

INDEPENDENT COMMISSIONER RECOMMENDATION
(regarding SECT response to TWC
ERSKINE COLLEGE resource consent application)

A. Introduction and Statement of Engagement

- [1] I was engaged by Save Erskine College Trust (SECT) on Wednesday 21 March 2017 "to make a recommendation to SECT [on] whether it should accept or refuse the request by The Wellington Company for SECT's written consent to develop Erskine College; in accordance with the resource consent application and approval given to the owners by the Wellington City Council on 19 December, with reasons."
- [2] While this engagement is not a delegation by a local authority under s 34A(1), and I understand the prime purpose of this recommendation is to inform SECT decision-making, in writing this recommendation I have complied with the usual independent commissioner decision-making processes and the requirements of s 113 of the RMA.
- [3] SECT has provided me with a copy of legal advice prepared for them by Mr Philip Milne to assist this process. I understand that a copy of this opinion was provided to the Applicant who has indicated that they disagree with Mr Milne's advice but have unfortunately declined to make any legal submissions in response.
- [4] I have not undertaken a site visit, as I do not consider this to be necessary in order to come to a recommendation.
- [5] I have organised the recommendation as follows:
 - A. Introduction and Statement of Engagement [1]
 - B. History to date.....[6]
 - C. Description of the Proposal.....[22]
 - D. Principle Issues in Contention.....[24]
 - E. Summary of Evidence.....[28]
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B. History to date

- [6] In **1987** Erskine Chapel was classified A under s 35 of the Historic Places Act 1980.¹
- [7] In **1992** SECT was approved as a Heritage Protection Authority (HPA) for "the purpose of protecting the buildings and grounds (including the Chapel building) of the former Erskine College in Island Bay, Wellington"² by an Order in Council which came into force on 14 December 1992.

¹ *Trustees of the NZ Hibernian Australiasian Catholic Benefit Society v Minister for the Environment* CP 167/93, 4 ELRNZ 219 at 2.

² Resource Management (Approval of The Save Erskine College Trust as Heritage Protection Authority) Order 1992

[8] In **1993** the HPA gave notice of requirement to the WCC for a heritage order over Erskine College under RMA s 189. A heritage order was duly incorporated into the Wellington District Plan.³

[9] In **1998** the status of SECT as an HPA was subject to a judicial review.⁴

[10] In **2000** the owner of the site (New Zealand Hibernian Australasian Catholic Benefit Society), when SECT's status as a Heritage Protection Authority (HPA) and Erskine heritage order were approved in 1992 and 1993, sold the site.⁵

[11] In **October 2000** Property Link (Developments) Limited bought Erskine College.⁶

[12] On **31 May 2001** the Chris Cochrane and Michael Kelly Erskine College Conservation Plan for Property Link Developments was completed.

[13] On **18 December 2001** The WCC and Property Link (Developments) signed a Memorandum of encumbrance of an 18 year duration,⁷ requiring:

- i. Property Link (Developments) to pay an annual rent of \$1,000, strengthen and maintain buildings (Erskine College and Erskine Chapel) and comply with the WCC DP classification of the buildings, and
- ii. the WCC to provide financial assistance (\$75,000) for earthquake strengthening and maintaining buildings.

[14] On **13 August 2009** Erskine College (Former), which includes the complex and grounds, was entered on the NZHPT register as an Historic Place Category 1 (No. 7795).⁸

[15] On **16 April 2012** Erskine College and Chapel was identified by the WCC as earthquake-prone.⁹

[16] In **January 2015** the Archifact Erskine College Conservation Plan for WCC was completed.

³ Both Erskine Main Block (Convent Building) 1906 and Erskine Chapel of the Sacred Heart 1929/1930 (including all moveable fittings and furniture) are listed on the Wellington District Plan (Map 4, symbol 21/1 and 21/2).

⁴ Trustees of NZ Hibernian Australasian Catholic Benefit Society v William Robson Storey; Governor-General of NZ; Save Erskine College Trust; Wellington City Council CP167/93; (1998) 4 ELRNZ 217.

⁵ *Trustees of the Hibernian Catholic Benefit Society v WCC and others* W59/2000. Paragraph [11](b) states: “*the matter has been resolved by a last minute purchase which has resulted in the appeal being withdrawn and the building protected.*”

⁶ Appendix b, Archifact Conservation Plan (January 2015) pp. 163ff.

⁷ Appendix b, Archifact Conservation Plan (January 2015) pp. 163ff.

⁸ Heritage New Zealand “Erskine College (Former)” (13 August 2009)

<http://www.heritage.org.nz/the-list/details/7795>. The HNZ listing includes: “*all of the buildings and structures known as Erskine College (Former) and their fittings and fixtures, including the main convent building, the Chapel of the Sacred Heart, and all of the grounds including the Reverend Mother's Garden, Our Lady of Lourdes Grotto and the terraced lawn, and notable trees. The following chattels are also included in the registration: all moveable contents of the Chapel of the Sacred Heart (including statuary, pedestals, altars and altar furniture, vestment furniture in sacristy, pews and pedal organ in choir loft) and in the convent building: the remains of the dormitory enclosure (T3) and wardrobe cubicles in hallways as well as plaques naming the rooms. The Coen and Lisieux buildings, St Anthony's and the gymnasium and other additions and extensions to the main convent building are also within the boundary of the registration although they are considered to be of limited significance.*”

⁹ Archifact Conservation Plan (January 2015) p. 8.

