

Changing the Landscape of Heritage Buildings in New Zealand

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This dissertation is dedicated to my grandfather Duncan Leishman Garvan.

TABLE OF CONTENTS

Chapter I. INTRODUCTION.....	1
Chapter II. OUTSTANDING NATURAL LANDSCAPES.....	4
A. Legislation.....	4
B. Case Law	5
1. ‘Pigeon Bay’ criteria used to assess a landscape.....	5
2. Classification as ‘Outstanding’	8
3. Criteria for assessing ‘naturalness’	10
4. Protection afforded to ONL.....	11
Chapter III. HERITAGE BUILDINGS.....	12
A. Legislative Provisions.....	12
1. RMA.....	12
(a) Part 2 matters	12
(b) Role of Local Authorities	14
(c) Heritage orders	15
(d) The role of the New Zealand Historic Places Trust	17
2. Historic Places Act 1993	18
(a) Historic Places Register	18
(b) Heritage covenants	20
(c) Historic places managed by the New Zealand Historic Places Trust	21
3. Other Legislation.....	22
B. Case Law	22
1. Cases decided before the 2003 amendment to the Resource Management Act 1991	22
2. Cases post 2003 where the Court has granted consent for heritage buildings to be substantially altered, removed, or demolished.....	24
3. Cases post 2003 where the Court has refused to grant consent for heritage buildings to be substantially altered, removed, or demolished	34
Chapter IV. COMPARISON BETWEEN THE TWO APPROACHES	40
A. Criteria Used to Make Classification.....	40
B. Ability of the Court to Classify Despite District Plan.....	42
C. Concern for Owner’s Financial Position.....	45
Chapter V. IDENTIFICATION OF THE PROBLEM	49
A. Differences between a Plans’ Identification of Heritage Buildings and the Historic Places Trust Register	49
B. Register has Minimal Practical Effect.....	50
C. The Court Giving Minimal Weight to Heritage as Section 6 Matter	52
D. Skewed Weighing Test.....	54
Chapter VI. SOLUTIONS TO PROVIDE FOR GREATER PROTECTION OF HERITAGE BUILDINGS.....	56
A. National Policy Statement	56
1. Contents of proposed policy statement	56

2. A more democratic solution than the Court formulating policies and objectives	57
3. Practicalities	58
B. Reconcile Historic Places Register and Regional and District Plans	58
C. Greater Powers for the Historic Places Trust.....	60
1. Decision makers	60
2. Advocates for the building	60
3. Maintenance of the building	61
Chapter VII. MECHANISMS TO ENCOURAGE PROPERTY OWNERS TO PROTECT HERITAGE BUILDINGS	64
A. Compensation.....	64
B. Maintenance Payments	65
C. Education	67
Chapter VIII. CONCLUSION.....	69
Appendix.....	71
Bibliography	73

Abbreviations

CCC	Christchurch City Council
CCDP	Christchurch City District Plan
EO	Enforcement Order
HO	Heritage Order
HPR	Historic Places Register
ICOMOS	International Council on Monuments and Sites
LA	Local authority
Las	Local authorities
NPIF	National Preservation Incentive Fund
NPS	National Policy Statement
ONL	Outstanding Natural Landscapes
PA	Heritage Protection Authority
RMA	Resource Management Act 1991
TA	Territorial authorities
VAL	Visual Amenity Landscapes

CHAPTER I. INTRODUCTION

The focus of this paper is to assess whether the law adequately protects heritage buildings in New Zealand, particularly in light of the amendment to the Resource Management Act 1991 (“RMA”) in 2003 that elevated the protection of historic heritage to a matter of national importance.¹ The protection of heritage buildings is considered to be nationally significant because once a historic building is demolished it is irreplaceable. Furthermore New Zealand’s history is unique in terms of its Maori and colonial aspects.² Heritage buildings provide a tangible record of this history and often contribute to a community’s sense of identity.

Yet the communities’ interest in protecting heritage buildings may often conflict with private property rights. The Court has stated that private property rights are subject to the RMA.³ Nevertheless the question arises as to what level of infringement of these rights is acceptable. Owners require certainty about what the law entitles them to do with their property. Likewise the community may place reliance on the fact a plan appears to protect a particular building. It is imperative that the legal approach to heritage buildings is consistent and clear and provides buildings with sufficient protection.

In order to assess whether the Environment Court’s (“EC”) approach to protecting heritage buildings accurately reflects their important national status, a comparison is made with the approach to outstanding natural

¹ Section 6(f) of the RMA was added, on 1 August 2003, by section 4 of the Resource Management Amendment Act 2003.

² Parliamentary Commissioner for the Environment 1996 *Historic and Cultural Heritage Management in New Zealand* (Wellington, 1996) Preface [PCE report].

³ *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 29.

landscapes (“ONL”). ONL were selected on the basis that the protection of them is also considered to be a matter of national importance under the RMA.⁴ From the outset it is apparent that the legal approach to protecting ONL is far more comprehensive and robust than the approach to historic buildings. This is largely because the EC have adopted uniform criteria to assess whether a landscape is an ONL,⁵ and have clearly established that it is permitted to find that a landscape is an ONL, even if it is not classified as such in a plan.⁶

To make an effective comparison between the two approaches, it was important to first discuss the law applicable to ONL in Chapter 2 and heritage buildings in Chapter 3. It was considered necessary to include a detailed summary of the legislation relevant to heritage buildings, to provide the reader with an understanding of the current legal tools available to protect heritage buildings. Several cases about heritage buildings are reviewed in considerable detail to demonstrate the variety of issues relevant to the protection of heritage buildings, and to provide the reader with an appreciation of the nature of the heritage buildings affected. This section also highlights the problems with the current legal approach within the context of specific cases. After the relevant law has been identified a direct comparison between the two approaches is then made in Chapter 4.

Chapter 5 emphasises and discusses in further detail the problems with the current approach to heritage buildings. Specific reference is made to the concern that district plans and the Historic Places Register (“HPR”) do not always identify the same heritage buildings for protection. This problem is

⁴ RMA, s 6(b).

⁵ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59, para 80 [*Wakatipu*].

⁶ *Chance Bay Marine Farms Ltd v Marlborough District Council* unreported, HC Wellington, AP210/99, 15 March 2000, Doogue J, paras 24-25 [*Chance Bay*].

exacerbated by the fact the HPR has nominal legal consequences. The question is raised as to whether the EC is affording sufficient weight to heritage as a matter of national importance; particularly when it carries out the weighing test prescribed by section 5 of the RMA.⁷

In light of the concerns with the current legal framework, Chapter 6 discusses the merits of possible solutions. These solutions include a National Policy Statement (“NPS”), reconciling the HPR and plans, and greater powers for the New Zealand Historic Places Trust (“NZHPT”). Chapter 7 outlines potential mechanisms to encourage property owners to protect heritage buildings. These include compensation, maintenance payments and education. Chapter 8 concludes that overall a range of measures are necessary to overcome the deficiencies in the current approach to the protection of heritage buildings.

The author believes that heritage buildings have value and are worthy of protection. This is because they form part of many people’s sense of identity, and should also be appreciated for the skill and effort that has gone into creating them. For the purposes of this paper the interference in people’s property rights is considered to be legitimate as long as any restriction is in the public interest and people know what they can and cannot do with their property. This paper should be read with the above biases and assumptions in mind.

⁷ RMA, s 5(2). Heritage values are incorporated into this test through the requirement to manage resources in a way that enable communities to provide for their social, economic, and cultural wellbeing while providing for the needs of future generations.

CHAPTER II. OUTSTANDING NATURAL LANDSCAPES

A. *Legislation*

Outstanding natural features and landscapes are one of the seven matters of national importance under section 6 of the RMA. The RMA states those who exercise functions or powers under the Act shall recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.⁸

Section 7(c) of the RMA may also have application to cases involving the proposed subdivision, use, or development of an ONL. This section includes that persons exercising functions or powers under the RMA shall also have particular regard to the maintenance and enhancement of amenity values.⁹

Local Authorities (“LAs”) must prepare and change any plans in accordance with the provisions of Part 2, which includes section 6 of the RMA.¹⁰ Plans must state the objectives and policies for the region or district, relating to the protection of ONL and any rules necessary to implement the policies.¹¹

⁸ RMA, s 6(b).

⁹ RMA, s 7(c). ‘Amenity values’ are defined in section 2(1) of the RMA as those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

¹⁰ RMA, ss 66(1) and 74(1).

¹¹ RMA, ss 67(1) and 75(1).

B. *Case Law*

There has been much litigation regarding what constitutes an ONL and what level of subdivision, use, and development is inappropriate.

The EC has helpfully formulated several criteria in order for LAs to assess whether a landscape is ‘outstanding’ and what degree of ‘naturalness’ is required. Depending on the factual matrix, further factors may also be relevant when making an assessment as to the appropriate classification of a landscape. The EC have also discussed the suitable level of protection to be afforded to an ONL once it has been classified.

1. *‘Pigeon Bay’ criteria used to assess a landscape*

The criteria used by the EC to assess a landscape were originally formulated for the Canterbury Regional Landscape Study.¹² They were adopted by the EC in *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council*.¹³ These criteria were then developed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*.¹⁴ They have been affirmed in many cases, including recently by the High Court (“High Court”) in *Unison Networks Ltd v Hastings District Council*.¹⁵ They are as follows:¹⁶

- (a) the natural science factors - the geological, topographical, ecological and dynamic components of the landscape;
- (b) its aesthetic values including memorability and naturalness;

¹² Canterbury Regional Landscape Study (Boffa Miskell Ltd and Lucas Associates, October 1993). As discussed in *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8, para 105 [*Outstanding Landscape Protection Society*].

¹³ *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209, para 56 [*Pigeon Bay*].

¹⁴ *Wakatipu*, above n 5, para 80.

¹⁵ *Unison Networks Ltd v Hastings District Council* unreported, HC Wellington, CIV-2007-485-896, 11 December 2007, Potter J, para 79 [*Unison Networks*].

¹⁶ *Wakatipu*, above n 5, para 80.

- (c) its expressiveness (legibility), how obviously the landscape demonstrates the formative processes leading to it;
- (d) transient values (occasional presence of wildlife; or its values at certain times of the day or of the year);
- (e) whether the values are shared and recognised;
- (f) its value to tangata whenua;
- (g) its historical associations.

In order to illustrate how the criteria are used, the EC's application of some of them in *Outstanding Landscape Protection Society Inc v Hastings District Council* will be outlined.¹⁷ This case concerned an application to construct and operate a wind-farm near a feature known as Te Waka.¹⁸ The EC commented that it was a "very distinctive landform" which resembled the shape of a waka and was visible from many places in the region.¹⁹

(a) the natural science factors

In relation to this factor the EC made reference to "the limestone formations, with the outcrops and escarpments, a large beech forest area, sub-alpine bluff vegetation and open shrublands, and several tarns or wetlands."²⁰

(d) transient values

The three witnesses varied in the weight they placed on this factor. The witness who rated the landform as having high transient values reached this conclusion based on the seasonal variations, which caused different parts of

¹⁷ *Outstanding Landscape Protection Society*, above n 12, para 107.

¹⁸ *Outstanding Landscape Protection Society*, above n 12, para 1.

¹⁹ *Outstanding Landscape Protection Society*, above n 12, para 4.

²⁰ *Outstanding Landscape Protection Society*, above n 12, para 107.

the landform to be accentuated through changes in light and atmosphere.²¹

This witness also felt the presence of falcon was important.²²

(e) whether the values are shared and recognised;

The values were said to be shared by the people of the Hawkes Bay who recognised Te Waka as a landmark.²³

(f) its value to tangata whenua;

These were rated as high, but there was no evidence included in this section of the judgment because it had been discussed in detail elsewhere.²⁴

(g) its historical associations.

It was accepted that the landform had historical associations. One witness “referred to the significance of the evidence of natural history; key associations for iwi as a part of local history; the colonial history in the area; the historic settlement and transport route associations.”²⁵

After considering these criteria the EC found that Te Waka was indeed an ONL.²⁶

²¹ *Outstanding Landscape Protection Society*, above n 12, para 107.

²² *Outstanding Landscape Protection Society*, above n 12, para 107.

²³ *Outstanding Landscape Protection Society*, above n 12, para 107.

²⁴ *Outstanding Landscape Protection Society*, above n 12, para 107.

²⁵ *Outstanding Landscape Protection Society*, above n 12, para 107.

²⁶ *Outstanding Landscape Protection Society*, above n 12, para 108.

2. Classification as ‘Outstanding’

A landscape “may be interpreted to include both the physical and the perceptual”.²⁷ The ‘perceptual’ includes the significance of the landscape to the people who view them.²⁸ Yet in *Munro v Waitaki District Council* the EC made the obiter comment that a landscape may be considered by people to be magnificent but this did not mean it was outstanding.²⁹ Importantly in *Wakatipu* the EC stated that “what is outstanding can in our view only be assessed - in relation to a district plan - on a district-wide basis because the sum of the district’s landscapes are the only immediate comparison that the territorial authority has.”³⁰ In obiter the EC noted landscapes in other districts did not have to have the same features as those in the Queenstown-Lakes district, but they must still satisfy the amended Pigeon Bay criteria.³¹ The EC commented that a district may have no ONL.³²

The EC has drawn a distinction between landscapes that are ONL, those that are Visual Amenity Landscapes (“VAL”), and those that do not raise any significant resource management issue.³³ The EC have described VAL as having “a cloak of human activity...these are pastoral or Arcadian landscapes with more houses and trees, greener (introduced) grasses”.³⁴ The reason why these landscapes are categorised as VAL is because they are “adjacent to outstanding natural features or landscapes; or on ridges or hills; or because they are adjacent to important scenic roads; or a combination of the above.”³⁵

²⁷ *New Zealand Marine Hatcheries Ltd v Marlborough District Council* unreported, EnvC Wellington, W129/97, 18 December 1997, Kenderdine J, 18 [*Marine Hatcheries*].

²⁸ *Marine Hatcheries*, above n 27, 18.

²⁹ *Munro v Waitaki District Council* unreported, EnvC Christchurch, C098/97, 25 September 1997, Jackson J, 16.

³⁰ *Wakatipu*, above n 5, para 85.

³¹ *Wakatipu*, above n 5, para 86.

³² *Wakatipu*, above n 5, para 86.

³³ *Wakatipu*, above n 5, para 92.

³⁴ *Wakatipu*, above n 5, para 93.

³⁵ *Wakatipu*, above n 5, para 93.

The classification of landscapes into one of the three categories is acknowledged by the EC to be “a very crude way of dealing with the richness and variety of most of New Zealand’s landscapes”.³⁶ However this distinction is important to be aware of when evaluating whether a landscape will be considered to be ‘outstanding’.

In *Chance Bay Marine Farms Ltd v Marlborough District Council* the HC held that the EC was permitted to make a finding of fact that a landscape is ‘outstanding’ even though it is not classified as such in the Plan.³⁷ *Chance Bay* concerned the provision of marine farms under a proposed District Plan.³⁸ Subsequently the EC has held that the ability of the Court to classify a landscape as an ONL when it was not already categorised as such in a plan, also applied to resource consent applications made under operative plans.³⁹

In relation to ONL, the difficulty will usually be in deciding where the landscape begins and ends as opposed to whether there is an ONL. Expert analysis will usually be required in order to establish these beginning and ending points of a landscape.⁴⁰

³⁶ *Wakatipu*, above n 5, para 92.

³⁷ *Chance Bay*, above n 6, paras 24-25.

³⁸ *Chance Bay*, above n 6, paras 2-3.

³⁹ *Unison Networks*, above n 15, paras 1 and 87.

⁴⁰ *Wakatipu Environmental Society v Queenstown Lakes District Council* [2003] NZRMA 289, para 37.

3. *Criteria for assessing 'naturalness'*

The main criteria used to assess whether a landscape is 'natural' for the purposes of section 6(b) of the RMA were set out in *Wakatipu*.⁴¹ These have since been extended in *Long Bay-Okura Great Park Society Inc v North Shore City Council* and are as follows:⁴²

- (a) relatively unmodified and legible physical landform and relief;
- (b) the landscape being uncluttered by structures and/or "obvious" human influence;
- (c) the presence of water (lakes, rivers, sea);
- (d) the vegetation (especially native vegetation) and other ecological patterns.

