use of a building, a policy promoting continued use does not specifically address demolition activities. Further, if Policy 1.4 was absent, then Policy 1.6 would become more influential, but it is not overly helpful at providing guidance or reconciling the core tensions that exist in cases such as this.

Conclusion

19. The Commissioners do not need to tie themselves in knots in understanding these words. For the reasons given, when considered in the light of their purpose, the proper interpretation of the word 'demolition' and its pair, 'partial demolition', should not be read as excluding proposals that have as their centrepiece major destructive works on the external fabric of scheduled heritage buildings.

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[35] *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA).
[36] At [12].

20. Consequently, the activity status agreed by Mr O'Leary and Mr Forrest is correct, and Policy 1.4 is properly treated as the most relevant policy due to its specificity to this application.

21. Considering, momentarily, the issue from another angle, the Commissioners should ask themselves whether or not a fine-grained discussion whether the relevant activity is 'demolition' is actually necessary. This is because, while exercising their lawful discretion as they see fit, the Commissioners may only make a decision based upon the evidence that has been presented to them.

22. This point is made as this dispute over the meaning of 'demolition' has only arisen in hearing. Throughout the assessment of environmental effects, the applicant refers to "the demolition of the baptistery". Throughout expert witness conferencing the activity was described as 'demolition'. Despite the applicant's sudden change of heart as to the characterisation of their proposal, the body of evidence before the commissioners is predicated upon, in large, the (formerly) shared position that this proposal involved 'demolition'.

23. The Commissioners should be certain that they are only making decisions reasonably available to them, based on the evidence.

Nicholas Jessen