- [17] In **June 2015** the property within which Erskine College and Chapel are located was made a Special Housing Area under the Housing Accords and Special Housing Areas Act (HASHAA) 2013 and the Housing Accords and Special Housing Area (Wellington-New June 2015 Areas) Order in Council 2015.
- [18] In **August 2016** The Wellington Company submitted a resource consent to the Wellington City Council (WCC) to develop the Erskine College site.
- [19] On **12 December 2016** an *ex parte* interim enforcement order was made by the Environment Court following SECT lodging an application on 9 December 2016.¹⁰
- [20] On **19 December 2016** WCC granted landuse and subdivision consents for TWC for the redevelopment of the Erskine College site.¹¹
- [21] On **22 December 2016** the Environment Court rescinded the interim enforcement order, accepting undertakings by the Respondents not to act on the WCC consents until either: SECT consented to these, or the Environment Court overturned a decision by SECT not to give consent.¹²

C. Description of the Proposal

- [22] The application is for the redevelopment of the former Erskine College site at 31-33 Avon St, Island Bay. The site is currently used for rental accommodation in the Coen Wing. The Erskine College Main Building and Erskine Chapel are closed off due to their earthquake-prone status.
- [23] The TWC resource consent application proposes to re-develop the site primarily for residential purposes, and the non-residential adaptive re-use of the Erskine Chapel. This includes:
 - i. multi-unit residential development (96 units);
 - ii. earthquake strengthening and refurbishment of Erskine Chapel;
 - iii. non-residential adaptive re-use of Erskine Chapel as a chapel, café/function centre;
 - iv. demolition of a listed heritage building (Erskine College Main Building);
 - v. associated earthworks and subdivision (fee simple and unit title);
 - vi. contamination investigation and possible remediation;
 - vii. the removal of some of the heritage landscapes;
 - viii. demolition of the former gymnasium and Lisieux Wing;
 - ix. construction of a new glazed screen;
 - x. construction of a car parking structure and podium on the west and north of the Chapel;
 - xi. construction and use of an early learning centre on top of the podium; and
 - xii. associated directional and non-residential signage.

¹⁰ *SECT v TWC* [2016] NZEnvC 247 (ENV-2016-WLG-000069)

¹¹ Resource Consent applications issued 19 December-10 January 2017

<http://wellington.govt.nz/~media/services/consents-and-licenses/resource-consents/files/issued-applied/issued-19-december-2016---10-january-2017.pdf?la=en>

¹² *SECT v Erskine Developments Ltd* [2016] NZEnvC 255 (ENV-2016-WLG-000069)

D. Principle Issues of Contention

[24] The principle issue of contention is whether or not SECT should grant consent under s 193 RMA for TWC's resource consent application.

[25] There is no contention in relation to:

- (a) the significance of the heritage value of Erskine College, Chapel and grounds;
- (b) the Erskine College, Chapel and grounds heritage order; and
- (c) the status of SECT as a Heritage Protection Authority (HPA).

[26] The Environment Court has determined that "*the HASHAA does not remove the jurisdiction of heritage authorities under s 193*,"¹³ meaning that the Applicant needs consent from SECT to proceed with the proposed development at the Erskine College site.

[27] Consequently this recommendation does not:

- i. question whether or not the buildings or grounds have heritage significance;
- ii. question the validity of the SECT's status as HPA, or of the heritage order; nor
- iii. consider any possible impact of HASHAA.

E. Summary of Evidence

[28] The evidence I have considered is as follows:

- i. The Chris Cochrane and Michael Kelly Erskine College Conservation Plan for Property Link Developments (31 May 2001).
- ii. The Archifact Erskine College Conservation Plan for WCC (January 2015).
- iii. The John Adam Erskine College, Island Bay, Heritage landscape report and survey (January 2015), appended to the Archifact Conservation Plan
- iv. Downer Erskine College Site: Preliminary Tree Review (10 April 2016)
- v. Archifact Erskine Assessment of Effects – heritage (13 July 2016).
- vi. Land Lab Erskine Landscape Design Report (15 July 2016).
- vii. Heritage New Zealand Pouhere Taonga, Heritage Impact Assessment: Proposed Development of Erskine College (9 November 2016).
- viii. WCC Heritage Assessment on Resource Consent Application by Amanda Mulligan (11 November 2016).
- ix. Barbara Fill Heritage Comment (2 March 2017)

The Chris Cochrane and Michael Kelly Erskine College Conservation Plan for Property Link Developments (31 May 2001)

[29] The scope of the Cochran Kelly Conservation Plan is the Erskine College main building (1906-1930), the Lisieux Wing (1949), the gymnasium and classroom block additions (1957), the Coen Wing (1967) and the grounds surrounding the buildings, including the grotto, stone walls, iron fences and gates, and gardens. This scope was intended to reflect the extent of the Erskine heritage order.

[30] The conservation plan provides a history, an assessment of the cultural heritage significance and recommendation of treatment to protect and enhance heritage values, and includes photographs, copies of historic drawings, and more recent architectural plans indicating areas of Heritage Value 2 (considerable cultural heritage value) and Heritage Value 1 (some cultural heritage value) and Heritage Value 0 (little or no cultural heritage value) (pp. 84-91). Feedback on the draft

¹³ *SECT v Erskine Developments Ltd* [2016] NZEnvC 255 (ENV-2016-WLG-000069)

conservation plan was received from Ian Cassells, Rasheer Gill, Gerald Melling, SECT, NZHPT and WCC (p. 2).

[31] The plan identifies the Erskine site's significance (pp. 79-83) in terms of:

- i. Wellington's history of secondary education;
- ii. associations with significant and notable people;
- iii. social significance to the community, including spiritual links;
- iv. architectural value, including the significance of architect John Swan, the technology value of the main building, as an early twentieth century masonry building; and
- v. townscape value.

It also notes that the college building is the oldest purpose-built secondary school building (p. 79), and that the chapel is on a par with old St Paul's, Thorndon (p. 82). It also supports the removal of the 1957 gymnasium block in order to enable "*the restoration of the ground and first floors of the north elevation of the main building*" (p. 103), and notes that while the St Anthony's wing has heritage value, restoring it is "*hard to justify*" (p. 103).

[32] In relation to possible re-use, it is stated that: "*Erkine[sic] College is suitable for a variety of uses*" (p. 98) and recommends that "*[b]ecause of the significance of the building, personnel involved in the design, documentation and execution of work on the site ... should have appropriate skills, training and experience in conservation*" (p. 101).