Importantly it was noted in *Wakatipu* that "the absence or compromised presence of one or more of these criteria does not mean that the landscape is non-natural, just that it is less natural. There is a spectrum of naturalness from a pristine natural landscape to a cityscape".⁴³ In *Harrison v Tasman District Council* the Planning Tribunal commented that the word 'natural' excluded man-made objects, and instead implied a creation of nature, but this did not have to be indigenous vegetation or wildlife.⁴⁴ Therefore exotic trees may be considered to be natural, yet in *van Brandenburg v Queenstown Lakes District Council* the EC did note that "there is a limit to how much a landscape can be closed in with exotic trees before it loses too much natural character".⁴⁵

⁴¹ *Wakatipu*, above n 5, para 89.

⁴² *Long Bay-Okura Great Park Society Inc v North Shore City Council* unreported, EnvC Auckland, A078/08, 16 July 2008, Jackson J, para 135 [*Long Bay-Okura*].

⁴³ *Wakatipu*, above n 5, para 8.

⁴⁴ *Harrison v Tasman District Council* [1994] NZRMA 193, 5 [*Harrison*].

⁴⁵ *van Brandenburg v Queenstown Lakes District Council* unreported, EnvC Christchurch, C212/01, 21 November 2001, Jackson J, para 31.

4. *Protection afforded to ONL*

In *Wakatipu* it was stated that ONL are not zones, and even though some landscapes may be identified by the Court as matters of national importance this does not necessarily preclude all development.⁴⁶ Conversely the RMA protects ONL, “not simply views of them”.⁴⁷ Therefore development on an ONL may be inappropriate even if houses and surrounding development cannot be seen.⁴⁸

The EC has formulated rules that give greater clarity and thereafter protection to ONL. It is necessary to establish whether a similar approach has been adopted in relation to heritage buildings.

⁴⁶ *Wakatipu*, above n 5, para 104.

⁴⁷ *Upper Clutha Environmental Society v Queenstown Lakes District Council* unreported, EnvC Christchurch, C104/02, 30 August 2002, Jackson J, para 38 [*Upper Clutha Environmental Society*].

⁴⁸ *Upper Clutha Environmental Society*, above n 47, para 3.

CHAPTER III. HERITAGE BUILDINGS

A. *Legislative Provisions*

1. *RMA*

Section 2(1) of the RMA includes a wide definition of 'historic heritage' that could apply to a vast number of areas and objects,⁴⁹ however the following analysis is limited to heritage buildings, not historic heritage in general.

(a) Part 2 matters

Since the addition of Section 6(f) of the RMA in 2003, the protection of historic heritage from inappropriate subdivision, use, and development has been elevated to be a matter of national importance.⁵⁰ Those persons who exercise functions and powers under the RMA are to "recognise and provide for" this matter of national importance.⁵¹

Section 7 of the RMA may also be applicable to any decision regarding a heritage building. Those persons who exercise functions and powers under the RMA are to have particular regard to the efficient use and development of natural and physical resources.⁵² Arguably it is a more efficient use to retain and restore a heritage building as opposed to demolishing it. This is in acknowledgement of the time, energy, and resources used to create the building. In addition the obligation to have particular regard to the maintenance and enhancement of amenity values could apply to decisions

⁴⁹ However reference will still be made to those elements of 'historic heritage' that are applicable to buildings.

⁵⁰ Section 6(f) of the RMA was added, on 1 August 2003, by section 4 of the Resource Management Amendment Act 2003.

⁵¹ RMA, s 6.

⁵² RMA, s 7(b).

about heritage buildings.⁵³ In many cases protecting a heritage building will be important to enhance the pleasantness of an area, and the cultural significance of the building.

Ultimately any decision made under the RMA should reflect the paramount purpose of the Act, as set out in section 5 of the RMA, being the sustainable management of natural and physical resources.⁵⁴ Heritage values are arguably incorporated into this section through the stipulation that resources should be managed in a way that enables people and communities to provide for their social, economic, and cultural wellbeing; and the proviso that the way a resource is managed should also meet the reasonably foreseeable needs of future generations.⁵⁵ Heather and Baumann state that providing for communities' cultural wellbeing and the needs of future generations unquestionably "includes maintaining the community's sense of identity in its heritage."⁵⁶ Further the argument is made that "heritage conservation is also a component of urban sustainability – (recycling buildings instead of demolishing and rebuilding new ones)."⁵⁷

⁵³ RMA, ss 7(c). Amenity values' are defined in section 2(1) of the RMA and include "the qualities of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".

⁵⁴ RMA, s 5. For the purposes of the Act 'sustainable management' means "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonable foreseeable needs of future generations; and... (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment."

⁵⁵ RMA, s 5.

⁵⁶ Heather, C and G Baumann "Protecting historic heritage", in R Harris (ed.) *Handbook of Environmental Law* (Royal Forest and Bird Protection Society of New Zealand, Wellington, 2004) 504 [*Handbook of Environmental Law*].

⁵⁷ *Handbook of Environmental Law*, above n 56, 505.

(b) Role of Local Authorities

The mandatory obligation to recognise and provide for the protection of historic heritage is supported by more specific provisions. LAs must prepare and change any plan in accordance with the provisions of Part 2, which includes Section 6(f) of the RMA.⁵⁸ They are also to have regard to any relevant entry in the HPR,⁵⁹ which identifies heritage buildings of historical or cultural significance.⁶⁰ Thus heritage buildings should be provided for in plans.

It is an offence to contravene any rules in a plan concerning the protection of heritage buildings, unless the necessary resource consent has been obtained.⁶¹ A resource consent to alter the use of a heritage building may be granted on any condition considered to be appropriate by the consent authority.⁶² This for example could include requiring the restoration or enhancement of the building.⁶³ Thus conditions can be a useful tool in negotiating with property owners.⁶⁴ Compliance with resource consents and conditions is supported by the enforcement provisions in the RMA.⁶⁵

LAs must notify the NZHPT about an application for a resource consent if it relates to land subject to a HO; a requirement for a HO; if it is noted in the plan or proposed plan as having heritage value; or if it affects any historic

⁵⁸ RMA, ss 66(1) and 74(1). Regional and district plans must state the objectives and policies for the region or district, and any rules necessary to implement the policies (RMA, ss 67(1) and 75(1)).

⁵⁹ RMA, ss 61(2)(a)(iia) and 66(2)(c)(iia) and 74(2)(b)(iia).

⁶⁰ HPA, s 22(3).

⁶¹ RMA, s 338(1)(a).

⁶² RMA, s 108(1).

⁶³ RMA, s 108(2).

⁶⁴ *Handbook of Environmental Law*, above n 56, 508.

⁶⁵ This could be through the LA issuing an abatement notice (RMA, s 322), or applying to the EC for an enforcement order (RMA, s 316(2)).

place registered under the HPA.⁶⁶ The exception to notification is if the local authority (“LA”) determines that the adverse effects of the activity on the environment will be minor; the application is for a controlled activity; and the NZHPT is not regarded as a person adversely affected.⁶⁷

(c) Heritage orders

Heritage orders may be utilised when provisions in a plan fail to protect heritage values.⁶⁸ The effect of a heritage order (“HO”) is that no person may, without the prior written consent of the relevant PA, do anything to the land to wholly or partly negate the effect of the HO.⁶⁹ This includes a prohibition on changing the character, intensity, or scale of the use of the land; and the alteration, extension, removal, or demolition of any structure on the land.⁷⁰

A requirement for a HO may be made by a heritage protection authority (“PA”) for the purposes of protecting places of special interest, character, or amenity value, or of special significance to the tangata whenua.⁷¹ Once a PA has given notice of a requirement for a HO, then at this interim stage it becomes an offence to do anything that would negate the effect of the HO.⁷²

⁶⁶ RMA, ss 93 and 94. The NZHPT is a ‘person prescribed in regulations’. Regulation 10(2)(g) of the Resource Management (Forms, Fees, and Procedure) Regulations 2003, SR 2003/153, made pursuant to the Resource Management Act 1991.

⁶⁷ RMA, ss 93 and 94. It is argued that LAs should not have discretion in deciding whether the NZHPT is ‘adversely affected’ if a resource consent application relates to a heritage building.

⁶⁸ *Handbook of Environmental Law*, above n 56, 506. Heritage orders effectively replaced the regime concerning protection notices under the Town and Country Planning Act 1977 (RMA, s 421).

⁶⁹ RMA, s 193. Technically a heritage order means a provision in a district plan that gives effect to a requirement made by a heritage protection authority (RMA, s 187).

⁷⁰ RMA, s 193.

⁷¹ RMA, s 189. Places qualifying for protection also include places of intrinsic value and visual appeal, as well as the area surrounding such places. A number of bodies are heritage protection authorities, including the NZHPT and LAs (RMA, s 187). Any body corporate with an interest in the protection of a place may apply for approval to be a heritage protection authority (RMA, s 188).

⁷² RMA, s 194(1). It will not be an offence if the prior written consent of the heritage protection authority has been obtained or if the person did not know, or could not have reasonably been expected to have known at the time of the contravention, that the heritage protection authority had given notice of the requirement (RMA, s 194(3)). The heritage protection authority must give notice to a TA of the requirement for a heritage order on the prescribed form and must include several pieces of information including details of how the heritage order will affect the present use of the place, and what uses may

The territorial authority (“TA”) may recommend a requirement be confirmed, modified, or withdrawn.⁷³ Yet the PA makes the decision as to whether a HO will be included in a plan.⁷⁴ The relevant TA or any person who made a submission on the requirement may appeal the decision of the PA to the EC.⁷⁵ The EC may impose conditions, or confirm, modify, or cancel the requirement.⁷⁶ If no appeal is lodged, or it is withdrawn or dismissed, or the EC confirms or modifies the requirement, then the TA shall as soon as reasonably practicable include the HO in its district plan and any proposed district plan as if it were a rule in accordance with the issued or modified requirement.⁷⁷

be continued under the heritage order (RMA, s 189(3)). There is no obligation of the heritage protection authority to consult about the notice of a requirement (RMA, s 36A). The requirement for a heritage order must be publicly notified and notice must be served on every person prescribed within the regulations (RMA, s 190(2)).

⁷³ RMA, s191(2). In making the recommendation under section 191 of the RMA, the TA is to have regard to the matters in the notice and any submissions; and is to have particular regard to several matters including whether the place merits protection, and whether the requirement is reasonably necessary for protecting the place to which the requirement relates (RMA, s 191(1)). If the TA recommends that a requirement be confirmed, then it may propose that the heritage protection authority reimburses the owner for any maintenance costs required as a result of the heritage order (RMA, s 191(3)(a)).

⁷⁴ RMA, s 192. By virtue of section 192, section 172(3) of the RMA applies. The heritage protection authority is to inform the TA within 30 working days of receiving a TA’s recommendation as to whether the recommendation is accepted, or rejected in whole or in part (RMA, ss 192 and 172(1)). A heritage protection authority may only modify a requirement if that modification is recommended by the TA or is not inconsistent with the requirement (RMA, s 172(2)). This is restated in Clause 13(2) of Part 1 of the First Schedule of the RMA.

⁷⁵ RMA, s192. By virtue of this section, section 174(1) of the RMA applies, the requirements are discussed above. Any parties who are in disagreement about the requirement for a heritage order cannot apply to the EC for the matter to be resolved through arbitration (RMA, s 356).

⁷⁶ RMA, s192. By virtue of this section, section 174(4) of the RMA applies, the requirements are discussed above.

⁷⁷ RMA, s192. By virtue of this section, section 175(1) of the RMA applies, the requirements are discussed above. The obligation to include an existing heritage order and any requirement for a heritage order is restated in Clause 4 of Part 1 of the First Schedule of the RMA. Clause 5(1B) of Part 1 of the First Schedule of the RMA states that a territorial authority shall ensure that notice is given of the existence of a heritage order, or any requirement for a heritage order, to those land owners and occupiers who are likely to be directly affected. Under section 195(1) of the RMA, any person who proposes to do anything in relation to land that is subject to a heritage order for a purpose which would have been lawful if there was no such heritage order, and has been refused consent to undertake that use, may appeal to the EC. In considering the appeal the Court is to have regard to whether the refusal has caused serious hardship to the appellant, and whether the refusal has rendered the land incapable of reasonable use, and whether the decision could be modified without impacting on the effect of the heritage order (RMA, s 195(3)).

(d) The role of the New Zealand Historic Places Trust

The NZHPT has a limited role under the RMA but may undertake certain actions, like any other person, to ensure the protection of a heritage building. This may involve making a submission on a resource consent application,⁷⁸ or appealing the decision made by a consent authority in relation to a resource consent.⁷⁹ The NZHPT can also apply for a plan change, for example if it determines that a current or proposed plan fails to provide policies or rules to protect heritage buildings.⁸⁰ The NZHPT does not have any special status in these above applications, apart from the fact that they may be directly notified as an adversely affected person.⁸¹

In situations where a person is doing something that breaches the RMA, a HO, a rule in a plan or proposed plan, or a resource consent, then the NZHPT may make an application to the EC for an Enforcement Order (“EO”).⁸² If an EO is made, it could be to require a person to cease an activity, to prohibit a person from commencing an activity, or to ensure a person complies with a provision in the RMA, a plan or a HO.⁸³ It is an offence to fail to comply with an EO.⁸⁴

⁷⁸ RMA, s 96(1). The ability to make a submission on a resource consent application will apply as long as the application was publicly notified or notice was served on the NZHPT as a person who was adversely affected. Heather and Baumann state that the NZHPT “is clearly an affected party for sites having particular heritage values recognised by registration under the HPA, or listed or identified under district plans” (*Handbook of Environmental Law*, above n 56, 499).

⁷⁹ RMA, s 120. The NZHPT will only have the right to appeal to the EC if they made a submission on the application.

⁸⁰ RMA, ss 65(4) and 73(2).

⁸¹ RMA, s 94.

⁸² RMA, s 316(1). The NZHPT can apply as ‘any person’. Section 2(1) of the RMA defines ‘person’ to include the Crown. Under section 28(3) of the HPA the NZHPT is a Crown entity for the purposes of section 7 of the Crown Entities Act 2004. The NZHPT is listed as an autonomous crown entity in Part 2 of the First Schedule of the Crown Entities Act 2004. Under section 317 of the RMA as an applicant the NZHPT has to serve notice of the application on every person directly affected by the application.

⁸³ RMA, s 314. The EC shall hear the applicant and the person against whom the order is sought, if they wish to be heard (RMA, s 318). The EC has the discretion to refuse the application, or make any appropriate order unless the person was acting in accordance with a rule in a plan or a resource consent, and the adverse effects for which the order is sought were expressly recognised at the time the plan was approved or the resource consent was granted (RMA, s 319). The person directly affected by an

In urgent cases where a building is about to be demolished the NZHPT could instead apply for an interim EO.⁸⁵ It is possible in appropriate circumstances for this order to be obtained without serving notice on those adversely affected or holding a hearing.⁸⁶

2. *Historic Places Act 1993*

The purpose of the HPA is “to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand”.⁸⁷ The HPA primarily achieves this through affirming and extending the role of the NZHPT.⁸⁸ The NZHPT has a number of responsibilities including advocating for the protection of heritage and fostering public interest in heritage.⁸⁹

(a) Historic Places Register

One of the key functions of the NZHPT is to register historic places.⁹⁰ The purpose of the register is to inform members of the public, notify the owners of historic places, and to assist historic areas to be protected under the RMA.⁹¹ The NZHPT may enter any historic place on the register “if the place or area

enforcement order may at any time apply to the EC to change or cancel the order, under section 321 of the RMA.

⁸⁴ RMA, s 315(4). The NZHPT can also apply for a declaration from the Court under section 311 of the RMA that an act contravenes the RMA, a rule in a plan, a heritage order, or a resource consent. However these are not as effective as enforcement orders because it is merely a declaration, where enforcement orders must be complied with.

⁸⁵ RMA, s 320.

⁸⁶ RMA, s 320(2). Before making an interim enforcement order, the Judge is to consider the effect on the environment of not making the order, whether the applicant has given an undertaking as to damages, and whether the Judge should hear the relevant parties (RMA, s 320(3)(c)).

⁸⁷ HPA, s 4(1).

⁸⁸ The NZHPT was originally established by the Historic Places Act 1954.

⁸⁹ HPA, s 39. The NZHPT has been afforded the necessary powers to enable it to undertake its functions (HPA, s 54).

⁹⁰ HPA, s 39(1). The NZHPT is also responsible for establishing and maintaining a register of historic areas, wahi tapu, and wahi tapu areas.