The Archifact Erskine College Conservation Plan for WCC (January 2015)

[33] The scope of the Archifact conservation plan is "*the legally defined boundaries of the site*" (p.7). The purpose of the plan is "*to guide and inform the [Wellington City] Council and the property owner [Property link (Development) Limited] of heritage values of this place and the most appropriate processes for the conservation of those values and for the surviving historic building fabric associated with the College*" (p. 6). It states that "*This plan does not anticipate development; nor is it determined by development. It does however establish essential information that should be used to guide appropriate development in the future*" (p. 7).

[34] The conservation plan includes:

- i. a history of the site and location;
- ii. identification of similar historic places (namely: the Convent of the Sacred Heart, Timaru (demolished); the Convent of the Sacred Heart, Rose Bay, Sydney; Jesuit Church, Molsheim, France);
- iii. documentation of original fabric and modifications, primarily to the Main Block and Chapel;
- iv. description of original specifications and construction technologies;
- v. photographs, and drawings, especially architectural plans;
- vi. an assessment of significance using the 6-level scale from the NZHPT 1994 guidelines, and criteria based on seven of the 10 areas of value in s 66(1) of HNZPTA 2014, and two additional criteria (functional and townscape); and
- vii. recommendations for conservation work referencing the NZ ICOMOS Charter, the HNZPTA 2014, Building Act 2004, and the WCC Earthquake-Prone Buildings Policy.

[35] The appendices to the report include: a heritage landscape report by John Adam, and this is summarised below.

[36] The following is an excerpt from the Archifact Conservation Plan executive summary:

*“the essential historic heritage values of Erskine College rest most clearly in values associated with the Main Block, the Chapel, and the Reverend Mother’s Garden. While of historic heritage significance the Lawn (playing fields), Lady of Lourdes Grotto, and the Black Forest-Mother of Mary Glade are considered secondary to these essential elements ... The impression of this property remains one of high-status with the large scale and massing of the Edwardian Gothic Revival-style of the Main Block contrasting with the elegant proportions of the Chapel; the interior space of which has been recognised as presenting one of the finest French Gothic-style interiors in New Zealand. The rarity of this type of building in relation to the Wellington region and wider national context is highly significant, with few surviving schools built in this style, or associated with an integral subservient chapel of the scale and magnificence as evident at Erskine College. The place is recognised as the oldest college building left in Wellington and is also considered to be the last purpose-built Victorian or Edwardian secondary school building within the Wellington region ... Through this analysis of the inherent qualities of the site Erskine College is considered to hold **exceptional** cultural heritage significance overall”* (emphasis in original).

[37] The report also records that “*no formal archaeological assessment has been undertaken of the site to date*” (p. 127).

The John Adam Erskine College, Island Bay, Heritage landscape report and survey (January 2015)

[38] The John Adam landscape report and survey includes:

- i. a landscape history of the Erskine site, including a short chronology;
- ii. a photographic comparative summary of other examples (namely: Bishop Pompallier’s house, Ponsonby, St Mary’s Thorndon; St Joseph’s Convent, Dannevirke; Sacred Heart Convent (Kereve Park), Burradoo, NSW, Australia);
- iii. an assessment of cultural heritage significance of the designed landscape;
- iv. conservation recommendations for maintenance of landscape elements;
- v. recording and measurements of identified heritage elements;
- vi. identification of Erskine College as a “*religious institution*” as defined by the Cultural Landscape Foundation of America; and
- vii. photographs of the site.

[39] The report states that the Erskine College landscape and gardens are significant due to:

- i. architectural significance or value;
- ii. aesthetic significance or value;
- iii. cultural significance or value;
- iv. historical significance or value;
- v. spiritual significance or value; and
- vi. technical significance or value.

[40] The evaluation of cultural heritage significance uses a 4-level scale to rank specific aspects of the cultural heritage landscape as having: exceptional (3), considerable (2), some (1), or no appreciable (0) cultural significance. Additionally two elements (graffiti and a dead tree) are noted as “*intrusive*,” and no elements are noted as “*negative*.” The evaluation identifies most aspects of the site as having “*exceptional*”

(3) or “considerable” (2) ratings. No element is identified as having no appreciable significance.

[41] The report includes a recommendation regarding development as follows:

“Any development on adjoining boundaries, which had the potential to negatively impact the heritage values and acquired experimental qualities of the garden should be carefully monitored. Every possible effort should be made to mitigate at best, or minimise where mitigation is not possible, any adverse impact caused by the development activity” (p. 60, 5.2.1).

Downer Erskine College Site: Preliminary Tree Review (10 April 2016)

[42] The Downer Preliminary Tree Review provides a site description, methodologies relating to calculations of vegetation cover and tree and root protection zones. It provides a list of significant trees, and recommendations in relation to remedial pruning, retention and protection measures. Both the site and specific trees are documented in photographs.

[43] The review notes:

- i. the significance of the site as a green backdrop to Island Bay;
- ii. the minimal maintenance of the grounds since 2012; and
- iii. evidence of possible unconsented tree felling.

[44] It recommends:

- i. mitigation of any loss of green canopy;
- ii. the promotion of green corridors through the site; and
- iii. the retention and protection of the Reverent Mothers Garden in its entirety.

Archifact Erskine Assessment of Effects – heritage (13 July 2016)

[45] This assessment relies on the earlier Archifact Erskine College Conservation Plan for WCC (summarised above), and as such reiterates the finding that “[t]hrough this analysis of the inherent qualities of the site, the place identified as Erskine College is considered to hold **exceptional** cultural heritage significance overall” (p. 9).

[46] The document assesses the proposal in relation to District Plan provisions for a resource consent, and is underpinned by an assumption that loss is inevitable:

“While the loss of the Main Block is clearly a significant and irreversible adverse effect, it is recognised that to save the greater “spirit” of Erskine and its most significant physical assets some sacrifice is unavoidable. The question of balance in that sacrifice recognises that there is no practical or financial ability to save everything. The report acknowledges that the proposed wider residential development is essential to the survival of the Chapel, the Reverend Mother’s garden, and other historic heritage values recognised within the former Erskine College” (p. 5) (emphasis added).

[47] In its review of WCC DP 21A.2, the author notes: “*It is of note that the criteria tend to address individual assets (“building or object”) where the historic heritage values of Erskine College embrace a broader and collective phenomenon”* (p. 12). The assessment records that: “[a] comprehensive exploration of alternatives to the loss of the Main Block has been undertaken by the applicant and this has explored every reasonable alternative solution to outright demolition, but has concluded that this loss is regrettably unavoidable if the adverse effects on the historic heritage values of the whole are to be minimised” (p. 26, emphasis added).

[48] The most significant aspect of this Assessment of Effects is the shift in position in relation to the importance of retaining the Erskine College Main Building, in contrast to the earlier Archifact Conservation Plan. This contradiction is justified in terms of non-heritage issues, specifically economic feasibility as noted above. The assessment concludes that the proposal for the site outlined in the application is an “appropriate future use” (p. 26), with “appropriate density, form and scale of ... proposed development” (p. 27).

Land Lab Erskine Landscape Design Report (15 July 2016).

[49] The Land Lab Erskine Lanscape Design Report describes the current site and the proposed landscape design, including a schedule of trees for removal. A CPTED assessment is appended to the report.

[50] The report notes:

- i. a state of dilapidation and minimal maintenance
- ii. original landscapes are located in their original locations, but have been modified significantly
- iii. the tree species create a number of challenges in transforming the site

[51] The proposed landscape plan will:

- i. “re-establish the historical sequence of spaces” (p. 5);
- ii. provide for public accessibility;
- iii. refurbish the Reverend Mothers’ garden, which has been “lost beneath the emergent Pohutukawa and invasive weed species” (p. 6), including a new code compliant path;
- iv. provide a new multi-functional roof top space (chapel podium); and
- v. remove a number of significant trees “to provide building platforms for and access to proposed dwellings” (p. 8).

Heritage New Zealand Pouhere Taonga, Heritage Impact Assessment: Proposed Development of Erskine College (9 November 2016)

[52] The HNZ heritage impact assessment uses the ICOMOS NZ Charter and Heritage NZ guidelines to evaluate the effects of the application. The assessment:

- i. finds the Cochran-Kelly conservation plan to be consistent with the principles for conservation, in contrast to the Archifact conservation plan, which it finds to be inconsistent with its own findings: “Rare, possibly unique features are given only moderate significance” (p. [3]);
- ii. states that there is archaeological value in the technical interest of the buildings, and there is potential pre-1900 occupation;
- iii. states that the site has “huge community esteem” (p. [1]);
- iv. notes the “high heritage importance and integrity” in the site’s buildings and setting (p. [9]); and
- v. states that the site is “of outstanding heritage significance” (p. [1]).

[53] The assessment notes that in the TWC proposal:

- i. the heritage resource would be “significantly modified” (p. [7]);
- ii. all elements of the site would be subject to change, “indicating that the level of change in the setting is major” (p. [8]); and
- iii. the Chapel’s new purpose lacks rationale, meaning that “the impact on this attribute is major” (p. [9]).

[54] The Heritage NZ assessment also includes a statement on potential mitigation and states in relation to HASHAA that:

“It is clear that the identification of the site as a Special Housing Area has created a significant alternate rationale for the site to that of heritage conservation. However, these two things need not be in conflict if the three key components of the heritage listing are secured for the future” (p. [13]). It also states that “[t]he change of use from a residential college to a residential development has the potential to be successful” (p. [10], emphasis added).

WCC Heritage Assessment on Resource Consent Application by Amanda Mulligan (11 November 2016)

[55] The WCC assessment reviews the Archifact and the Heritage New Zealand assessments, and concludes that little weight should be given to the Archifact assessment (which supports the application), and that the Heritage New Zealand assessment (which does not support the proposal) be adopted.

[56] The assessment:

- i. identifies the Erskine College Main Building as “*the most important building from the site*” (p. [1]);
- ii. applauds the applicant’s proposal to strengthen the Erskine Chapel to 67% of NBS;
- iii. notes that it is not apparent how the residential development will sustain the chapel (which is proposed to be held in a trust) in the future;
- iv. states that subdivision could allow future development which could adversely affect the heritage values of the Chapel;
- v. argues that there has been insufficient consideration of alternatives; and
- vi. states that the application cannot be supported because adverse heritage effects have not been avoided, remedied or adequately mitigated.

[57] The conclusion states:

“Even when assessed under the provisions of the HASHA Act ... this proposal has an unacceptable and unjustified adverse impact on historic heritage values of national significance ... the current proposal seeks to destroy the essential interrelatedness and collective value of the three main elements of the former Erskine College site – the Chapel, Main Block and Reverend Mother’s Garden” (p. [15], emphasis added).

Barbara Fill SECT Heritage Evidence

[58] This comment describes the heritage order, and compares the two conservation plans, supporting the Heritage New Zealand position regarding these, favouring the Cochran-Kelly Conservation Plan. The document:

- i. disputes statements that the site is derelict;
- ii. disagrees with the Archifact evaluation that an unused building has no use value;
- iii. recognises the lower value of the gymnasium and Coen wing;
- iv. concludes that neither conservation plan allows for the type of development proposed by the application; and
- v. states that the removal of the gymnasium, Coen Wing, Lisieux Wing and St Anthony’s Wing would not necessarily nullify the heritage order, and would provide area for development.

Summary

[59] All of the evidence recognises the outstanding or exceptional heritage significance of the Erskine College site. Much of the evidence refers to this significance as relating not simply to individual heritage items but to the interrelationship of specific items and the site in a holistic fashion (both within the site and in relation to its Island Bay

location). Heritage New Zealand, the SECT heritage report and the WCC heritage advisor all prefer the Cochran-Kelly Conservation Plan over the Archifact Conservation Plan. Identifying the most appropriate conservation plan is important as the heritage order states that: *“Any modifications or alterations are to be in accordance with any relevant Erskine College Conservation Plan.”* I will consequently prefer the Cochran-Kelly Conservation Plan when considering the application.