⁹¹ HPA, s 22(2).

possess aesthetic, archaeological, architectural, cultural, historical, scientific, social, spiritual, technological, or traditional significance or value.”⁹² The registration process involves the NZHPT assessing a number of criteria to determine whether the place should be classified as Category 1, or Category 2.⁹³ Category 2 places are of “historical or cultural heritage significance or value”, this also applies to Category 1 places but they must be “special or outstanding”.⁹⁴ If the Trust proposes to register a place then it must notify the public, the owner of the historic place, and the relevant LA.⁹⁵

If the proposal is supported by sufficient evidence then the NZHPT may grant interim registration.⁹⁶ This is likely to be used when a historic place is considered to be under immediate threat of alteration, removal or demolition. It is an offence to demolish, damage, modify, or extend a historic place while it is subject to interim registration.⁹⁷ People can also have their rights or ability

⁹² HPA, s 23(1). Registration may be proposed by anyone, (HPA, section 24(1)). The NZHPT has a right of entry in relation to locating, recording, and inspecting a historic place (HPA, s 21). Section 101 of the HPA provides it is an offence to refuse an authorised person to have access to a historic place for the purposes of section 21 of the HPA. Only certain categories of people may make written submissions in relation to a proposal to register (HPA, s 28(1)).

⁹³ HPA, s 23(2). The criteria are: “(a) The extent to which the place reflects important or representative aspects of New Zealand history; (b) The association of the place with events, persons, or ideas of importance in New Zealand history; (c) The potential of the place to provide knowledge of New Zealand history; (d) The importance of the place to the tangata whenua; (e) The community association with, or public esteem for, the place; (f) The potential of the place for public education; (g) The technical accomplishment or value, or design of the place; (h) The symbolic or commemorative value of the place; (i) The importance of identifying historic places known to date from early periods of New Zealand settlement; (j) The importance of identifying rare types of historic places; (k) The extent to which the place forms part of a wider historical and cultural complex or historical and cultural landscape; (l) Such additional criteria for registration of wahi tapu, wahi tapu areas, historic places, and historic areas of Maori interest as may be prescribed in regulations made under this Act; (m) Such additional criteria not inconsistent with those in paragraphs (a) to (k) of this subsection for the purpose of assigning Category I or Category II status to any historic place, and for the purpose of registration of any historic area, as may be prescribed in regulations made under this Act.”

⁹⁴ HPA, s 22(3)(a).

⁹⁵ HPA, s 24(3).

⁹⁶ HPA, s 26(1). Interim registration is effective on and from the day on which notice is given, and lapses when registration is confirmed or six months after the date of interim registration (HPA, s 26(3)). There are further provisions under section 26 of the HPA to allow for interim registration to be extended.

⁹⁷ HPA, s 103(1)(a). The penalties for demolition or destruction are a fine not exceeding \$100,000, and in the case of alteration, extension, damage, or modification to a fine not exceeding \$40,000 (HPA, s 103(2)). They are strict liability offences and only statutory defences will apply (HPA, s 106). It is also an offence to do other things to the building through the interplay of several provisions. Section 27 of

to carry out activities suspended by the Court under section 105(1) of the HPA if they have committed offences in relation to a building subject to interim registration or a HO.⁹⁸

Registration of a historic place can be confirmed by agreement between the NZHPT and the owner.⁹⁹ A historic place is registered when the NZHPT has confirmed its registration, and the owner has received notice.¹⁰⁰ The NZHPT must publicly notify the registration.¹⁰¹ They must also maintain and supply to every TA a record of registered places and heritage covenants relevant to the area.¹⁰²

(b) Heritage covenants

The NZHPT can negotiate with property owners to enter into heritage covenants to ensure the protection, conservation, and maintenance of the property.¹⁰³ It can include any conditions the parties want, but there must be

the HPA sets out that if a historic place has interim registration then section 194 of the RMA will apply, as if the interim registration was a notice of a requirement for a heritage order. The application of section 194 of the RMA is that no person may do anything that would wholly or partly nullify the effect of the interim registration. Section 9(2) of the RMA states that no one may contravene section 194 of the RMA unless they have consent from the requiring authority, and section 338(1) of the RMA makes it an offence to contravene section 9 of the RMA.

⁹⁸ Section 105(2)(b) of the HPA deems all activities for which other resource consents could be sought, as prohibited activities. Further section 32B of the HPA establishes that if there is a suspension then the holder shall carry out pest and weed control measures, take measures to maintain the land in a clean and safe condition, and any other measures that may be necessary to protect the place.

⁹⁹ HPA, s 32B. This is subject to the requirements in the section being satisfied.

¹⁰⁰ HPA, s 32C(1). Any person may apply to the NZHPT for a review of registration of any historic place, as long as it is no sooner than three years since registration or the last review (HPA, s 37(2) and (3)). The NZHPT can decline the review if it considers there are insufficient grounds to justify a review (HPA, s 37(6)). After commencing a review the NZHPT may vary, remove, or confirm the registration (HPA, s 37(8)).

¹⁰¹ HPA, s 32C(2)(a).

¹⁰² HPA, s 34(1). In accordance with this section the TA must make the record available for public inspection. This is also for the purposes of notification for section 34(1)(b) of the Building Act 2004, section 44A(2)(g) of the Local Government Official Information and Meetings Act 1987; and if there is sufficient detail of the particulars then the information can be included in any land information memorandum issued by the TA under section 44A of the Local Government Official Information and Meetings Act 1987, and any project information memorandum issued by the TA under section 34 of the Building Act 2004.

¹⁰³ HPA, s 6(1). Section 7 of the HPA establishes that heritage covenants are deemed to be interests in land and may be registered under the Land Transfer Act 1952.

agreement from the current owner of the property.¹⁰⁴ It has been noted that “a heritage covenant may be placed over the most important part of a site as a condition of a resource consent in exchange for allowing other areas to be damaged or destroyed.”¹⁰⁵ Heritage covenants can be framed to only have effect for a certain period of time or until a specified event occurs.¹⁰⁶ For example a property owner may only want to agree to adhere to the effects of a heritage covenant while they own the building. However an owner and the NZHPT can agree for covenant to have effect in perpetuity.¹⁰⁷ It is an offence to either cause or personally destroy, damage, or modify a historic place with the knowledge or reasonable cause to suspect that it is protected by a heritage covenant.¹⁰⁸ There is provision for the owner and NZHPT to agree to vary or cancel the covenant.¹⁰⁹

(c) Historic places managed by the New Zealand Historic Places Trust

The NZHPT also has the responsibility for managing and controlling all historic places and buildings that are owned, controlled or vested in the Trust.¹¹⁰ The NZHPT may formulate a conservation plan for any of these buildings.¹¹¹ It is an offence to intentionally cause or personally destroy, damage, or modify any historic place that is vested or under the control of the NZHPT.¹¹²

¹⁰⁴ HPA, ss 6(2) and (5).

¹⁰⁵ *Handbook of Environmental Law*, above n 56, 503.

¹⁰⁶ HPA, s 6(3).

¹⁰⁷ HPA, s 6(3).

¹⁰⁸ HPA, s 98(1). Every person who commits the offence of destruction is liable to a fine not exceeding \$100,000, and for damage or modification is liable to a fine not exceeding \$40,000 (HPA, s 98(2)).

¹⁰⁹ HPA, s 6(3).

¹¹⁰ HPA, s 39(e).

¹¹¹ HPA, s 58. It can also make bylaws to create rules to be observed by anyone who enters upon the named property (HPA, s 61). Section 104 of the HPA establishes that unless it is in accordance with a bylaw made by the NZHPT, it is an offence to intentionally: enter upon the land, take any animal or vehicle upon the land, or light any fire upon the land, without the authority of the NZHPT. Every person who commits an offence is liable to a fine not exceeding \$2,500.

¹¹² HPA, s 97(1). Every person who commits the offence of destruction is liable to a fine not exceeding \$100,000, and for damage or modification is liable to a fine not exceeding \$40,000 (HPA, s 97(2)). For

3. *Other Legislation*

Several other statutes are also applicable to the protection of heritage buildings, including the Building Act 2004 and the Conservation Act 1987.¹¹³ However it is outside the scope of this paper to discuss these in any detail.

B. *Case Law*

The following section summarises the approach of the EC to the protection of heritage buildings before the 2003 amendment to the RMA. This is considered to be useful to provide a comparison with the cases decided after the amendment, and to assess whether the amendment has had any noticeable affect on the Court's reasoning.

1. *Cases decided before the 2003 amendment to the Resource Management Act 1991*

The main issue for the Court in cases concerning heritage buildings is weighing the economic benefit to the applicant in being able to demolish or remove a building, against the benefit to the community in retaining a building to preserve its heritage values. In the majority of cases where the EC has undertaken this balancing exercise, it has found in favour of the economic

more minor offences like removing a plaque from the land, results in an offence under the HPA with every person liable to a fine not exceeding \$2,500 (HPA, s 104).

¹¹³ The Reserves Act 1977, and the Queen Elizabeth the Second National Trust Act 1977 are also applicable. It has been said that around 20 statutes either directly or indirectly apply to heritage protection in New Zealand, (S Bartlett "The development of heritage protection legislation in New Zealand" (2005) 6 *BRMB* 65, 65).

benefits to the applicant.¹¹⁴ The EC has affirmed the focus is not about ‘sustainable management of heritage buildings’ but sustainable management in terms of the factors in section 5: social, economic, and cultural wellbeing of people and communities and providing for health and safety, subject to certain provisos.¹¹⁵ Heritage values are still relevant to the overall broad judgement to be exercised by the Court, but they are not paramount.¹¹⁶

The EC has rejected the submissions that the owner of a heritage building has an obligation under the RMA to maintain it,¹¹⁷ and that the ethic of stewardship means the Council is under an obligation to purchase the heritage building when the owner no longer has a use for it.¹¹⁸

In cases involving the demolition of a heritage building the EC has often placed reliance on the fact there were still other original examples in the area of that type of building.¹¹⁹ This is even in cases where a building was said to have significant heritage value, and where the relevant Plan emphasised that the building had extra significance because it was part of a group of buildings that formed the gateway to the city.¹²⁰ Emphasis is also often placed on potential adaptive re-uses of the building. If the applicant has considered

¹¹⁴ See *Shell Oil New Zealand Ltd v Wellington City Council* (1993) 1 A ELRNZ 383, 390; *AA McFarlane Family Trust v Christchurch City Council* [1999] NZRMA 365, 76 [AA McFarlane]; *New Zealand Historic Places Trust/Pouhere Taonga v Christchurch Central Methodist Mission* unreported, EnvC Christchurch, C041/02, 2 April 2002, Smith J, para 99 [*Christchurch Central Methodist Mission*]. In the latter case the EC notes that if there no health and safety issues then it would have concluded that the heritage value of the buildings outweighed other considerations. See also *Steven v Christchurch City Council* [1998] NZRMA 289, para 49 [Steven]. This case specifically concerned an application for a plan change under section 85(3) of the RMA, not an application for demolition or removal, but still economic considerations were paramount.

¹¹⁵ *Christchurch Central Methodist Mission*, above n 114, para 84; *AA McFarlane*, above n 114, 101.

¹¹⁶ *Christchurch Central Methodist Mission*, above n 114, para 84.

¹¹⁷ *Christchurch Central Methodist Mission*, above n 114, para 89.

¹¹⁸ *Christchurch Central Methodist Mission*, above n 114, para 92.

¹¹⁹ *Christchurch Central Methodist Mission*, above n 114, para 45.

¹²⁰ *Christchurch Central Methodist Mission*, above n 114, para 53.

alternatives and not found a viable option then this is a factor the EC is likely to take into account as favouring demolition.¹²¹

2. *Cases post 2003 where the Court has granted consent for heritage buildings to be substantially altered, removed, or demolished*

In order to assess whether the amendment has had any noticeable effect on the decisions of the EC it is considered necessary to discuss individual cases before general conclusions are drawn. This also provides the reader with an appreciation of the EC's varied approach to the decision of whether to allow a particular heritage building to be substantially altered, removed, or demolished,

*New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*¹²²

This case concerned an application for a resource consent to demolish the Sidnam Building in Feilding.¹²³ The EC acknowledged there was strong agreement amongst all the witnesses that "the Sidnam Building is a striking example of authentic Edwardian Baroque externally, and that the remarkably intact and original interior of the office premises on the first floor make it specially significant".¹²⁴ The building had a Category B status in the Manawatu District Plan,¹²⁵ and the demolition of the building was a

¹²¹ *AA McFarlane*, above n 114, 55; *Christchurch Central Methodist Mission*, above n 114, para 58; *Stevens*, above n 114, para 7. This latter case concerns an application for a plan change under section 85(3) of the RMA, not an application for demolition or removal, but the EC still placed weight on the applicant exploring alternative options for the property.

¹²² *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council* [2005] NZRMA 431 [*New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*].

¹²³ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 19.

¹²⁴ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 5.

¹²⁵ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 5.

discretionary activity.¹²⁶ The building was currently untenable as there was water leakage on the first floor, and the electrical services needed to be substantially improved.¹²⁷

The EC correctly identified the practical implications of not allowing demolition of the building. The current owners could not afford the necessary restoration work, so without financial assistance it is likely the building would have fallen into a state of disrepair, and the Council would have had to order it be demolished as a health and safety hazard.¹²⁸ It is almost inevitable that this will be an overriding consideration of the Court in its decision making. Yet this reasoning could allow owners of other heritage buildings to claim they cannot or will not spend money to maintain a heritage building, so as a practical matter the EC should allow it to be demolished. One could argue this approach, taken in conjunction with the inability of the EC to order maintenance, fails to protect heritage buildings from inappropriate use and development.

In the current case the EC observed that the Plan noted “it is the collective value of all of the older buildings in the precinct which is important and which needs to be protected”.¹²⁹ There are competing interpretations as to what is meant by the phrase ‘collective value of all of the older buildings’.

¹²⁶ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 11.

¹²⁷ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 20. At para 22 the witness Ms Amanda Coates estimated the costs of refurbishment and structural upgrading to be between \$492,000 and \$570,000. At para 23 the witness Mr Winston Clark, who provided quotes to both the Manawatu District Council and the NZHPT, estimated the costs to be between \$339,750 and \$543,656.25. These have been re-calculated by the author to include G.S.T. in order to provide a comparison with Ms Amana Coates’ estimates. At para 25 the Court held that ‘it would be very difficult, if not impossible, to make the building self-sustaining.’

¹²⁸ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 33. The legal basis for this approach is that it provides for sustainable management, as defined in section 5 of RMA.

¹²⁹ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 6.

One possible interpretation is that it is legitimate for an individual heritage building to be demolished as long as the ‘collective value’ of the precinct is retained. An alternative interpretation is one heritage building alone may have minimal value, but as part of a group of buildings it has ‘collective value’ which should be protected. The Plan itself has emphasised the word ‘all’ by underlining it.¹³⁰ The context of the phrase is also important to accurately interpret it. The paragraph states:¹³¹

The Plan recognises the historic character of the Feilding town centre by identifying a special “Heritage Precinct” (Appendix 4A, Page 214). While there are a number of registered buildings in this area, it is the collective value of all of the older buildings in the Precinct which is important and which needs to be protected.

In light of the context of the statement and emphasis on ‘all’ of the older buildings, it is contended that the latter interpretation of ‘collective value’ is most accurate, and arguably this interpretation would accord better with section 6(f) of the RMA. Yet the EC in reaching its conclusion, appeared to place significant weight on the contrary position. The EC held it was acceptable for the Sidnam Building to be demolished because there were other examples of buildings of the 20th century Edwardian architecture in Feilding.¹³² This reasoning appears to be in contrast to the Plan that emphasised the collective value of “all of” the buildings.¹³³

¹³⁰ Manawatu Operative District Plan (1 December 2002), Part 1, District Plan Strategy, 3 Heritage Values, 3.2 Important Places, 7.

¹³¹ Manawatu Operative District Plan (1 December 2002), Part 1, District Plan Strategy, 3 Heritage Values, 3.2 Important Places, 7.

¹³² *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 31.

¹³³ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 6.

*Tuscany Ltd v Christchurch City Council*¹³⁴

In this case the Christchurch City Council (“CCC”), the NZHPT, and the Merivale Precinct Society opposed the removal of Leinster House.¹³⁵ Tuscany Ltd was the owner of the building, and applied for consent for removal.¹³⁶ Leinster House was designed in the Queen Anne and American Stick Style, and was “symmetrical when viewed on a diagonal from the intersection of Papanui and Leinster Roads, with balconies on both levels, terminating in two-storey bay windows and radiating from a central turret.”¹³⁷ Leinster House was classified as a Category 2 building under the HPA and a Group 4 building under the Christchurch City District Plan (“CCDP”).¹³⁸ Removal of a Group 4 building was classified as a restricted discretionary activity under the Plan.¹³⁹ The discretion was limited to “matters concerning the heritage values of a protected building”.¹⁴⁰

The EC limited its analysis to the assessment matters and other provisions concerning heritage values in the Plan. The EC stated that the matters to be considered under Part II, including sustainable management of the environment, were “encapsulated within the Plan”.¹⁴¹ Importantly the EC observed¹⁴²

It would only be if we considered that any of these assessment matters and other objectives and policies in the Plan did not properly

¹³⁴ *Tuscany Ltd v Christchurch City Council* unreported, EnvC Christchurch, C99/05, 8 July 2005, Smith J [*Tuscany*].