- [60] Additionally, there is only one heritage landscape report and survey (that by John Adam). This is found as an appendix to the Archifact Conservation Plan. In the absence of any other heritage landscape report by a qualified landscape heritage expert, this report will also inform my consideration of the application.
- [61] This heritage evidence is also largely consistent with the WCC decision which concluded that TWC resource consent application “does not protect historic heritage from inappropriate subdivision, use and development” (p. 62). Like the Archifact assessment, the WCC decision takes into account aspects of financial viability.

F. Relevant Statutory provisions

Resource Management Act (RMA) 1991

- [62] Section 6 RMA identifies historic heritage as a matter of national importance, as Mr Milne ([3]) notes it states that, *“all persons exercising functions and powers under [the Act] ... shall recognise and provide for”* historic heritage.
- [63] Part 8 of the RMA addresses designations and heritage orders. Heritage orders are defined as *“a provision made in a district plan to give effect to a requirement made by a heritage protection authority under section 189 or section 189A”* (s 187 RMA). The establishment of a heritage order requires a notice of requirement, the process of which is described in ss 189-191. Section 188 describes the process for approving HPAs and the inclusion of heritage orders in a District Plan via a notice of requirement process (including alterations to, and removal of, a heritage order), which mirrors that of the designation process (ss 189-192, 195A-196). The remainder of Part 8 that relates to heritage orders describes: the effect of a heritage order (ss 193-194),¹⁴ appeals (s 195), compulsory acquisitions (s 197) and Environment Court ordering land taken (s 198). The relevant provisions for this recommendation are provided below (emphasis added):

s188 Application to become heritage protection authority---

...

- (6) *Where the Minister is satisfied that--*
 - (a) *A heritage protection authority is unlikely to continue to satisfactorily protect the place for which approval as a heritage protection authority was given, or*
 - (b) *A heritage protection authority is unlikely to satisfactorily carry out any responsibility as a heritage protection authority under this Act, -- the Minister shall, by notice in the Gazette, revoke an approval given under subsection (4).*

...

¹⁴ Section 194 addresses the interim effect of a requirement for a heritage order.

s193 Effect of heritage order

Where a heritage order is included in a district plan then, regardless of the provisions of any plan or resource consent, no person may, without the prior written consent of the relevant heritage protection authority named in the plan in respect of the order, do anything including—

- (a) undertaking any use of land; and*
- (b) subdividing any land; and*
- (c) changing the character, intensity, or scale of the use of any land—
that would wholly or partly nullify the effect of the heritage order.*

s193A Land subject to existing heritage order or designation

- (1) Subject to sections 9(2) and 11 to 15, where a heritage order is included in a district plan, and the land that is the subject of the heritage order is already the subject of an earlier heritage order or a designation,—*
 - ...*
 - (2) The authority responsible for the earlier designation or order may withhold its consent under subsection (1) only if that authority is satisfied—*
 - ...*
 - (b) that in the case of an earlier heritage order, the thing to be done would wholly or partly nullify the effect of the order.*

195 Appeals relating to sections 193 and 194

- (1) Any person who—*
 - (a) proposes to do anything in relation to land that is subject to a heritage order or requirement for a purpose which, but for the heritage order or requirement, would be lawful; and*
 - (b) has been refused consent to undertake that use by a heritage protection authority under section 193 or section 194, or has been granted such consent subject to conditions—*
may appeal to the Environment Court against the refusal or the conditions.
 - ...*
 - (3) In considering an appeal under this section, the court shall have regard to—*
 - (a) whether the decision appealed against has caused or is likely to cause serious hardship to the appellant; and*
 - (b) whether the decision appealed against would render the land which is subject to the heritage order or requirement incapable of reasonable use; and*
 - (c) the extent to which the decision may be modified without wholly or partly nullifying the effect of the requirement or heritage order—*
and may confirm or reverse the decision appealed against or modify the decision in such manner as the court thinks fit.

Resource Management (Approval of the Save Erskine College Trust as Heritage Protection Authority) Order 1992 (SR 1992/352)

[64] The order in council which approved SECT as an HPA states:

"The Save Erksine College Trust ... is ... hereby approved as a heritage protection authority for the purpose of protecting the buildings and grounds (including the Chapel building) of the former Erskine College in Island Bay, Wellington" (s 2, emphasis added).

G. Provisions in policy statements and plans

National Environmental Standards

[65] There are no NESs addressing issues of heritage.

National Policy Statement

[66] There are no NPSs addressing issues of heritage.

Wellington Regional Policy Statement

[67] There is no reference to heritage orders or heritage protection authorities in the Wellington Regional Policy Statement.

Wellington District Plan

[68] Under 20.1.5 Heritage Orders, the Wellington DP states:

"Where a heritage order is included in the District Plan regardless of the provisions of the Plan or resource consents, no person may, without the prior written consent of the relevant heritage protection authority named in the Plan in respect of the order, do anything including -

- a) undertaking any use of land; and*
- b) subdividing any land; and*
- c) changing the character, intensity, or scale of the use of any land*

that would wholly or partly nullify the effect of the heritage order" (emphasis added).

This provision replicates 193 RMA.

[69] Under 21A, the DP states: "*Where a heritage item is subject to a heritage order the applicant must obtain the written consent of the heritage protection authority if the work contravenes the heritage order before proceeding with the work under Section 193 of the Resource Management Act 1991.*"

[70] Under 21A.3 Discretionary Activities (Unrestricted), the Wellington DP states:

"The decision on whether or not a resource consent application will be notified will be made in accordance with the provisions on notification in the Act. Where:

- a heritage building or object is subject to a heritage order from a heritage protection authority, Council will advise the authority that an application has been made."*

Similar provisions are stated under 21B.2 Discretionary Activities (Restricted), and 21B.3 Discretionary Activities (Unrestricted).

[71] In addition to being the subject of a heritage order, Erskine College Main Building and Erskine Chapel of the Sacred Heart are listed in the WCC District Plan (map 4, refs: 21/1 and 21/2).

[72] The heritage order states that:

The effects the heritage order will have on the present use of the place and surrounding area, and the extent to which the present and other uses may continue or commence without nullifying the effect of the heritage order, are:

Without consent of the Heritage Protection Authority, Save Erskine College Trust:

a No person shall alter, modify, extend, remove, damage or demolish the buildings known as Erskine College (and located as shown on Figure 1) or any part of the buildings known as the Chapel of the Sacred Heart and the Main College Block (Convent Building) including:

- i. all exterior and interior walls;*
- ii. all timber joinery, skirtings, architraves, doors, windows, fireplaces, dadoes, caps, staircases and newel posts;*
- iii. the lift in the Main College Block (Convent Building);*
- iv. all fireplace metalwork;*
- v. all interior hardware;*
- vi. the roofs of the two buildings (i.e. the Chapel of the Sacred Heart and the Main Block (Convent Building));*

b No person shall remove, damage or destroy any mature trees or shrubs or any structures or erect or place any structure or substance in, on or over any part of the land, or undertake any disturbance to the land surrounding Erskine College, including the gardens, as shown in Figure 1.

...
While recognising the architectural significance of the Main Block and the Chapel, the buildings may need to be freed of some of the additions that have been made over the years to enable reasonable use of all the buildings and surrounding site. There is a need to take advantage of those ancillary buildings which are reasonably sited and well-constructed and which have amenity value. The heritage order is designed to enable reasonable use of the buildings and surrounds without compromising the overall intrinsic value of the place.

*Any modifications or alterations are to be in accordance with any relevant Erskine College Conservation Plan.*¹⁵

H. Discussion

[73] The first part of the discussion outlines the significance of HPAs and heritage orders within the RMA framework and heritage legislation in order to provide the broader context for the issue in contention. The second part of the discussion more directly addresses the question of s 193 and its application in this recommendation.

Heritage Protection Authorities and heritage orders

[74] Historic heritage is a matter of national importance (s 6(f) RMA). Under the RMA framework there are various instruments to identify and protect heritage. In Wellington city, these are:

- i. The Heritage New Zealand List/Rārangi Kōrero, which entries must be given regard to when changing a District Plan (s 74(2)(b)(ii) RMA), but otherwise have no legal protection.
- ii. The WCC DP Heritage list, which gives effect to the Wellington Regional Policy Statement (Policy 21), and

¹⁵ Chapter 21, Appendix 1, pp. 43-47 of the Wellington DP; also Erskine College Main Block and Erskine Chapel of the Sacred Heart are also listed under 20.1.5 p. 20/7.

iii. Heritage orders (Part 8 RMA)

[75] The HNZPTA 2014 also provides for a National Historic Landmarks list/Ngā Manawhenua o Aotearoa me ona Kōrero Tūturu which is to be a list of "places of outstanding national heritage value" (s 81(1) HNZPTA).¹⁶ Like heritage orders, places to be listed are determined by the Minister (s 82(1) HNZPTA), but, unlike heritage orders, a place proposed to be a listed Landmark must already have "appropriate legal protection" (s 82 (4)(a) HNZPTA), the listing itself is hence not intended as a legal protection. Instead the focus of the Landmarks list is on establishing the mitigation of the effects of natural disasters and standard of care (s 82(5) HNZPTA).

[76] The HNZPTA also legislates heritage covenants (ss 39-41, 86 HNZPTA), which require consent from the owner of the land (s 39(3) HNZPTA). While covenants are outside of the RMA framework, their relevance in this context is to understand the position of a heritage order within the hierarchy of heritage protection in New Zealand. Heritage orders do not require land owner consent.

[77] Listing offers little legal protection, only a heritage order, or a covenant, protects heritage with any certainty. This is explicitly stated in *Waikanae Christian Holiday Park Inc. v NZHPT Maori Heritage Council* [2013] NZHC 2319:

*"However, the signification of heritage value through registration alone does not, of itself, restrict land use or otherwise impact on the legal rights of property owners. It does not impose any regulation on land use. ... The plaintiff adduced evidence that a wahi tapu registration could have a 20 per cent impact or more on the value of land. ... what the calculations do indicate is something of a chilling effect as a consequence of heritage value and thus a practical as opposed to legal consequence. ... Whilst a decision by the Council to register or confirm an area as wahi tapu is the exercise of a statutory power of decision, it does not determine anything. This is in contrast to the effect of a heritage order under the RMA. ... Nor does registration alone provide legal protection for wahi tapu or other features of heritage value. Legal protection occurs only if a heritage order is made under the RMA, in which case there will be consequences for a landowner who, for example, wishes to develop the subject land."*¹⁷

[78] It is recognised that a heritage order will impose constraints on land use, just as the parallel instrument of a designation does.¹⁸ This presumably reflects the recognised significance of the heritage protected. Designations are instruments which provide certainty by designating specific land for a future use, or safeguarding the continuance of an existing use, that specific land will be available in the long-term for a specific use. Heritage orders similarly designate land for future and long-term heritage purposes, to "protect ... public rights in ... property," as stated during the

¹⁶ There are yet to be any places included in the Landmarks list, and "[a]pplications for the Landmarks list are not yet open," at the time of writing this recommendation. Heritage New Zealand Pouhere Taonga "National Historic Landmarks" <http://www.heritage.org.nz/the-list/landmarks>

¹⁷ *Waikanae Christian Holiday Park Inc. v NZHPT Maori Heritage Council* [2013] NZHC 2319 (CIV-2012-485-515), reissued 13 September 2013 at [81], [89], [106], [159]; cited in *Waikanae Christian Holiday Park Inc. v NZHPT Maori Heritage Council* [2015] NZCA 23 (CA679/2103) at [22]-[25].

¹⁸ The prefatory Explanatory Note to the original RMA bill stated: "The Bill sets out a process for considering a heritage protection order which has a number of common features with the designation provisions. These include a public inquiry, recommendation to the body which issued the order, interim protection, and appeal rights" Explanatory Note, preface to the Resource Management Bill (11 December 1989).

Parliamentary debates on the Resource Management Bill.¹⁹ The powers of an HPA likewise include compulsory acquisition “*for the purposes of giving effect to a heritage order*” (s 197(1)).