¹³⁵ *Tuscany*, above n 134, para 5.

¹³⁶ *Tuscany*, above n 134, para 15. Tuscany Ltd had previously been granted consent to demolish the building in 1998, this consent expired in 2001 (*Tuscany*, above n 134, para 11). Tuscany applied to the Council for an extension of time, but the Council did not process this request as decided that a different consent had since replaced the demolition consent (*Tuscany*, above n 134, para 14).

¹³⁷ *Tuscany*, above n 134, para 2.

¹³⁸ *Tuscany*, above n 134, para 3.

¹³⁹ *Tuscany*, above n 134, para 18.

¹⁴⁰ *Tuscany*, above n 134, para 18.

¹⁴¹ *Tuscany*, above n 134, para 23.

¹⁴² *Tuscany*, above n 134, para 24.

encapsulate all of the issues that were relevant to a determination of this case that we would consider it necessary to move on to consider these broader issues beyond the Plan itself.

This passage implies that if a Plan did not adequately provide for all of the considerations contained within Part II of the RMA, including the protection of heritage buildings from inappropriate use and development,¹⁴³ then the EC would include those additional considerations in its decision making under Section 104 of the RMA. It is arguable that this could provide the Court with the ability to order that a heritage building to be retained, despite the fact the provisions in a plan did not readily support this conclusion. However in this case the EC, in an obiter comment, stated that the classification of a building was not able to be readjusted as owners had placed reliance on the Plan.¹⁴⁴ This implies that the provisions relating to a certain category have to be applied. The reference to reliance is a fair comment by the EC as building owners' desire certainty. Nevertheless it does mean submitters seeking to preserve heritage buildings need to be proactive at the time a plan is proposed or apply for a plan change, to ensure a building is placed in a category that provides the greatest degree of protection possible.

The CCDP places the city's historic buildings into four categories that require differing levels of protection.¹⁴⁵ In relation to the retention of buildings there is a range from Group 1 where retention is considered essential, to Group 4 where retention is seen as desirable.¹⁴⁶ The EC attributed importance to the fact the Plan had prioritised the retention of certain buildings over others.¹⁴⁷

¹⁴³ As required by section 6(f) of the RMA.

¹⁴⁴ *Tuscany*, above n 134, para 42.

¹⁴⁵ *Tuscany*, above n 134, para 31.

¹⁴⁶ *Tuscany*, above n 134, para 38.

¹⁴⁷ *Tuscany*, above n 134, paras 44-45, and 48.

The EC acknowledged the buildings in Group 4 still had heritage values.¹⁴⁸ Yet in the EC's view this was not a sufficient reason to refuse consent for the removal of the building, instead there needed to be suitable grounds in terms of the assessment criteria.¹⁴⁹ The criteria included 15 different matters the Council should have had regard to in determining the application for removal.¹⁵⁰

One of the assessment criteria was whether the removal of the building would reduce the number and quality of heritage features in the vicinity and city as a whole.¹⁵¹ The EC appreciated this would be the effect of removing Leinster House.¹⁵² In relation to the assessment criterion regarding the impact of the removal on the city's heritage values, the EC believed these values could largely be retained, especially if the house was moved to another site within Merivale.¹⁵³ The EC held that "the applicant has gone to extreme lengths" to reach a compromise that would ensure the building was retained, on the condition the owner was either compensated for the loss of the benefits of development or economic development of the site was accommodated.¹⁵⁴ The incentives in the Plan to retain the building, like rates relief and waiving of resource consent fees, were described by the EC as realistic and "[i]f those are not sufficient to convince the applicant, then in our view it is clear that the ability to economically develop the site would require the removal of Leinster House."¹⁵⁵ In respect of the assessment criterion that concerned whether the

¹⁴⁸ *Tuscany*, above n 134, para 40.

¹⁴⁹ *Tuscany*, above n 134, para 49.

¹⁵⁰ *Tuscany*, above n 134, Annexure A. Seven of the criteria were applicable to the current case.

¹⁵¹ *Tuscany*, above n 134, para 50.

¹⁵² *Tuscany*, above n 134, para 53.

¹⁵³ *Tuscany*, above n 134, paras 56, 58 and 59.

¹⁵⁴ *Tuscany*, above n 134, para 63.

¹⁵⁵ *Tuscany*, above n 134, paras 28, 66 and 68.

retention of the heritage features causes additional costs,¹⁵⁶ the EC estimated the total cost of upgrading the building to be \$500,000.¹⁵⁷

Overall the EC held that the removal was appropriate when considering the hierarchy of protection in the Plan, which recognises there is a balance to be achieved in terms of costs to the owner and heritage protection.¹⁵⁸

Consequently the Plan provided incentives to retain a Group 4 building as opposed to imposing coercive mechanisms like for a Group 1 building.¹⁵⁹ The EC stated that the Plan provisions did not suggest “that the Plan contemplated regular refusals of applications for consent”.¹⁶⁰ This statement can be turned around by questioning whether the Plan suggested refusals should be rare. It is argued that if this were the case then what is the point of classifying the building as having heritage values and listing it in Group 4 in the first place. The question arises as to whether the EC would have granted consent for removal if the building had been in a different category, or if the developer had not investigated alternative uses for the site.

*Palmer v Masterton District Council*¹⁶¹

This case concerned the Tinui Hotel, which was built in 1931. The applicant sought consent to move the building to Greytown, to be used as a family home.¹⁶² The building was listed in the Masterton District Council Operative District Plan as a heritage item.¹⁶³ The Council did not undertake their own

¹⁵⁶ *Tuscany*, above n 134, para 69.

¹⁵⁷ *Tuscany*, above n 134, para 71. The estimated cost included upgrading the building to current seismic and fire protection standards, as well as improving the upstairs interior and the exterior of the entire building.

¹⁵⁸ *Tuscany*, above n 134, para 74.

¹⁵⁹ *Tuscany*, above n 134, para 78.

¹⁶⁰ *Tuscany*, above n 134, para 74.

¹⁶¹ *Palmer v Masterton District Council* unreported, EnvC Wellington, W105/07, 3 December 2007, Sheppard J [*Palmer*].

¹⁶² *Palmer*, above n 161, para 2.

¹⁶³ *Palmer*, above n 161, para 23.

assessment of the building, but included the Tinui Hotel on the basis it was listed as being a Category I building under the HPA.¹⁶⁴

The EC framed the main issue as being whether the Tinui Hotel met the criteria for 'historic heritage' under the RMA, and if so what protection was required under both the Act and the Plan.¹⁶⁵ The removal of the heritage item was a discretionary activity under the Plan.¹⁶⁶ The appellants argued the building had significant heritage values and these would be impaired if the building was removed because they were related to the location.¹⁶⁷ It was contended that the ICOMOS ("International Council on Monuments and Sites") Charter emphasised relocation should only be a last resort, and in this case there were other options.¹⁶⁸ The building was said to be a source of local history and identity that should be protected.¹⁶⁹ The applicants asserted that a distinction should be made between historic heritage and nostalgia, and in this case the building had simply been used by the community since 1931, but this did not qualify the building as being historic heritage.¹⁷⁰

The EC concluded that the removal of the building would better serve the paramount purpose of the RMA of promoting sustainable management.¹⁷¹

¹⁶⁴ *Palmer*, above n 161, para 25. The building was actually classified as being Category II, but there was a deficiency in the registration process, as there was no record that it had been registered by the Board (*Palmer*, above n 161, para 26). The EC held this did not effect the question of whether the building had heritage values (*Palmer*, above n 161, para 29).

¹⁶⁵ *Palmer*, above n 161, para 53.

¹⁶⁶ *Palmer*, above n, para 24. The proposed plan also identifies the removal of a heritage item as a discretionary activity (*Palmer*, above n 161, para 34).

¹⁶⁷ *Palmer*, above n 161, para 45.

¹⁶⁸ *Palmer*, above n 161, para 37. The ICOMOS Charter is a set of guidelines on cultural heritage conservation, produced by ICOMOS New Zealand. The Court at para 41 accepted the finding from *Waitakere City Council v Minister of Defence* [2006] NZRMA 253, para 79 that the Charter is an apt guide to accepted good practice in relation to the conservation of heritage.

¹⁶⁹ *Palmer*, above n 161, paras 55-58.

¹⁷⁰ *Palmer*, above n 161, para 48.

¹⁷¹ *Palmer*, above n 161, para 149. The Court considered it would be sustainable management to allow the removal of Tinui Hotel because it enabled the applicants and their family to provide for their wellbeing, while mitigating any adverse effects on the environment and providing that the Hotel could meet the reasonable foreseeable needs of future generations.

Arguably the EC's decision to grant consent for removal is appropriate however the finding that the building had "limited historic heritage value" is contended to be incorrect.¹⁷² This is because the EC's conception of 'historic heritage' is arguably unduly limited. 'Historic heritage' is defined in Section 2 of the RMA as "those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, and this may be derived from various qualities including architectural, cultural, and historic". The EC's consideration of the heritage values of the building largely dismissed any argument based on the community's connection and historical association with the building.¹⁷³ Instead the EC appeared to place greater weight on the standard conception of heritage values, which arguably focuses more upon the architectural quality of the building.¹⁷⁴

The EC stated that the subjective view of members of the community should not be afforded the same status as the opinion of objective expert witnesses.¹⁷⁵ However the reference to 'expert witnesses' suggests more than one expert believed the building had minimal historical and cultural value. In fact only Mr Kernohan, a qualified architect and former Dean of the Faculty of Architecture at Victoria University believed the building had negligible historical significance.¹⁷⁶ Mr Cochran, the other expert in the case, is a senior conservation architect and has been a member of ICOMOS New Zealand since it was founded.¹⁷⁷ He described the hotel as being a landmark in "the

¹⁷² *Palmer*, above n 161, para 102.

¹⁷³ *Palmer*, above n 161, para 95.

¹⁷⁴ *Palmer*, above n 161, paras 97 and 114. In the opinion of Chris Cochran, one of the expert witnesses in the case, the EC had a narrow view of heritage values that was limited to architectural considerations (Interview with Chris Cochran, Senior Conservation Architect, founding member of ICOMOS New Zealand, and a Member of the New Zealand Order of Merit for the services to the conservation of historic buildings (the author, telephone interview, 26 September 2008) transcript annexed to paper) [Interview with Chris Cochran].

¹⁷⁵ *Palmer*, above n 161, para 95.

¹⁷⁶ *Palmer*, above n 161, para 59.

¹⁷⁷ *Palmer*, above n 161, para 38.

heart of the town, -critical to its identity and social life".¹⁷⁸ In the situations where the two experts differed, the EC preferred the 'detached' opinions of Mr Kernohan.¹⁷⁹ This was because Mr Cochrane was said to have coloured his claim to impartiality by making public comments that the Tinui hotel should be preserved, which reflected his strong interest in the conservation of heritage buildings.¹⁸⁰

The findings of the EC in relation to the evidence concerning the heritage values of the building, raises the interesting issue as to who is the appropriate person to evaluate the cultural and historical quality of a given building. While a qualified architect has the credentials to provide the EC with an assessment of the architectural quality of the building, does this person necessarily have the knowledge to determine its cultural and historical significance? Surely, the most appropriate witnesses to testify as to the cultural quality of a building are the people who live in the relevant community. Arguably this would better reflect the sentiment in Section 2 of the RMA that historic heritage means those resources which contribute to an understanding and appreciation of New Zealand's history and cultures. While the Tinui Hotel may not be grand, it reflects a classic country hotel built during the depression.¹⁸¹ It may well provide people with an understanding of the rudimentary materials which were available during the 1930s, and an appreciation of the importance of a social meeting point for those in rural areas. It is argued that the EC should not limit their conception of 'historic heritage' to the eras that produced buildings with high architectural merit. There should not be a selective assessment of history.

¹⁷⁸ *Palmer*, above n 161, paras 69-70.

¹⁷⁹ *Palmer*, above n 161, para 94.

¹⁸⁰ *Palmer*, above n 161, para 94. It is questioned whether this finding is valid considering conservation architects are likely to have strong opinions about the preservation of heritage buildings, and understandably are likely to advocate for their protection.

¹⁸¹ *Palmer*, above n 161, para 62.

Even though the EC's analysis of heritage values was questionable, a finding that the building had moderate heritage value would probably not have altered the final decision. This is because under the current proposal the building will be restored and refurbished,¹⁸² which will protect some of the heritage values of the building more than if it remained on the present site with no renovations. Admittedly it will be a loss to the Tinui community in terms of its historical and cultural significance. Yet in the overall judgment approach under Section 5 of the RMA the proposal could be seen as enabling the applicants and the current owners of the building to provide for their social and economic wellbeing, while meeting the reasonably foreseeable needs of future generations by preserving the building. Nevertheless it is still important to highlight the EC's reasoning because it raises the question of whether the elements of 'historic heritage' in Section 2 of the RMA are being correctly interpreted by the EC.

3. *Cases post 2003 where the Court has refused to grant consent for heritage buildings to be substantially altered, removed, or demolished*

*Canterbury Museum Trust Board & Ors v Christchurch City Council*¹⁸³

Although this case was not decided pursuant to the RMA, it is an interesting approach to the assessment of heritage values. This case concerns judicial review proceedings against the Canterbury Museum Trust Board ("the Board") by the John Robert Godley Memorial Trust ("the JRGM Trust").¹⁸⁴

¹⁸² *Palmer*, above n 161, para 144.

¹⁸³ *Canterbury Museum Trust Board & Ors v Christchurch City Council* unreported, HC Christchurch, CIV-2005-409-1425, 13 December 2005, Fogarty J [*Canterbury Museum* (HC)].

¹⁸⁴ Originally the Board applied for a declaration pursuant to section 3 of the Declaratory Judgments Act 1908. The Court discussed with the parties that it would be more useful to frame the proceedings as an application for review by the Trust, as permitted by section 7 of the Judicature Amendment Act 1972 (*Canterbury Museum* (HC), above n 183, para 8).

The Board was established by Parliament through the Canterbury Museum Trust Board Act 1993 (“the CMTBA”), and has various functions and powers in relation to the operation of the Museum.¹⁸⁵ At the time of the proceedings it was embarking on a project to modify the Museum building.¹⁸⁶ The JRGM Trust asserted that the Board did not have statutory authority to modify the façade of the Museum building.¹⁸⁷ The Canterbury Museum was listed in the CCDP as a Group 1 heritage building. The Plan noted: “Group 1 listed heritage buildings are of international or national significance, the protection of which is considered essential”.¹⁸⁸

The Court appeared to depart from the position in previous RMA cases, that asserted that the classification of a building was to be determined by reference to the relevant plan.¹⁸⁹ Interestingly in this decision the Court noted that¹⁹⁰

the city plans reflect what is public knowledge, that the Canterbury Museum sits within a cluster of heritage buildings comprising Christ’s College, the museum, the Robert McDougall Art Gallery, and the old university site. These facts are taken for granted in Christchurch and thus recognised by the Court, but usefully confirmed by the city plan.

This suggests weight was given to the public’s perception of the Museum building as having heritage value. The inference is in this specific legal context, the listing of a building as ‘heritage’ in the Plan was not necessary for

¹⁸⁵ Canterbury Museum Trust Board Act 1993, s 9.

¹⁸⁶ The ‘Museum building’ actually comprises several connected buildings, but for the purpose of this case they are referred to as one entity, the ‘Museum Building’.

¹⁸⁷ The Trust also questioned two further areas: whether commercial activities fall within the powers of the Board; and whether or not the Board has the authority to allow overnight accommodation at the Museum (*Canterbury Museum* (HC), above n 183, para 10). For the purposes of this paper these matters do not need to be discussed.

¹⁸⁸ *Canterbury Museum* (HC), above n 183, para 17.

¹⁸⁹ *Tuscany*, above n 134, para 42; *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 5.

¹⁹⁰ *Canterbury Museum* (HC), above n 183, para 18.

the Court to conclude that the building was of heritage value. An interesting question is could this finding be transposed from judicial review proceedings to the RMA context, if the Court is confronted with the situation where a building has accepted heritage value to the community but it is not recognised as having heritage status in the district plan? There may be concerns that this approach may involve judges confining the assessment of the heritage values of a building to the views of those who made submissions in a particular case, which may subvert the democratic process that produced the plan. Although it is important to note that this is precisely the approach adopted by the EC in relation to ONL.