[79] This means that there are significant powers associated with HPAs and heritage orders. The potential severity of this was discussed in the parliamentary debates leading up to the enactment of the RMA, indicating the intent of the Bill. No substantial changes to the sections of the Bill relating to the rights of an HPA nor the constraints on land use subject to a heritage order were made prior to the Bill's enactment.²⁰ Examples of issues raised during the debate include the following:

*"The matter of heritage orders will also cause some consternation to various groups, because power is virtually given to prevent the use of land set aside for heritage purposes. ... The restrictions placed by heritage orders need to be examined. They may go too far, although I concede that there is a ready place for heritage orders in the legislation."*²¹

*"There is a move to give our heritage greater protection. ... The [heritage protection] authority has very wide-ranging and severe powers, including compulsory acquisition powers that parallel the taking of land under the Public Works Act. ... Any person involved in planning and development will now have to be aware of the powers of the heritage protection authority. There will be some concern about the authority's wide-ranging powers to give notice to a territorial authority that it wants to put in place a heritage order for the purpose of preserving or protecting almost anything. ... The provision will have to be scrutinised very carefully in the select committee, because it has wide-ranging implications for planning. It gives extremely wide powers in some respects to any Minister of the Crown. I want to flag that issue as one that requires a great deal of careful consideration before it can be put into law."*²²

[80] Heritage orders are thus the highest level of heritage protection available in New Zealand because they:

- i. safeguard specific land for long term heritage protection purposes
- ii. provide legal certainty for heritage protection
- iii. impose constraints on land use, and
- iv. do not require the consent of the land owner.

[81] The HPA is approved with the express requirement to protect. The HPA approval process and its mandate to protect heritage has the authority of a Minister of the Crown. Section 188(5) RMA requires that:

¹⁹ “*The provision makes the concept clearer, more workable, and ties it in with all other resource management procedures so that there is not a different procedure for heritage protection, for example, as against protection for a natural reserve---as at present---and so that there is not a different procedure for protecting public rights in other property. The same procedure will be used, but the concept is not new. Powers of acquisition exist at the moment.*” Woollaston, Philip (Labour government MP for Nelson) Resource Management Bill: Introduction *Hansard* (5 December 1989), emphasis added.

²⁰ There were amendments to the processes for HPA approval and notices of requirements for the heritage order.

²¹ Kyd, Warren (National opposition MP for Clevedon) Resource Management Bill: Introduction *Hansard* (5 December 1989), emphasis added.

²² Marshall, Denis (National opposition MP for Rangitikei) Resource Management Bill: Introduction *Hansard* (5 December 1989), emphasis added.

The Minister shall not issue a notice under subsection (4) unless he or she is satisfied that—

- (a) the approval of the applicant as a heritage protection authority is appropriate for the protection of the place that is the subject of the application; and*
- (b) the applicant is likely to satisfactorily carry out all the responsibilities (including financial responsibilities) of a heritage protection authority under this Act.*

[82] While the current RMA stipulates that the approval of an HPA is by the Minister, or their delegate (s 188(4) RMA), when SECT was approved as HPA, the Act required approval by the Governor General (on the recommendation of a Minister) via an Order in Council.²³

[83] The purpose of an HPA is to protect "*the [designated] place and on such terms and conditions (including provision of a bond) as are specified in the notice.*" (s 188(4) RMA). While the HPA is required to protect, they are not mandated to limit or restrict development that does not affect that which they are statutorily required to protect. Equally s 188 states that a Minister shall revoke an HPA approval if they are satisfied an HPA "*is unlikely to continue to satisfactorily protect the place for which approval as a heritage protection authority was given*" (s 188(6)(a)).

Section 193

[84] Section 193 states that an HPA can give somebody "*written consent ... [to] do anything ... that would wholly or partly nullify the effect of the heritage order*" (s 193). As Mr Milne observes "*an activity [that] would wholly or partly nullify the effect of the order is a pre-condition for approval being required*" ([28]).

[85] The difficulty that SECT is faced with is that there appears to be a tension between its purpose, which is to "protect the place" subject to a heritage order (namely the Erskine College site) and its ability to give written consent to someone to "*do anything ... that would wholly or partly nullify the effect of the heritage order.*" (s 195(3)(a)-(c) RMA). The assumption of s 193 therefore appears to be that it might be possible for protection to be effected in an alternative way than a strict implementation of the heritage order. This conclusion is consistent with Mr Milne's legal opinion at [29].

[86] Despite this, other sections of the RMA appear to state a threshold prohibiting anything that would "*wholly or partly nullify the effect of the order.*" For example in s 195, the Environment Court is to consider "*the extent to which the decision may be modified without wholly or partly nullifying the effect of the ... heritage order*" (s 195(3)(c) RMA). In s 193A, consent may be withheld:

"only if that authority is satisfied—

...

- (b) that in the case of an earlier heritage order, the thing to be done would wholly or partly nullify the effect of the order" (s 193(2)(b) RMA, emphasis added).*

[87] The consequence of this and the significant powers of an HPA suggests that an HPA has considerable discretion regarding granting or declining consent under s 193. Specifically, the HPA can only withhold consent if "*the thing to be done would wholly*

²³ This requirement was altered in the Resource Management Amendment Act 1993.

or partly nullify the effect of the order,” but it may grant consent for an activity that “would wholly or partly nullify the effect of the heritage order.” The constraint on this discretion must be the purpose of the HPA to protect the place in accordance with s 188(1) and, in the case of SECT, the relevant Order in Council, which states that its HPA status was approved “*for the purpose of protecting the buildings and grounds*” (SR 1992/352 at [2]). SECT must meet this requirement in order to retain its status as HPA (s 188(6)).

[88] The RMA does not define “protection.” The OED definition is: “*The action of protecting someone or something; the fact or condition of being protected; shelter, defence, or preservation from harm, danger, damage, etc.; guardianship, care; patronage*” (emphasis added).

[89] My conclusion then is that SECT can grant consent to a proposal which would “*wholly or partly nullify the effect of the heritage order*” only if it can do so and preserve the place from harm, danger, damage. A case in point might be the proposed invasive investigation of the chapel which will likely breach the effect of the heritage order by damaging original and protected heritage fabric, likewise in the case of seismic strengthening, but in each of these cases the activity will contribute positively to the preservation of the building, depending on techniques used.