The question of whether there was any duty on the Board to maintain the heritage values of the Museum building, was assessed in light of the obligation in Section 9(1)(c) of the CMTBA, “to ensure that the Museum building, collections and documentation are maintained in good order and condition.” The Court evaluated competing constructions of this section. The interpretation most favourable to the Board was that this section allowed it full discretion to implement policy, as long as it was in accordance with the objectives of the Museum set out in Section 3 of the CMTBA.¹⁹¹ An alternative construction was that the section was a constraint on the Board’s powers in respect of the Museum building.¹⁹² This was supported by the fact that Section 4 of the Act permitted the Board to acquire or dispose of objects and data, but there was no similar authority given to the Board in respect of the Museum building.¹⁹³

After reviewing the legislative history of the Act, the Court held that in any case: “The demolition and rebuilding of a new facility on the present site or

¹⁹¹ *Canterbury Museum* (HC), above n 183, para 56.

¹⁹² *Canterbury Museum* (HC), above n 183, para 59.

¹⁹³ *Canterbury Museum* (HC), above n 183, para 59.

on a Greenfields site cannot be fitted into any of the three available possible constructions".¹⁹⁴ The Court noted maintenance of the building was permitted as long as the heritage values of the building were retained.¹⁹⁵ The Court in effect adopted the construction which viewed Section 9(1)(c) of the CMTBA as a constraint on the Board's power.

However arguably, the meaning of Section 9(1)(c) of the Act is not as wide as the first suggested interpretation, which would permit the Board to fundamentally alter the Museum. Further, the wording "maintained in good order and condition", arguably also does not support the alternative construction which infers an obligation of the Board to retain the heritage values of the building. It could be suggested that Parliament would never have contemplated that anybody would want to demolish or alter the Museum, because of its inherent heritage value. While this may be plausible, the argument should not be used to subvert the express wording of the legislation. In respect, the Court appears to have read in the obligation in order to protect what is a magnificent heritage building.¹⁹⁶

The Court analysed the Board's own perception of their role, and found it had failed to appreciate Parliament had directed them to fulfil their objectives in a way that retains the Museum building in order to preserve its heritage values.¹⁹⁷ The Court declined to issue the Board with a declaration that the

¹⁹⁴ *Canterbury Museum* (HC), above n 183, para 72.

¹⁹⁵ *Canterbury Museum* (HC), above n 183, para 76. It acknowledged that this requires the Board to exercise their judgment as to what qualifies as appropriate maintenance (*Canterbury Museum* (HC), above n 183, para 78).

¹⁹⁶ It is advocated that the pertinent avenue to protect this building is at the resource consent stage, where the LA and the EC should give appropriate weight to section 6(f) of the RMA, by affording greater consideration to heritage values. There were proceedings that challenged the proposal on the basis of provisions in both the City Plan and the RMA (*Canterbury Museum Trust Board & Ors v Christchurch City Council* unreported, EnvC Christchurch, C 59-06, May 17 2006, Jackson J [*Canterbury Museum* (EnvC)]).

¹⁹⁷ *Canterbury Museum* (HC), above n 183, para 79. This position is strongly supported by the evidence at para 80 that the Board considered demolishing the Museum building in 1988.

revitalisation project was within the powers of the Board. The Board was instead directed to reconsider the proposed alterations that affected the façade of the Museum building fronting Rolleston Avenue, in light of Section 9(1)(c) of the Act.¹⁹⁸

*Wellington Boys' and Girls Institute' Inc v Wellington City Council*¹⁹⁹

This case involved a proposal to raise Spinks Cottage by 1.9 metres to create space for a youth café.²⁰⁰ The Cottage was no less than 145 years old and was listed on the District Plan.²⁰¹ The proposal had accepted positive effects through the establishment of a safe and well-resourced café that would enable younger people to better provide for their wellbeing and health and safety.²⁰² The principles in the ICOMOS Charter concerning relocation were held to apply even though the proposal was merely to elevate the cottage above the same footprint.²⁰³ The Court held that the proposal was not consistent with the heritage objectives and policies in the Plan, because of a loss in heritage values.²⁰⁴

In this case the future maintenance of the Cottage was financially assured as the St John's Church held money on trust for the maintenance of its buildings.²⁰⁵ It is argued that the decision in this case can be distinguished from other cases predominately because of this fact. In previous cases the maintenance of the heritage building was not financially guaranteed, and this

¹⁹⁸ *Canterbury Museum* (HC), above n 183, para 101.

¹⁹⁹ *Wellington Boys' and Girls Institute' Inc v Wellington City Council* unreported, EnvC Wellington, W010/08, 25 February 2008, Thompson J [*Wellington Boys' and Girls Institute' Inc v Wellington City Council*].

²⁰⁰ *Wellington Boys' and Girls Institute' Inc v Wellington City Council*, above n 199, para 4. At para 38 it states the activity was discretionary under the operative district plan.

²⁰¹ *Wellington Boys' and Girls Institute' Inc v Wellington City Council*, above n 199, paras 8, 10, and 38.

²⁰² *Wellington Boys' and Girls Institute' Inc v Wellington City Council*, above n 199, para 19.

²⁰³ *Wellington Boys' and Girls Institute' Inc v Wellington City Council*, above n 199, para 33.

²⁰⁴ *Wellington Boys' and Girls Institute' Inc v Wellington City Council*, above n 199, para 43.

²⁰⁵ *Wellington Boys' and Girls Institute' Inc v Wellington City Council*, above n 199, para 17.

appears to be the overriding consideration that influenced the Court to grant consents for demolition or removal.²⁰⁶

²⁰⁶ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 33; *Palmer*, above n 161, paras 13 and 146.

CHAPTER IV. COMPARISON BETWEEN THE TWO APPROACHES

A. *Criteria Used to Make Classification*

In relation to ONL detailed criteria have been adopted by the EC as to when a landscape will be classified as ‘outstanding’, and the degree of ‘naturalness’ required.²⁰⁷ Yet in relation to heritage buildings the Court has not adopted or developed any uniform criteria to determine if a building has heritage values. The EC should emphasise what considerations are relevant to the classification of a heritage building. This should include those qualities listed in the definition of ‘historic heritage’ in the RMA, which are wider than architectural considerations.²⁰⁸ If the EC developed or emphasised clear criteria this would enable planners to adequately provide for heritage buildings. It would also assist the EC in future decision making, in assessing whether a plan adequately incorporated Part 2 matters including the providing for heritage.

In addition in the context of ONL the EC has held “there seems now to be consensus that *landscape* comprises more than the purely visual, and encompasses the ways in which individuals and the communities they are part of perceive the natural and physical resources in question.”²⁰⁹ There has not been such an encompassing definition applied to the assessment of heritage buildings. The EC has focussed primarily on the aesthetic state of the building.²¹⁰ There appears to be scope within the RMA for the Court to legitimately incorporate the communities’ view into any decision regarding a

²⁰⁷ *Wakatipu*, above n 5, paras 80 and 89.

²⁰⁸ RMA, s 2(1).

²⁰⁹ *Outstanding Landscape Protection Society*, above n 12, para 46.

²¹⁰ See *Palmer*, above n 161, paras 95 – 97.

building's heritage values. This is because 'historic heritage' includes cultural and historic qualities not merely architectural merit. It is argued that the EC should firstly consider if the communities' perception of the value of the building has been reflected in the plan; and secondly if it has failed to do so then the EC should consider this factor as part of its decision making by hearing relevant evidence.

In *Canterbury Museum* the HC noted that the heritage status of the Museum was not even questioned by the people of Christchurch, so it was therefore readily accepted by the Court and only usefully confirmed by the Plan.²¹¹ This was a case concerning judicial review of a decision of the Board who managed the Museum, so it is not a precedent within the RMA context. Nevertheless, this finding could have useful application in the RMA setting where the EC is confronted with the situation where a building has accepted heritage value to the community but this is not recognised in the district plan. The case of *Canterbury Museum*²¹² could only be relied upon where the heritage values of the building were undisputed and accepted by the vast majority of the community.²¹³ Perhaps the reason the Courts has placed more weight on the public's perception in relation to ONL compared to heritage buildings is because the value of a landscape is arguably less contentious than the value of a building.²¹⁴

²¹¹ *Canterbury Museum* (HC), above n 183, para 18.

²¹² *Canterbury Museum* (HC), above n 183.

²¹³ This is probably satisfied on an objective test to be determined on the evidence.

²¹⁴ As noted by Jackson J: "Usually an outstanding natural landscape should be so obvious (in general terms) that there is no need for expert analysis" (*Wakatipu*, above n 5, para 99). It is doubtful that the same could be said about heritage buildings.

B. *Ability of the Court to Classify Despite District Plan*

The Court has repeatedly affirmed that it is permitted to find that a landscape is ‘outstanding’ even if it is not classified as such in the relevant district plan.²¹⁵ The basis for this position is that section 104 of the RMA directs that the Court acting as a consent authority must have regard to the district plan but this is subject to Part 2.

The Court considered what is meant by the phrase “must have regard to”. In *Unison Networks*,²¹⁶ the Court agreed with the analysis of Hansen J in *Foodstuffs (South Island) Ltd v Christchurch City Council*,²¹⁷ that ‘must have regard to’ did not equate to the more erroneous test of ‘shall give effect to’. Instead the wording was held to mean “the requirement for the decision maker is to give genuine attention and thought to the matters set out in s 104 but they must not necessarily be accepted”.²¹⁸ Therefore the EC must consider the decision of a LA not to classify a particular landscape as ‘outstanding’, but ultimately if the criteria for ONL are satisfied then the Court can decide that the landscape is in fact an ONL. This same reasoning can logically apply to ‘heritage buildings’. However, the Court has been reluctant to find that a building has heritage values to be protected if it is not classified as a heritage building under the relevant plan.

In *North Dunedin Urban Concern Inc v Dunedin City Council*²¹⁹ the Santa Sabina building was not listed in the HPR or recognised under the District Plan.²²⁰

²¹⁵ *Chance Bay*, above n 6, paras 24-25; *Unison Networks*, above n 15, para 87; *Okura Bay*, above n 42, para 144; *Kaupokonui Beach Society Inc v South Taranaki District Council* unreported, EnvC Wellington, W030/08, 19 May 2008, Dwyer J, para 41. This latter cases strictly concerned the coastal area not an ONL.

²¹⁶ *Unison Networks*, above n 15, para 70.

²¹⁷ *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481.

²¹⁸ *Unison Networks*, above n 15, para 70.

²¹⁹ *North Dunedin Urban Concern Inc v Dunedin City Council* unreported, EnvC Christchurch, C095/07, 20 July 2007, Smith J [*North Dunedin Urban Concern*].

Despite this, all the witnesses and the EC accepted the building had heritage values.²²¹ The Court questioned whether the Plan had failed to provide for items as required by section 6(f) of the RMA.²²² This section was created after the Plan was promulgated,²²³ although at that time heritage values were still a matter to have particular regard to under section 7(e) of the RMA.²²⁴ The Court commented that the Plan “takes a relatively strong approach to heritage matters”.²²⁵ It then suggested the fact the building was constructed in the 1930s may be a sufficient reason for the Council not to have listed the building.²²⁶ So although the Court acknowledged the building had heritage values, it stated: “We are not able to conclude that these are such that the Plan has failed to recognise or provide for them under section 6(f).”²²⁷ It is unclear whether Smith ECJ was meaning the Court can never conclude that a plan has failed to provide for heritage values; or because the Plan did take a generally robust approach to heritage issues, it was therefore not for the Court to question the Council’s judgment in respect of the Santa Sabina building.²²⁸

It has been suggested that the Court could have regard to other considerations in its decision making, if the provisions of a plan did not adequately incorporate Part II of the RMA.²²⁹ Yet there is no known authority that supports the Court overruling a plan’s classification of a building. The likely reason why the approach to re-classification in ONL cases has not been

²²⁰ *North Dunedin Urban Concern*, above n 219, paras 39 and 42. The relevant District Plan was the Dunedin City District Plan.

²²¹ *North Dunedin Urban Concern*, above n 219, para 41.

²²² *North Dunedin Urban Concern*, above n 219, para 39.

²²³ *North Dunedin Urban Concern*, above n 219, para 39.

²²⁴ Paragraph (e) was repealed, as from 1 August 2003, by Section 5 of the Resource Management Amendment Act 2003.

²²⁵ *North Dunedin Urban Concern*, above n 219, para 40.

²²⁶ *North Dunedin Urban Concern*, above n 219, para 41.

²²⁷ *North Dunedin Urban Concern*, above n 219, para 41.

²²⁸ This finding was not crucial to ensure the protection of the building, because the owner was willing to protect it through the creation of a covenant and through the establishment a historic management plan as well as undertake renovations to improve the state of the building (*North Dunedin Urban Concern*, above n 219, para 43).

²²⁹ *Tuscany*, above n 134, para 24.

adopted is the concern that owners of buildings may have placed considerable reliance on the plan's classification. It is argued that there is a greater sense of reliance on the classification of heritage buildings compared with the classification of ONL. This is because most ONL are on public land so any re-classification does not directly affect private property rights. Conversely, any re-classification which meant a building now had heritage values is likely to detrimentally affect an owner's private property rights. While it is important to respect that the owners of a building may have placed reliance on the classification, it should not mean that the Court ought to be limited in what to take into account at the decision making stage. This is because section 104 of the RMA expressly provides that the consideration of the consent authority is subject to Part 2.

In addition provisions in a plan considered collectively can usually be interpreted in alternative ways. For example in *Tuscany* the Court could have potentially reached a different decision on the resource consent application while respecting the Council's classification of the building as Group 4.²³⁰ The discretion of the Council was limited to matters concerning the heritage values of the building.²³¹ Some of the applicable assessment criteria could be interpreted as supporting the position that the building should not be moved. This is because the removal would arguably reduce the range, number, and quality of heritage features in the vicinity;²³² have a detrimental impact on the city's heritage values;²³³ and be contrary to the conservation principles in the ICOMOS Charter.²³⁴ The other assessment criteria that the EC relied on to

²³⁰ *Tuscany*, above n 134.

²³¹ *Tuscany*, above n 134, para 18.

²³² Christchurch City District Plan (14 November 2005), Volume 3, Part 10 Heritage and Amenities, 1.4 Assessment matters for resource consents, 1.4.1 Assessment matters - Demolition, removal or alteration of any protected buildings, places or objects, assessment criteria (a) [Assessment matters].

²³³ Assessment matters, above n 232, assessment criteria (b).

²³⁴ Assessment matters, above n 232, assessment criteria (i).

justify demolition could have been interpreted to support the retention of the building in accordance with section 6(f) of the RMA.²³⁵

If the policies and rules of a plan do not sufficiently provide for the protection of historic heritage, then it is appropriate for the Court to consider the impact of Part II of the RMA during the decision making stage. It is also argued that that the policies and rules of a plan relating to the protection of historic heritage should be afforded the interpretation which best reflects the sentiment in section 6(f) of the RMA.²³⁶

C. *Concern for Owner's Financial Position*

In the majority of cases involving heritage buildings the Court appear to have placed more weight on providing for people's economic wellbeing, than in the cases which concern ONL.

For example in the ONL case *Outstanding Landscape Protection Society* the Court discussed factors to be considered under section 5 of the RMA, they noted that even though "the proposal would help enable people and communities to provide for their economic wellbeing and their health and safety...it would not help people and communities provide for their cultural, and possibly social wellbeing. Nor would it sustain the landscape, visual and cultural amenity resource for future generations."²³⁷ In this case the Court

²³⁵ Assessment matters, above n 232, assessment criterion (j), (k), (l), and (m).

²³⁶ See also *Canterbury Museum* (EnvC), above n 196, para 160. The Court emphasised that both the RMA and the Christchurch City Plan are very conservative documents in regards to historic heritage, so this should be respected.

²³⁷ *Outstanding Landscape Protection Society*, above n 12, para 116.

decided the latter factors were more important and outweighed any economic considerations.²³⁸

In contrast, in most heritage building cases the financial hardship of the applicant has been relied upon to justify the modification, removal, or demolition of a heritage building. One pertinent example is the case *Steven v Christchurch City Council*.²³⁹ The Court held “imposing costs of \$300,000 on the applicant (a sum of money she does not have and cannot readily obtain) to renovate the property would be an unreasonable burden”.²⁴⁰ The Court made this comment despite the fact Ms Steven purchased the house with the knowledge it was listed as a heritage building.²⁴¹ Palmer described this case as “represent[ing] a high point in the ability of a property owner to succeed, largely on the grounds of personal hardship, and an inability to maximise the sale potential of a property.”²⁴² It is argued that a purchaser who buys a property with the knowledge it is a heritage building should not then be able to claim that the financial burden of owning such a building is too great and it should be removed or demolished. If this is permitted to happen then people could purchase a neglected heritage building for a modest sum, in recognition of the restoration work that needs to be done to it, and then may potentially benefit from its demolition by not having to pay for any refurbishment and being able to develop the land.

²³⁸ *Outstanding Landscape Protection Society*, above n 12, para 116 and 118. See also *Lakeview Properties v Queenstown Lakes District Council* unreported, EnvC Christchurch, C80/06, 19 June 2006, Commissioners Manning and Grigg, paras 79-80; *Ducks In A Row Ltd v Queenstown Lakes District Council*, unreported, EnvC Christchurch, C103/05, 21 July 2005, Jackson J, para 49. [*Ducks In A Row*].

²³⁹ *Steven*, above n 114. It is to be noted that this case was decided before the 2003 amendment that added s6(f) to the RMA and meant ‘historic heritage’ was a matter of national importance.

²⁴⁰ *Steven*, above n 114, para 49. This case concerns an application for a plan change under section 85(3) of the RMA, not a resource consent application.

²⁴¹ *Steven*, above n 114, para 48.

²⁴² K Palmer “Resource Management Amendment Act 2003 – a timely upgrade” (2003) 5 *BRMB* 37, 42.

A further example of the Court placing substantial weight on economic considerations is the case of *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council* where the Court noted the alternative to demolition could be to keep the building shut until a viable solution arose, but this option, which would be less costly than restoration, was described by the Court as placing “a fiscal millstone” around the necks of the current owners.²⁴³ This case reflects the pervading view of the Court, that property owners should not be burdened with the costs of restoring a heritage building.

The Court is right to acknowledge that nothing in the RMA imposes an absolute duty on the owners of heritage buildings to preserve them.²⁴⁴ Yet it is questionable whether economic considerations should be afforded more weight than concerns about people’s cultural wellbeing and the need of future generations. In *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council* there was recognition that the demolition provided for the cultural wellbeing of the community because if the building was not demolished then it would fall into disrepair and this would be detrimental from a cultural perspective.²⁴⁵ Yet ultimately it was the fact the owners could not afford to restore the building that influenced the Court to grant the consent for demolition.²⁴⁶

²⁴³ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, at para 26.

²⁴⁴ *Canterbury Museum (EnvC)*, above n 196, para 136.

²⁴⁵ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 33.

²⁴⁶ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, paras 24-26.

One likely reason as to why the Court places less emphasis on economic considerations in ONL cases is that ONL are often on public land.²⁴⁷ This means developers usually do not lose direct financial benefit they would have had as of right, had it not been for the classification. They only lose the potential to develop on the ONL, which in the Court's view is not a right. The ONL decisions usually concern one of two common situations. The first scenario involves a company applying to erect some sort of facility on the ONL. In relation to wind-farm cases the Court has stated that renewable energy is important, but it cannot dominate all other values.²⁴⁸ In relation to the positioning of utilities on ONL the Court has held that utility operators should not be able to claim they have a right to site a utility on an ONL, instead the TA should have the discretion to decide.²⁴⁹ The second scenario involves private land in an ONL. The Court has sometimes restricted the ability of an individual to develop their property.²⁵⁰ Although the crucial factor is there are other potential uses of the land so these individuals still have viable alternative options.²⁵¹ Whereas in relation to heritage buildings, it is often a case of costly repair or considerable ruin.

Thus, there is a clear difference of approach in relation to whether something is a direct financial burden like the maintenance of a heritage building, or rather just prevents opportunities to improve financial position by new development or use.

²⁴⁷ For example Coronet Peak and Lake Hawea are both Crown Pastoral Land (Land Information New Zealand *Status and Location of Crown Pastoral Land* (Internet) <<http://www.lin.govt.nz/crown-property/pastoral-land-tenure-review/status-of-pastoral-land/index.aspx>> accessed 01/10/08).

²⁴⁸ *Outstanding Landscape Protection Society*, above n 12, para 116.

²⁴⁹ *Wakatipu*, above n 5, para 16.

²⁵⁰ *Ducks In A Row*, above n 238, para 50.

²⁵¹ For example in continuing the use of farming, or developing the portion of the land not in the ONL.

CHAPTER V. IDENTIFICATION OF THE PROBLEM

The deficiencies in the approach to heritage buildings have been alluded to in the discussion of the case law. These will now be expressly discussed

A. *Differences between a Plans' Identification of Heritage Buildings and the Historic Places Trust Register*

When preparing plans LAs do not have to include any of the buildings the NZHPT lists on the register of historic places.²⁵² Sections 66(2)(c)(iia) and 74(2)(b)(iia) of the RMA set out when preparing or changing a plan, the LA “shall have regard to” any relevant entry in the HPR. This inevitably leads to the situation where “plans vary widely across the country and there may be a better chance to revamp a heritage building in Auckland than in Christchurch”.²⁵³

LAs often list the buildings recorded in the HPR as items requiring protection in the plans. Yet this is not always the case. A recent example is St Mary's Presbytery in Wanganui, which is listed as a Category I historic place.²⁵⁴ The Wanganui District Council had identified St Mary's Presbytery as an important building that deserved protection, but decided to postpone the Plan Change that would have protected it and other heritage buildings.²⁵⁵ The Council “cited their concern over the potential cost obligations for heritage

²⁵² However this does not mean that a Territorial Authority or Regional Council can disregard s 6(f) of the RMA.

²⁵³ M Erwin “Museum Piece” (2006) 102 *Heritage New Zealand* 8, 9. The philosophy of the RMA is to have regional variations in approach, but this may not be adequately protecting built heritage.

²⁵⁴ Historic Places Register, Registration number 7756, Registered 27/06/08.

²⁵⁵ New Zealand Historic Places Trust Media Release 10 September 2008, *Historic place being demolished for car parks* (Internet) <http://www.historic.org.nz/news/media_releases/2008_09_10stmarys.htm> accessed 20/09/08 [Media Release].

owners if historic places are included in the District Plan."²⁵⁶ Demolitions have begun on St Mary's Presbytery and the proposal is to provide car parking on the site.²⁵⁷ Ann Neill, NZHPT General Manager, Central Region, noted that: "As NZHPT has no regulatory protection that we can apply to historic places, we rely on local authorities to protect them through their district plans. Wanganui District Council has chosen not to protect the Presbytery building, and the end result is that it will be lost."²⁵⁸ This example highlights the fundamental concern that plans do not always make reference or provide protection for the buildings listed on the HPR.

B. *Register has Minimal Practical Effect*

Excluding the buildings on the HPR from plans is problematic because somewhat surprisingly it is not an offence to demolish a Category I or Category II heritage building registered under the HPA.²⁵⁹ The exceptions are if the building is vested or under the control of the trust²⁶⁰ or is subject to: interim registration,²⁶¹ a heritage covenant,²⁶² a heritage order,²⁶³ or if there is notice of the requirement for a heritage order.²⁶⁴

The NZHPT may be reluctant to apply for heritage orders, because as the heritage protection authority they may be ordered by the Court to either

²⁵⁶ Media Release, above n 255.

²⁵⁷ Media Release, above n 255.

²⁵⁸ Media Release, above n 255.

²⁵⁹ See generally section 99 of the HPA provides that it is an offence if a person has knowledge or reasonable cause to suspect that a site is archaeological; and then destroys, damages, or modifies the site.

²⁶⁰ HPA, s 97.

²⁶¹ HPA, s 103. A brochure produced by the NZNZHPT states that it is not standard procedure for the interim registration process to be used (New Zealand Historic Places Trust, *The Register* (brochure)).

²⁶² HPA, s 98.

²⁶³ RMA, s 193.

²⁶⁴ RMA, s 194.

remove the heritage order, or take the land under the Public Works Act 1981.²⁶⁵ There are not enough financial resources for the NZHPT to manage every heritage building under threat. It is likely that this is the same reason why only a few buildings are vested or under the control of the trust.²⁶⁶ Heritage covenants are useful but require the approval of the owner of the building.²⁶⁷

A further problem in relation to the regulation of heritage buildings is even if a building is protected, currently there is no express legal obligation to maintain the building.²⁶⁸ This means owners can let a building become derelict until either a concerned citizen or group purchases the building; or it has to be demolished as a health and safety hazard.²⁶⁹ In a NZHPT discussion paper 'demolition by neglect' has been defined as: "the destruction of a heritage place or area through abandonment or lack of maintenance."²⁷⁰ A further element of 'demolition by neglect' is said to be intention, as the categorisation 'demolition by neglect' only applies to those owners who have the means to maintain the building but refuse to do so.²⁷¹

The register could be described as 'toothless', as it lacks any enforcement mechanism. LAs are only under an obligation 'to have particular regard to' any relevant entry on the HPR.²⁷² Therefore this means the NZHPT is heavily

²⁶⁵ RMA, s 198.

²⁶⁶ As at 2007, 60 properties within New Zealand are managed and controlled by the NZHPT (R McClean "State of the Environment Reporting and Monitoring" *Sustainable Management of Historic Heritage Guidelines Guide No. 5* (2007) 24 [State of the Environment]).

²⁶⁷ HPA, s 6(1).

²⁶⁸ This is the case even if a building is subject to a heritage order. Section 193 of the RMA only limits using the land in the sense of section 9(4) of the RMA and 'changing the character, intensity, or scale of the use of any land', it therefore does not confer an obligation to maintain the land.

²⁶⁹ For example a previous owner of three of the old miner's cottages in Arrowtown let them fall into a state of disrepair. After much public outcry and pressure the Wakatipu District Council ended up purchasing them to ensure that they were maintained (P Wallace and A Franchetti "Heritage at Risk: Addressing the issue of demolition by neglect of New Zealand's Historic Heritage" *Sustainable Management of Historic Heritage Guidelines Discussion Paper No.6* (2007) 6 [Heritage at Risk]).

²⁷⁰ Heritage at Risk, above n 269, 4.

²⁷¹ Heritage at Risk, above n 269, 5.

²⁷² RMA, ss 66(2)(c)(iia) and 74(2)(b)(iia).

reliant on LAs to include the identified heritage buildings in plans in order to provide the necessary protection.

C. *The Court Giving Minimal Weight to Heritage as Section 6 Matter*

In 1996 the Parliamentary Commissioner for the Environment recommended that the protection of historic heritage be raised to a matter of national importance, as many historic places were not being adequately protected.²⁷³ This recommendation was realised through an amendment to the RMA in 2003.²⁷⁴ There has been minimal discussion in the case law about the consequences of the amendment.

One of the first cases to discuss the amendment was *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*.²⁷⁵ The Court noted the amendment was “obviously of some significance”.²⁷⁶ However the Court did not discuss the merits or benefits of the amendment and instead was quick to point out the limitations of Section 6(f) of the RMA. It highlighted not every building that could be classified as historic heritage was nationally important.²⁷⁷ It also noted “the protection of historic heritage is not an end in itself”, it is merely one of several factors to be considered when making an “overall judgment” about the application.²⁷⁸ The Court affirmed the position

²⁷³ PCE Report, above n 2, 93.

²⁷⁴ Section 6(f) of the RMA was added, on 1 August 2003, by section 4 of the Resource Management Amendment Act 2003. There was minimal discussion in Hansard about the elevation of the protection of historic heritage to a matter of national importance ((20 March 2003) 607 NZPD 4293).

²⁷⁵ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 13.

²⁷⁶ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 13.

²⁷⁷ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 14.

²⁷⁸ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 15. See also *Palmer*, above n 161, para 145.

that section 6 of the RMA was subordinate to the primary purpose of the Act, namely sustainable management, as defined in section 5 of the RMA.²⁷⁹

While these are valid points, the Court appears to have downplayed the legislative direction from Parliament. In *van Camp* the Court glossed over the consequences of Section 6(f) of the RMA and stated that the “[f]indings already made ensure that the issue is appropriately addressed”.²⁸⁰ Further, in *Tuscany* the Court did not discuss Section 6(f) of the RMA except for stating that it was already incorporated in the provisions of the Plan.²⁸¹

Before the amendment, the protection of historic heritage was considered under Section 7 of the RMA as a matter to ‘have particular regard to’. By elevating historic heritage to a matter of national importance that ‘must be taken into account’, LAs are under an obligation to amend the plans to reflect this statutory direction.²⁸² It could also be argued that there should be sufficient acknowledgment by the Court through a shift in approach to the protection of heritage values. This is not to say the heritage values of a building as a nationally important matter should always outweigh other considerations, but that these should be given appropriate weight in accordance with the legislative amendment.

²⁷⁹ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 15. See also *Outstanding Landscape Protection Society Inc*, above n, para 85; *Auckland Volcanic Cones Soc Inc v Transit NZ* [2003] 7 NZRMA 316, 36; *Pigeon Bay*, above n 13, 47.

²⁸⁰ *van Camp v Auckland City Council* unreported, EnvC Auckland, A073/07, 31 August 2007, Newhook J, para 220. The findings were that the requirement for the designation was confirmed, on the condition that the design of the roof structure and day lit gallery above the Grainger a D’Ebro building were modified (paras 216 and 223).

²⁸¹ *Tuscany*, above n 134, para 80.

²⁸² RMA, ss 66(1) and 74(1).

D. *Skewed Weighing Test*

Section 5 of the RMA is the paramount section of the Act. It involves the Court undertaking a balancing exercise and using the 'overall assessment' approach to determine what is sustainable management.²⁸³ Heritage values are related to this weighing test because enabling people to provide for their economic wellbeing often supports the demolition of a heritage building in favour of new development; and enabling for the cultural wellbeing of the community often supports the retention and protection of the building as heritage buildings often form part of people's sense of identity. Arguably the Court is placing too much emphasis on enabling individuals to provide for their economic wellbeing, at the expense of the cultural wellbeing of communities and the needs of future generations.

In cases that do not involve one individual but a community facility, it is contended the Court is more likely to give greater consideration to the cultural well-being of the community and the needs of future generations. This is apparent from analysing the cases concerning the Canterbury Museum and the Auckland Art Gallery. In the case concerning the Canterbury Museum the Court emphasised that even though the alternative options were very costly this did not outweigh the importance to the community of protecting the heritage values of the building.²⁸⁴ Conversely, in *van Camp* the Court held that allowing the alterations to be made to the Art Gallery, enabled people to provide for their cultural well-being, as the Gallery would be a world-class facility.²⁸⁵ It would also meet the reasonably foreseeable needs of future generations because the important heritage elements of the

²⁸³ *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, 46.

²⁸⁴ *Canterbury Museum (EnvC)*, above n 196, paras 142-143.

²⁸⁵ *van Camp*, above n 280, para 219.

Art Gallery would be retained.²⁸⁶ These cases perhaps demonstrate that when a building is considered to be a community asset then the Court is more willing to place emphasis on the cultural wellbeing of the community and the needs of future generations. However when the asset is owned by an individual the Court appears to be reluctant to afford much weight to the communities' cultural wellbeing and the needs of future generations. The underlying reason for this difference in approach is likely to be the belief that private property rights should not be circumvented in order to provide for the public interest. In light of these apparent failings, potential solutions to overcome the deficiencies in the current approach will be considered.

²⁸⁶ *van Camp*, above n 280, para 219.

CHAPTER VI. SOLUTIONS TO PROVIDE FOR GREATER PROTECTION OF HERITAGE BUILDINGS

A. *National Policy Statement*

The most direct way to establish a nationally coherent approach to the protection of heritage buildings would be through the creation of a NPS. This is because plans must give effect to any NPS.²⁸⁷ In addition LAs must amend any policy statement, plan, or variation, as soon as practicable or within the time specified in the NPS, in order to give effect to the NPS.²⁸⁸

1. *Contents of proposed policy statement*

The purpose of a NPS is to identify policies and objectives for matters of national significance related to achieving sustainable management.²⁸⁹ As the protection of historic heritage has been identified as a matter of national importance in Section 6 of the RMA, it is suggested it can easily be regarded as a matter of national significance applicable to sustainable management.

The criteria used to categorise a building under the HPA could form one policy of the NPS.²⁹⁰ However the essence of the problem is not so much the acknowledgement that a building has heritage value, but the subsequent importance attributed to this status. This could be addressed by applying the model guidelines for regional policy statements that have been developed by the NZHPT for use by Councils throughout New Zealand.²⁹¹ If these were

²⁸⁷ RMA, ss 67(3)(a) and 75(3)(a).

²⁸⁸ RMA, s 55.

²⁸⁹ RMA, s 45.

²⁹⁰ HPA, s 23(2).