I. Main findings on the principal issues in contention

[90] *Will the proposal described in the application wholly or partly nullify the effect of the heritage order?*

Yes, the heritage evidence is unanimous that the proposal will wholly or partly nullify the effect of the heritage order.

[91] *Is the proposal for an inappropriate development?*

There is disagreement regarding this. The Archifact Assessment of Effects states that the development is appropriate. This assessment is premised on consideration of non-heritage factors. The Supreme Court has determined that “*inappropriateness*” should be assessed by reference to what it is that is sought to be protected.”²⁴ If assessing the proposal in reference to what the heritage order aims to protect, the development is inappropriate.

[92] *Should SECT grant consent under s 193 for the TWC resource consent application?*

No. Taking the overall proposal, which is an inappropriate development in terms of s 6, and will wholly or partly nullify the effect of the heritage order, I consider that SECT would be in breach of its duties under the Order in Council approving its HPA status if it granted consent to the application.

[93] *Are there aspects of the proposal that SECT should agree to?*

Yes, these are identified in the following section.

J. Statement of Recommendation

[94] My recommendation is as follows.

SECT should **agree** to following components of the The Wellington Company’s resource consent application of August 2-16 to develop the Erskine site:

²⁴ King Salmon NZSC 38 [101].

- (a) the strengthening of the Erskine chapel (exterior scheme), conditional on continuing advice from a specialist heritage engineering professional and approval of the final scheme by the WCC heritage officer and Heritage NZ;
- (b) invasive investigation of the chapel building in order to inform a detailed seismic strengthening scheme;
- (c) the refurbishment of the Erskine chapel;
- (d) the adaptive re-use of the chapel;
- (e) demolition of the former gymnasium and Lisieux Wing, as is anticipated in the heritage order;
- (f) the refurbishment of the Coen building;
- (g) the refurbishment and retention of the existing wall and ironwork fronting Melbourne Rd;
- (h) new signage associated with the adaptive re-use of Erskine chapel, subject to WCC approval prior to installation, with appropriate heritage interpretation; and
- (i) the removal of any underground storage tank, if any is found still in-situ with advice regarding removal from a qualified heritage consultant.

Consent for the above should be conditional on continuing advice from appropriately qualified experts in conservation architecture with respect to any construction, alteration and earthworks resulting from the consent. Landscaping should reinstate and maintain the historic cultural heritage landscape informed by the application's heritage landscape assessment, and subject to continuing advice from an appropriately qualified expert in the conservation of cultural heritage landscapes.

[95] SECT should **not consent** to the following components of The Wellington Company's resource consent application of August 2-16 to develop the Erskine site:

- (a) demolition of the Erskine College Main Building;
- (b) construction of: a two-level carparking structure, an early learning centre, covered canopy between the entrance to the early learning centre and the main entrance to the chapel building, podium on top of the carparking structure (these depend on the demolition of the Erskine College Main Building);
- (c) the multi-unit residential development and associated carparking;
- (d) alterations to the Reverend Mother's garden, including: the removal of trees, and the destruction of the northern half of the Reverent Mother's garden;
- (e) subdivision of the Erskine College site, and
- (f) the glazed screen.²⁵

[96] I recommend a cautionary approach in relation to the use of the grounds for residences, while acknowledging that Heritage New Zealand has stated that it is open to the potential of a residential use of the site, and that the heritage order anticipates other uses for the site. My reason for hesitancy is due to the following reasons:

- (a) the heritage order states the "*inclusion of the surrounding area as part of the place (Erskine College) is necessary for the purpose of ensuring its protection and reasonable enjoyment*," citing: cultural, architectural, recreational,

²⁵ I note that the WCC decision refers to a reassessment of this element by the applicant. This reassessment may enable consent to be given. I recommend that SECT give consent to this element if the WCC heritage advisor gives her approval.

educational and spiritual significance; aspects of history, college setting and community resource, and their significant contribution to the local townscape.

- (b) the heritage evidence identifies the holistic value of the site;
- (c) the landscape assessment did not identify any areas that did not have cultural heritage significance, and even envisages the possibility of adverse effects due to development on sites adjacent to the Erskine College site;
- (d) the High Court has deemed the protection of the Erskine site grounds as appropriate;

"it is plainly contemplated by s189 that an area of land surrounding that place could be reasonably necessary for the purpose of ensuring its protection and the reasonable enjoyment of it. ... it seems perfectly justifiable to claim that the whole area should be protected when making an application under s188 which foreshadows a notice of requirement under s189. ... As s188(1) says, the purpose of an application under it is to protect a place, and that can involve a consideration of surrounding land. ... the land defined in the application includes the place of undoubted heritage value and it is enough that the Minister is satisfied that the protection of that place is in the public interest."²⁶

- (e) the grounds have a Category I Heritage New Zealand listing.

K. Reasons for the Recommendation

- [97] The reasons for my recommendation are as follows:
- [98] While the proposal described in the resource consent application will wholly or partly nullify the effect of the heritage order, aspects of the proposal are consistent with SECT's obligation to protect Erskine College as a significant heritage site.
- [99] Parts of the TWC application do however undermine SECT's function to ensure the protection of the Erskine College site. This is apparent when assessing the application against the Cochran-Kelly Conservation Plan which I have used as the relevant plan referred to in the heritage order. The applicant is clearly aware that this is the case, as the application states: *"The documents in Appendix 7 demonstrate the responsibility The Wellington Company feels to protect these heritage values. However, it is simply not economically feasible to do so"* (TWC Application p. 11). SECT cannot comply with its obligations as HPA unless it declines consent for those aspects of the application which are both inconsistent with the heritage order *and* which do not protect the historic heritage site which is specified in the heritage order and the Order in Council.



Christine McCarthy
31 March 2017

²⁶ *Trustees of the NZ Hibernian Australiasian Catholic Benefit Society v Minister for the Environment* CP167/93, 4 ELRNZ 224 6-37.