²⁹¹ R McClean and K Greig “Regional Policy Statements” *Sustainable Management of Historic Heritage Guidelines Guide No. 1* (2007).

incorporated into NPS, LAs would have to give effect to them.²⁹² Importantly this would foster clarity and a more consistent approach.

2. *A more democratic solution than the Court formulating policies and objectives*

The creation of a NPS is a more democratic process than the Court devising policies and objectives themselves. This is because in order to be approved as a NPS it is first subject to a statutory process. The public democratically elected the members of the legislature who were responsible for creating this statutory process.

This process stipulates if the Minister for Environment considers it desirable to develop a NPS then he or she must seek and consider comments from relevant iwi authorities and appropriate persons and organisations.²⁹³ After the policy statement is prepared, the public is to be notified and have the opportunity to make submissions about the statement which are then to be summarised in a report.²⁹⁴ The public submission stage may include a hearing conducted by a board of inquiry.²⁹⁵ This report is to be produced by a board of inquiry and is to consider several matters including the matters in Part 2, the proposed NPS, and any submissions.²⁹⁶ It is to include recommendations to the Minister, who must then consider the report and can make any necessary changes to the proposed statement.²⁹⁷ Upon the recommendation of the Minister, the Governor-General in Council may approve a NPS.²⁹⁸

²⁹² RMA, s 55.

²⁹³ RMA, s 46.

²⁹⁴ RMA, ss 46A, 48 and 49.

²⁹⁵ RMA, s 50.

²⁹⁶ RMA, ss 46A, 47, and 51.

²⁹⁷ RMA ss 46A, 51, and 52.

²⁹⁸ RMA, s 52(2).

The above process incorporates public participation through the submission stage. There is no rule that if the majority of the public objected to a proposed statement then it would be abandoned, the Minister only has to consider the submissions. Yet this process takes into account public opinion far more than if the Court were to construct arbitrary criteria.

3. *Practicalities*

Despite the stated advantages, it is not very likely that a NPS for the protection of heritage buildings will be created. This is because to date there are only two such statements.²⁹⁹ Furthermore to set a fixed approach to the protection of heritage buildings may not account for regional variation in the quality of the buildings and also for the practicalities of retaining them. For example in a rural area it may be more difficult to justify substantial restoration costs when these cannot be recovered through financial assistance or through rental income. Having certain criteria may also unjustifiably limit the ability of Councils to be flexible in their response to applications. It is contended that there is merit in the Council being allowed to waive certain policies particularly if this results in a heritage building being protected.

B. *Reconcile Historic Places Register and Regional and District Plans*

The obvious solution to overcome the problem of some buildings not being afforded heritage status under a plan, is to reconcile the HPR with plans. As already noted it is not an offence to alter, remove, or demolish a Category I or Category II heritage building registered under the HPA. Yet if LAs were

²⁹⁹ The New Zealand Coastal Policy Statement and the National Policy Statement on Electricity Transmission are the only two NPS as at July 2008 (Ministry for the Environment *Proposed National Policy Statement for Freshwater Management – Section 32 Evaluation* (Wellington, 2008) 4.

required to include these buildings in plans and provide corresponding rules to ensure their protection, then without the necessary resource consent it is likely it would be an offence to alter, remove, or demolish them.³⁰⁰

An amendment to the RMA would be required to ensure all the properties on the HPR were identified and provided for in the plans. It is suggested an amendment should be made to both Sections 67(3) and 75(3) of the RMA to stipulate that plans must also give effect to 'every relevant entry in the HPR'. In order to 'give effect to' every relevant entry, the LA would need to identify all those buildings on the register located in the area and provide a reasonable degree of protection for them.

If the plans were reconciled to include those buildings listed on the HPR then it may mean the owners of a building would have to apply to the LA for a resource consent to alter, remove, or demolish the building.³⁰¹ This may give rise to the LA's duty to notify an application for a resource consent, if the adverse effects on the environment would be more than minor.³⁰² If the application for resource consent is publicly notified then any person may make a submission in favour or against the application.³⁰³ This would allow a greater number of people to have input in the decision making process. It would also allow the council to potentially have a better perspective of the communities' view regarding a building. A further benefit from reconciling the register with the plans is the EC is likely to have greater regard for the heritage value of a building if it has been included in a plan.

³⁰⁰ RMA, s 338(1)(a). It would be an offence to contravene section 9(1) of the RMA which stipulates that no person may use any land in a manner that breaches a rule in a district plan unless they are expressly allowed by a resource consent. 'Use' in relation to land is defined in section 9(4) of the RMA as including alteration, removal or demolition of any structure.

³⁰¹ This is dependent upon the plan including corresponding policies and rules to protect heritage buildings, not merely just listing the buildings in a schedule.

³⁰² RMA, s 93.

³⁰³ RMA, s 96.

C. *Greater Powers for the Historic Places Trust*

1. *Decision makers*

It could be contended that the NZHPT should be the authority to decide resource consent applications concerning heritage buildings, because they are the authority with the most expertise in the area.³⁰⁴ However the compelling counter argument is the NZHPT are likely to be biased in favour of the protection of heritage buildings and their opinions do not always reflect the community view.

2. *Advocates for the building*

In order to overcome the fundamental problem of the NZHPT being possibly biased as a decision maker in favour of the protection of heritage buildings, they could instead undertake the role as advocate for the heritage building in litigation. This is analogous to ‘guardian ad litem’ in family law proceedings.³⁰⁵

Yet it is debatable as to whether formalising the NZHPT’s role in litigation would have any real effect on the final decision of the Court. In many cases the NZHPT already do undertake this role in presenting their views to the Court as an ‘adversely affected’ party under section 94 of the RMA. In *Tuscany* the NZHPT wanted to attach conditions to the removal of the building in respect of “building orientation, protection in perpetuity, and location in the Merivale area”.³⁰⁶ The Court stated the conditions went further than those considered to be necessary, and instead held it was more

³⁰⁴ Importantly section 39(2) of the HPA provides that the Minister is not to direct the NZHPT in relation to heritage matters.

³⁰⁵ In the family law context the ‘guardian ad litem’ is commonly known as ‘lawyer for the child’. This means that the lawyer is to be an advocate for the child’s views (Care of Children Act 2004, s 7).

³⁰⁶ *Tuscany*, above n 134, para 88.

appropriate to allow Tuscany Ltd flexibility in terms of the removal.³⁰⁷ This highlights that even when the NZHPT makes recommendations the Court will not necessarily follow them.³⁰⁸

3. *Maintenance of the building*

In New Zealand some limited measures have been used to counteract the neglect of buildings. For example many plans include objectives and policies to maintain the amenity values of residential areas. In the Waimate District Council Plan there is a rule which states 'all buildings shall be maintained in a safe and non-derelict state'.³⁰⁹ Non-derelict state is defined in the Plan as 'not in a state as if it had been abandoned by its occupants and/or owners'.³¹⁰ There have been cases where the Court has made EOs or upheld abatement notices compelling people to clean up their properties.³¹¹

In other jurisdictions there are direct provisions requiring owners to maintain heritage buildings. For example in the State of Victoria in Australia the Heritage Act 1995 requires the owners of registered places to undertake maintenance of the building.³¹² The Act states an owner of a registered place must not allow that place to fall into disrepair, or fail to maintain the place to the extent its conservation is threatened.³¹³ The Act then permits the Executive Director to issue repair orders if these

³⁰⁷ *Tuscany*, above n 134, paras 84 and 88.

³⁰⁸ Of course the Court should not necessarily be following all the recommendations made by the NZHPT. However the point is that it is unlikely that a formal status would mean that the Court would attribute more weight to the NZHPT's recommendations.

³⁰⁹ Waimate District Operative Plan (10 October 2001), Section 5 Residential Zone, Part 6 Site Standards, Standard (k).

³¹⁰ Waimate District Operative Plan (10 October 2001), Section 3 Definitions.

³¹¹ *Heritage at risk*, above n 269, 34.

³¹² In a report produced by the Productivity Commission in Australia, concerns have been raised about making owners maintain buildings (Australian Government Productivity Commission 2006 *Conservation of Australia's Historic Heritage Places* Report No. 37 (Canberra, 2006) 73).

³¹³ Heritage Act 1995, s 160 (Vic).

obligations are breached.³¹⁴ There has also been a case from the New York County Supreme Court in the United States that ordered the owner of a heritage building to undertake repairs.³¹⁵

There are several possible solutions that could be employed to overcome the problem of 'demolition by neglect'. The New Zealand Parliament could enact laws similar to those in the State of Victoria in Australia that place a duty on the owners of heritage buildings to maintain them.³¹⁶ These provisions are not so onerous as to require the owners to maintain the building to a premium standard. Instead they in effect place a minimum threshold on the level of maintenance required.

A less coercive solution could be to allow heritage buildings to be owned and maintained by different entities. This would mean an owner who was refusing to carry out maintenance would still be the legal owner of the building, but another body would be responsible for maintaining it to a level that ensured it would not fall into a state of disrepair. However it is unlikely that there is the necessary funding for this to be a plausible idea. Further it could raise the issue of unfair transfers of wealth, if a property owner was allowed to reap the benefits of having his building maintained but was not responsible for the costs. Such a scenario may adversely impact on the sense of civic responsibility.

³¹⁴ Heritage Act 1995, s 162 (Vic). The offence for failing to comply with the order is 2400 penalty units or five years imprisonment (Heritage Act 1995, s 164).

³¹⁵ *City of New York v. 10-12 Cooper Square Inc*, 793 N.Y.S.2d 688, 693 (N.Y. Sup. Ct. 2004).

³¹⁶ There were similar provisions in force in New Zealand under section 41 of the Historic Places Act 1980. The owner had a right of appeal on the grounds that the work was unnecessary, the amount was unreasonable, or the owner was in financial hardship. The NZHPT never used the provisions because they had to provide money or assistance to the owner of a building subject to these notices and this would have been a financial strain on the NZHPT (Heritage at Risk, above n 269, 17). The Historic Places Act 1980 has since be repealed (HPA, First Schedule).

Perhaps a satisfactory response in relation to resource consent applications would be to make any support from the NZHPT for the application conditional on a heritage covenant being created.³¹⁷ This could ensure the heritage building is maintained in other aspects. Obviously this would be pointless in relation to applications for demolition, but it may have merit when a resource consent application concerned alterations or removal. This may depend on the nature of the proposed alteration; and in respect of removal, the degree to which the heritage values of the building are interlinked with the location. It is unlikely many heritage supporters would consider this to be the ideal scenario, as the ICOMOS Charter stipulates buildings should, as much as possible, remain in their original form; and heritage buildings should only be moved as a last resort.³¹⁸ Yet in light of the multiple problems and competing interests it is advocated that compromises are necessary. From the perspective of the property owners at least this solution allows them to make a choice between adversarial litigation, or a compromised solution that allows them to undertake their proposal while ensuring the building is maintained for the future. From the viewpoint of the NZHPT this solution allows them to ensure a building is maintained and protected, instead of proceeding to Court where the outcome may be uncertain. Yet this option could only be utilised when an owner applies for a resource consent application, not when they are taking no action at all.

³¹⁷ The NZHPT has the power to enter into agreements with corporations, societies, and individuals for the maintenance of a historic place (HPA, s 54(g)). Any agreement could be formalised as a heritage covenant under ss 6, 7, and 8 of the HPA.

³¹⁸ The New Zealand National Committee of the International Council on Monuments and Sites *ICOMOS New Zealand Charter for the Conservation of Places of Cultural Heritage Value* (1993).

CHAPTER VII. MECHANISMS TO ENCOURAGE PROPERTY OWNERS TO PROTECT HERITAGE BUILDINGS

A. *Compensation*

Compensation is considered by some to be a valid mechanism to encourage property owners to protect heritage buildings. Yet section 85(1) of the RMA establishes that compensation is not payable in respect of controls of land.³¹⁹ There are two potential exceptions: if land subject to a designation is ordered to be taken under the Public Works Act 1981,³²⁰ or if land subject to a HO is ordered to be taken.³²¹ Previously under the Town and Country Planning Act 1977 compensation was available for land use restrictions in certain circumstances.³²²

Although compensation is not payable under the RMA, LAs do have the means to provide for forms of compensation through the Local Government Act 2002, and the Local Government (Rating) Act 2002. These can be through remission of rates,³²³ or other financial incentives to retain a building.³²⁴ However the decision to fund certain areas like heritage protection is now dependant on provision being made in the 10-year, Long-term Community Plans, as opposed to annual plans that provide details of the proposed expenditure for the year.³²⁵

³¹⁹ But see section 85(2) of the RMA which provides that a person with an interest in land can challenge a provision in a plan if it 'would render that interest in land incapable of reasonable use'. Section 85(3) of the RMA provides that the EC can direct a LA to modify, delete, or replace a provision in a plan if it 'renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in land'. Therefore although compensation is not payable, a land owner can succeed in overturning a restrictive provision.

³²⁰ RMA, s 185.

³²¹ RMA, s 198.

³²² TCPA, s 126.

³²³ Local Government (Rating) Act 2002, s 85.

³²⁴ It has been said that "the provision of incentives across New Zealand is patchy and inadequate" (Heritage at Risk, above n 269, 33).

³²⁵ *Handbook of Environmental Law*, above n 56, 497.

One example of a LA that provides such compensation is the CCC. Policy 4.3.5 of the CCDP relates to the assistance provided to owners of heritage items.³²⁶ This policy outlines that the Council will offer “incentives such as rates relief, remission of fees, exemptions from rules and assessment matters depending on the circumstances of each particular case”.³²⁷ Another unique form of compensation is provided by the Auckland City Council. They have a transferable development rights scheme in relation to buildings located in Concept Plan or Central Plan areas.³²⁸ The scheme “means that rights of development that are foregone as a result of retaining a heritage building can be used elsewhere in the CBD.”³²⁹ It is contended that the above forms of compensation provided by LAs are useful to encourage property owners to retain heritage buildings and not pursue other development options.

B. *Maintenance Payments*

Payments made for the maintenance of a heritage building differ from strictly compensatory measures. The focus of maintenance payments is to improve the state of a building, as opposed to compensation which is designed to remedy an owner’s perceived loss of development potential.

Central Government has recognised the need to provide funding for the maintenance of heritage buildings. The New Zealand Lottery Grants Board is said to be “New Zealand’s most important source of funding for heritage projects”.³³⁰ This funding is only available for community purposes.³³¹ In May

³²⁶ Christchurch City District Plan (14 November 2005), Volume 2, Section 4 City Identity, Objective 4.3 Heritage Protection, Policy 4.3.5 Assistance.

³²⁷ Christchurch City District Plan (14 November 2005), Volume 2, Section 4 City Identity, Objective 4.3 Heritage Protection, Policy 4.3.5 Assistance.

³²⁸ Auckland City Operative District Plan (August 2005), Isthmus Section, Part 5c Heritage, 8.

³²⁹ Heritage at Risk, above n 269, 22.

³³⁰ State of the Environment, above n 266, 31.

2003 the Government established the National Preservation Incentive Fund (“NPIF”) for owners of special or outstanding historic places and wahi tapu in private ownership.³³² The NZHPT manages the fund, with \$500,000 to be allocated each year.³³³

The types of projects eligible for funding include: repair or restoration work in relation to a historic building, and professional services like the preparation of a conservation plan.³³⁴ There are numerous projects not eligible for funding; these include the reconstruction of missing buildings, and any additions or extensions to existing buildings.³³⁵ The NIPF normally only covers up to 50 percent of the cost of conservation work, and this amount normally will not exceed \$100,000.³³⁶ The NZHPT will assess applications based on criteria including “extent of national significance, extent of public benefit, level of urgency of work, level of conservation standards proposed, and cost effectiveness.”³³⁷ While the NIPF is a great initiative, it is arguable that it requires a greater sum of money allocated to it per year.³³⁸

A second source of funding for the maintenance of a historic building may be available from LAs. For example the Waitaki District Council and the NZHPT have established the Waitaki Heritage Fund “to encourage the retention, preservation, conservation and maintenance of historic buildings and sites in

³³¹ Gambling Act 2003, s 277.

³³² L Rosie “1995-2004 Moving On” (2005) 97 *Heritage New Zealand* 52, 56 [Moving On]. The NPIF is specifically for those buildings in private ownership. This excludes persons and agencies that are eligible for funding from the New Zealand Lotteries Grants Board, which includes incorporated societies and charitable trusts buildings. It also excludes buildings owned by public sector agencies; like government departments, state-owned enterprises, and LAs (New Zealand Historic Places Trust, *National Heritage Preservation Incentive Fund* (brochure) [*Brochure on NHPIF*]).

³³³ Moving On, above n 332, 56.

³³⁴ *Brochure on NHPIF*, above n 332.

³³⁵ *Brochure on NHPIF*, above n 332.

³³⁶ *Brochure on NHPIF*, above n 332.

³³⁷ *Brochure on NHPIF*, above n 332.

³³⁸ The fact that an individual grant cannot normally exceed \$100,000 means that only five projects of this value could be funded before the total amount available in a given year is used up.

the Waitaki District”.³³⁹ Some district plans specifically mention that assistance is obtainable, however this does not mean funds are always available and also any funding is discretionary.³⁴⁰

C. *Education*

Education is considered to be an important tool to encourage property owners to protect heritage buildings. It is suggested there are three main aspects relevant to the education of property owners. Firstly, it is beneficial that owners develop an understanding of the heritage values of historic buildings. Secondly, that they have knowledge about how to appropriately maintain historic buildings. Thirdly, it is useful they are aware of the sources of funding and incentives available for the maintenance of buildings.

The NZHPT is responsible for fostering public interest in the conservation of historic places.³⁴¹ The educational role of the NZHPT is considered to be crucial in encouraging the public to take an interest in their heritage and to support the protection of historic buildings. When people realise the historical significance of a building they are far more likely to appreciate its value. It is only through education, either informal or formal, that this understanding is possible. For every building on the HPR, the NZHPT has conducted research about its history and significance.³⁴² While this information is accessible online

³³⁹ Waitaki District Council, *Waitaki Heritage Fund* (Internet) <<http://www.waitaki.govt.nz/Community/awards-grants/Waitaki+Heritage+Fund.htm>> accessed 28/08/08.

³⁴⁰ This was the situation in *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 122, para 27. The Manawatu District Plan had policies regarding assistance but the Council was unable to help.

³⁴¹ HPA, s 39.

³⁴² Interview with Chris Cochrane, above n 174.

or at the regional NZHPT offices,³⁴³ it could prove useful to provide this detailed information directly to the owners of the buildings.³⁴⁴

The second suggested aspect to education is that people should be made aware of the acceptable alterations and the proper methods to be used when maintaining a heritage building. The NZHPT have prepared a series of guidelines, discussion papers, and information sheets about the sustainable management of historic heritage.³⁴⁵ LAs should also arguably be attempting to educate people about the most appropriate way to maintain buildings. One example is the CCC which has a dedicated heritage website that includes useful information about heritage and development.³⁴⁶

A third matter that should be conveyed to property owners are the potential sources of funding and incentives available for retaining heritage buildings. Those owners who consult their LA are likely to be informed of the funding options and incentives available at the local level. Yet those who do not enquire are unlikely to be aware of these options. It is suggested to be advantageous if LAs promoted the range of maintenance payments and compensation that is available. This is because it may encourage those who are undertaking minimal maintenance measures to apply for a grant and more effectively conserve their heritage building. Although this could raise problems if the amount applicants are requesting exceeds the amount available.

³⁴³ HPA, s 36.

³⁴⁴ In addition if local communities are made aware of the history of buildings then they may be more inclined to campaign for their protection.

³⁴⁵ New Zealand Historic Places Trust, *Sustainable Management of Historic Heritage Guidance Series* (Internet) <http://www.historic.org.nz/publications/SustMgt_guidance_series.html> accessed 20/09/08.

³⁴⁶ Christchurch City Council, *Heritage and Development* (Internet) <<http://www.ccc.govt.nz/Christchurch/Heritage/Information/HeritageAndDevelopment.asp>> accessed 20/09/08.

CHAPTER VIII. CONCLUSION

It is contended that the Court is largely disregarding the legislative direction that the protection of historic heritage is a matter of national importance. It is somewhat ironic that ONL are afforded greater protection than heritage buildings, when there are numerous legislative provisions related to the protection of heritage and more limited provisions directly related to ONL. The likely reason why the Court is reluctant to give greater consideration to the importance of historic heritage is because of the financial burden it is perceived to place on the owners of heritage buildings.

It is argued that the owner's financial position should be the pre-eminent concern of the Court in cases where a building has not been listed in a plan. Only in extreme circumstances should the Court direct that a building needs to be listed in a plan, or there needs to be a change in the classification of a building. This is because property owners may have placed reliance on the classification and the corresponding policies and rules. Yet where those policies and rules can reasonably be interpreted as supporting the retention of a heritage building, it is contended that the Court at the decision making stage should be placing greater consideration on protecting the heritage values of the building.

There is an apparent conflict between providing for the public interest in retaining heritage buildings and the private interest that heritage buildings should not unreasonably restrain property owners. In order to effectively manage this tension it is advocated that there should be a dual approach with both increased regulation and incentives. In order to produce a nationally consistent approach to heritage protection the ideal solution would be to create a NPS. However as this is not likely to occur, the best alternative would be to make it a mandatory requirement for plans to provide protection for all

relevant buildings listed on the HPR. This would mean that in more instances resource consents for the demolition or removal of a heritage building would be notified. This would allow the public to have greater input into the decision making process than they currently have when a building is not listed.

To overcome the problem of demolition by neglect the NZHPT should support resource consent applications where practicable, on the condition that a heritage covenant is created to ensure the maintenance of the building. LAs should offer remission of rates, transferable development rights, and other financial incentives to encourage property owners to retain and maintain heritage buildings. The NZHPT should also arguably be promoting the significance of heritage buildings to owners and the community to a greater extent than what it currently does.

Ultimately the fundamental problem that heritage buildings can be a financial burden for property owners is unlikely to be remedied by the above solutions unless Central Government provides greater resources to enable the NZHPT and LAs to fulfil their statutory obligations in ensuring that heritage buildings are adequately protected.

Appendix

Transcript of the interview with Chris Cochrane, Senior Conservation Architect, founding member of ICOMOS New Zealand, and a Member of the New Zealand Order of Merit for the services to the conservation of historic buildings (the author, telephone interview, 26 September 2008).

Natasha Garvan: What do you understand to be the Court's understanding or conception of heritage values?

Chris Cochrane: The Court's view of heritage values have gone astray. One aspect of heritage values is architectural but this should not be the sole concern. For example in the case of Tinui Hotel the tone of the proceedings was that the Hotel was not a historic building because of its age and particularly because they did not think it had any architectural merit. This is a narrow view of heritage. There was much evidence from the community that the place had been the centre of the town, and was important for its social and cultural aspects. The Court seemed to sideline the views of the community.

Natasha Garvan: To overcome the problem of demolition by neglect, could the New Zealand Historic Places Trust give support for resource consent applications for alterations on the condition that a heritage covenant was entered into?

Chris Cochrane: This idea is plausible and does not step outside from the current way of doing things. New Zealand Historic Places Trust is always negotiating covenants if the owner has applied to them for grants. They use a standard covenant and then modify it to the particular building.

Natasha Garvan: What do you see as the benefits and problems with reconciling the Historic Places Register with plans?

Chris Cochrane: This is a long standing issue. In a few places there is the same correlation without any further research on behalf of the Council. Other local authorities have drawn up their own list with some rationalising. Councils sometimes leave off buildings for political reasons, for example the Wellington City Council owns heritage buildings that arguably deserve to be listed but are not, like the Thorndon Bars.

The handicaps are if there had to be a direct correlation then this could leave some buildings out, because the Register is very deficient in some areas. This is because they have a lack of resources so it is not comprehensive by any

means. The Trusts registration system is very time consuming and thorough. Some may say it is cumbersome but at least the end result is very reliable.

Natasha Garvan: What about if the local authorities had to include buildings on the register, but could also add others?

Chris Cochrane: Great idea! That allowance provides for buildings that are locally important. That is one other aspect of the register Category II buildings are of regional importance so may exclude many locally important buildings.

Natasha Garvan: What do you think about the New Zealand Historic Places Trust being an advocate for heritage buildings in litigation?

Chris Cochrane: There are always two parties in a case so the building already does have an advocate. Though it may be useful in situations where the New Zealand Historic Places Trust has previously chosen not to appear.

Bibliography

Statutes

Building Act 2004

Canterbury Museum Trust Board Act 1993

Conservation Act 1987

Gambling Act 2003

Heritage Act 1995 (Vic)

Historic Places Act 1993

Historic Places Act 1980

Local Government Act 2002

Local Government (Rating) Act 2002

Public Works Act 1981

Queen Elizabeth the Second National Trust Act 1977

Reserves Act 1977

Resource Management Act 1991

Town and Country Planning Act 1977

District Plans

Auckland City Operative District Plan (August 2005).

Christchurch City District Plan (14 November 2005).

Manawatu Operative District Plan (1 December 2002).

Waimate Operative District Plan (10 October 2001).

Charters

The New Zealand National Committee of the International Council on Monuments and Sites *ICOMOS New Zealand Charter for the Conservation of Places of Cultural Heritage Value* (1993).

Cases

AA McFarlane Family Trust v Christchurch City Council [1999] NZRMA 365.

Auckland Volcanic Cones Soc Inc v Transit NZ [2003] 7 NZRMA.

Canterbury Museum Trust Board & Ors v Christchurch City Council unreported, HC Christchurch, CIV-2005-409-1425, 13 December 2005, Fogarty J.

Canterbury Museum Trust Board & Ors v Christchurch City Council unreported, EnvC Christchurch, C 59-06, May 17 2006, Jackson J.

Chance Bay Marine Farms Ltd v Marlborough District Council unreported, HC Wellington, AP210/99, 15 March 2000, Doogue J

Christchurch Civic Trust (Inc) v Christchurch City Council unreported, EnvC Christchurch, C082/05, 3 June 2005, Jackson J.

Ducks In A Row Ltd v Queenstown Lakes District Council, unreported, EnvC Christchurch, C103/05, 21 July 2005, Jackson J.

Falkner v Gisborne District Council [1995] 3 NZLR 622.

Foodstuffs (South Island) Ltd v Christchurch City Council [1999] NZRMA 481.

Gannet Beach Adventures Ltd v Hastings District Council [2005] NZRMA 311.

Gulf District Plan Association Inc v Arraw Properties Ltd unreported, EnvC Auckland, A159/2002, 12 August 2002, Newhook J.

Harrison v Tasman District Council [1994] NZRMA 193.

JBH Investments Ltd v Auckland City Council unreported, EnvC Auckland, A140/06, 3 November 2006, Smith J.

J F Investments Ltd v Queenstown Lakes District Council unreported, EnvC Christchurch, C48/06, 27 April 2006, Jackson J.

Kaupokonui Beach Society Inc v South Taranaki District Council unreported, EnvC Wellington, W030/08, 19 May 2008, Dwyer J.

Lakeview Properties v Queenstown Lakes District Council unreported, EnvC Christchurch, C80/06, 19 June 2006, Commissioners Manning and Grigg.

Long Bay-Okura Great Park Society Inc v North Shore City Council unreported, EnvC Auckland, A078/08, 16 July 2008, Jackson J.

Munro v Waitaki District Council unreported, EnvC Christchurch, C098/97, 25 September 1997, Jackson J.

New Zealand Historic Places Trust/Pouhere Taonga v Christchurch Central Methodist Mission unreported, EnvC Christchurch, C041/02, 2 April 2002, Smith J.

New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council [2005] NZRMA 431.

New Zealand Marine Hatcheries Ltd v Marlborough District Council unreported, EnvC Wellington, W129/97, 18 December 1997, Kenderdine J.

North Dunedin Urban Concern Inc v Dunedin City Council unreported, EnvC Christchurch, C095/07, 20 July 2007, Smith J.

North Shore City Council v Auckland Regional Council [1997] NZRMA 59.

Official Bay Heritage Protection Society Inc v Auckland City Council [2008] NZRMA 245.

Outstanding Landscape Protection Society Inc v Hastings District Council [2008] NZRMA 8.

Palmer v Masterton District Council unreported, EnvC Wellington, W105/07, 3 December 2007, Sheppard J.

Pigeon Bay Aquaculture Ltd v Canterbury Regional Council [1999] NZRMA 209.

Shell Oil New Zealand Ltd v Wellington City Council (1993) 1 A ELRNZ 383.

Steven v Christchurch City Council [1998] NZRMA 289.

T & G Mutual Life Society Ltd v New Zealand Historic Places Trust unreported, HC Wellington, CP 1083-90, 7 September 1992, Jaine J.

Tuscany Ltd v Christchurch City Council unreported, EnvC Christchurch, C99/05, 8 July 2005, Smith J.

Unison Networks Ltd v Hastings District Council unreported, HC Wellington, CIV-2007-485-896, 11 December 2007, Potter J.

Upper Clutha Environmental Society v Queenstown Lakes District Council unreported, EnvC Christchurch, C104/02, 30 August 2002, Jackson J.

van Brandenburg v Queenstown Lakes District Council unreported, EnvC Christchurch, C212/01, 21 November 2001, Jackson J.

van Camp v Auckland City Council unreported, EnvC Auckland, A073/07, 31 August 2007, Newhook J.

Waitakere City Council v Minister of Defence [2006] NZRMA 253.

Wakatipu Environmental Society Inc v Queenstown Lakes District Council [2000] NZRMA 59.

Wakatipu Environmental Society Inc v Queenstown Lakes District Council unreported, EnvC Christchurch, C129/2001, 9 August 2001, Jackson J.

Wakatipu Environmental Society Inc v Queenstown Lakes District Council [2003] NZRMA 289.

Wakatipu Environmental Society Inc v Queenstown Lakes District Council unreported, EnvC Christchurch, C203/2004, 22 December 2004, Jackson J.

Wellington Boys' and Girls Institute' Inc v Wellington City Council unreported, EnvC Wellington, W010/08, 25 February 2008, Thompson J.

Hansard

Hon M Hobbs MP, Minister for the Environment, (20 March 2003) 607 NZPD 4293.

Papers and Reports

Australian Government Productivity Commission 2006 *Conservation of Australia's Historic Heritage Places* Report No. 37 (Canberra, 2006).

McClellan, R "State of the Environment Reporting and Monitoring" *Sustainable Management of Historic Heritage Guidelines Guide No. 5* (2007).

McClellan, R and K Greig "Regional Policy Statements" *Sustainable Management of Historic Heritage Guidelines Guide No. 1* (2007).

Ministry for the Environment *Proposed National Policy Statement for Freshwater Management – Section 32 Evaluation* (Wellington, 2008).

Parliamentary Commissioner for the Environment 1996 *Historic and Cultural Heritage Management in New Zealand* (Wellington, 1996).

Wallace, P and A Franchetti "Heritage at Risk: Addressing the issue of demolition by neglect of New Zealand's Historic Heritage" *Sustainable Management of Historic Heritage Guidelines Discussion Paper No.6* (2007).

Chapters of Books

Heather, C and G Baumann "Protecting historic heritage", in R Harris (ed.) *Handbook of Environmental Law* (Royal Forest and Bird Protection Society of New Zealand, Wellington, 2004) 493-510.

Articles

Bartlett, S "The development of heritage protection legislation in New Zealand" (2005) 6 *BRMB* 65-68.

Erwin, M "Museum Piece" (2006) 102 *Heritage New Zealand* 8- 11.

Palmer, K "Resource Management Amendment Act 2003 – a timely upgrade" (2003) 5 *BRMB*, 37-42.

Rosie, L "1995-2004 Moving On" (2005) 97 *Heritage New Zealand* 52-57.

Internet Resources

Christchurch City Council, *Heritage and Development* (Internet) <<http://www.ccc.govt.nz/Christchurch/Heritage/Information/HeritageAndDevelopment.asp>> accessed 20/09/08.

Land Information New Zealand *Status and Location of Crown Pastoral Land* (Internet) <<http://www.linz.govt.nz/crown-property/pastoral-land-tenure-review/status-of-pastoral-land/index.aspx>> accessed 01/10/08

New Zealand Historic Places Trust, *Sustainable Management of Historic Heritage Guidance Series* (Internet) <http://www.historic.org.nz/publications/SustMgt_guidance_series.html > accessed 20/09/08.

New Zealand Historic Places Trust Media Release 10 September 2008, *Historic place being demolished for car parks* (Internet) <http://www.historic.org.nz/news/media_releases/2008_09_10stmarys.htm> accessed 20/09/08

Waitaki District Council, *Waitaki Heritage Fund* (Internet) <<http://www.waitaki.govt.nz/Community/awards-grants/Waitaki+Heritage+Fund.htm>> accessed 28/08/08.

Other

Interview with Chris Cochrane, Conservation Architect, (the author, telephone interview, 26 September 2008) transcript annexed to paper).

New Zealand Historic Places Trust, *National Heritage Preservation Incentive Fund* (brochure).

New Zealand Historic Places Trust, *The Register* (brochure).