

**BEFORE AN INDEPENDENT HEARING COMMISSIONER FOR  
WELLINGTON CITY COUNCIL**

**IN THE MATTER**

of the Resource  
Management Act  
1991 (the **Act**)

**AND**

**IN THE MATTER**

of an application by  
New Zealand  
Fruitgrowers'  
Charitable Trust to  
the Wellington City  
Council for a resource  
consent to reinstate a  
sign on the building  
located at 2 Jervois  
Quay, Wellington (**the  
Application**)

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**LEGAL SUBMISSIONS ON BEHALF OF NEW ZEALAND FRUITGROWERS'  
CHARITABLE TRUST**

**DATED: 2 December 2022**

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## 1. INTRODUCTION

1.1 These submissions are made on behalf of the New Zealand Fruitgrowers' Charitable Trust (**NZFCT**) regarding its resource consent application made to the Wellington City Council to reinstate a sign on top of the Huddart Parker Building in Post Office Square (**the Proposal**).

1.2 The Huddart Parker Building is owned by the Huddart Parker Building Limited, a wholly owned subsidiary of the NZFCT. NZFCT is a registered charity.<sup>1</sup>

1.3 Details of the proposed reinstated sign (**Proposed Sign**) are set out in the assessment of environmental effects (**AEE**) provided in support of the Proposal, and are further detailed in the evidence from NZFCT's witness team. However, by way of summary:

- (a) The Proposed Sign is an LED billboard that will be attached to the existing framing which remains in place on the building;
- (b) The maximum dimensions of the sign will be 13m x 4m;
- (c) The base of the sign will align with the top of the building parapet;
- (d) The image on the sign will be static (i.e. it will not involve moving images) and will change on a rotating basis. It is expected that there will be up to six different displays, each with a minimum display time of 8 seconds and a 0.5 second dissolve time between the displays;
- (e) The Proposed Sign will provide time and temperature information to the community, which will continue the tradition of this information being provided on this building (as the original sign erected in 1963 included this information); and
- (f) In addition to being used for paid advertising, the sign will also provide public service information at least 20% of the time.

1.4 The Application was publicly notified with a total of 14 submissions lodged; eleven in support, and three in opposition.

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1 Charity Number CC21071.

**1.5** These legal submissions in support of the application address:

- (a) The witnesses NZFCT is calling in support of the Proposal;
- (b) A broad overview of the legal and planning framework, including the approach the Commissioner should take in considering the relevance of the Proposed Wellington District Plan (**PDP**);
- (c) Consideration of effects that remain in contention i.e. heritage, streetscape and positive effects of the Proposal;
- (d) Existing use rights that apply to the framing and the sign; and
- (e) Proposed consent conditions.

**1.6** In addition, and where appropriate, we have responded to the questions raised by the Commissioner in her minute dated 30 November 2022. The witnesses for the applicant will address the remainder of those questions at the hearing.

## **2. WITNESSES**

**2.1** NZFCT has prepared a comprehensive assessment of the proposal, and is calling the following witnesses in support of the Application:

- (a) Keith Mackenzie (company evidence on behalf of NZFCT);
- (b) Frank Costello (out of home advertising specialist);
- (c) Russ Kern (lighting expert);
- (d) Brett Harries (transport expert);
- (e) Adam Wild (heritage expert);
- (f) Richard Knott (heritage peer reviewer and urban design expert);  
and
- (g) Alistair Aburn (planner).

## **3. OVERVIEW OF THE LEGAL AND PLANNING FRAMEWORK**

**3.1** As detailed in the AEE, the proposed sign is a Discretionary Activity (Restricted) in accordance with Rules 13.6.4 and 21D.3.1 of the operative Wellington City Council District Plan (**ODP**). Rule 13.6.4 relates to signs within the Central Area zone (where the site is located), and Rule 21D.3.1 is triggered because the Huddart Parker building is listed as a heritage building in the ODP.

- 3.2** Given the heritage listing of the building, the Proposal currently triggers the need for resource consent under the ODP, in particular it triggers Rule 21D.3.1, which specifically relates to signs proposed on listed heritage items/objects. The PDP also lists the Huddart Parker building as a heritage building, we have considered the implications of this below.
- 3.3** Section 104 and 104C of the RMA will apply to the Commissioner's consideration of the Application. As the requirements of those provisions will be well known to the Commissioner and are traversed in the AEE, the Council Officer's section 42A report, and the evidence of Mr Aburn, we do not propose to replicate them here.

*Relevance of the Proposed Wellington District Plan*

- 3.4** Subsequent to the application being lodged for the Proposal, the PDP was notified on 18 July 2022. Mr Thornton discusses the relevance of the PDP in his section 42A report. Given the relatively early stage of the PDP process (further submissions close today), we submit that relatively little weight can be placed on the relevant PDP objectives and policies.<sup>2</sup>
- 3.5** In response to Minute 3 issued by the Commissioner, the Applicant has considered whether resource consent would be required for the sign under the provisions of the PDP. As will be discussed further by Mr Aburn at the hearing, proposed PDP rule SIGN-R6 (which has immediate legal effect) is relevant to the Proposal. Under that rule the Proposal would require a resource consent as a restricted discretionary activity.
- 3.6** Under s 86B(3)(c) a rule in a proposed plan has immediate effect from the date of notification of the proposed plan if the rule protects historic heritage. Legal effect does not mean operative. Section 86F states that rules in a proposed plan are only treated as operative if:
- (a) the time for lodging submissions or appeals has expired, and no submissions or appeals in opposition have been made;
  - (b) the appeals have been determined or dismissed; or

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<sup>2</sup> *Keystone Watch Group v Auckland City Council*, ENC Auckland A007/01, 11 January 2001 at [45] and [46].

(c) all submissions or appeals in opposition have been withdrawn.

- 3.7** While legal effect is not defined in the RMA, its operation derives from the fact that the RMA generally treats “rules” as including rules in a proposed plan.<sup>3</sup> Contravening a proposed rule that has legal effect can result in enforcement action in the same way as contravening an operative rule.<sup>4</sup>
- 3.8** Conversely, section 86G makes it clear that where a rule has not taken legal effect, it can be ignored when deciding whether or not an activity requires consent for the purposes of Part 3 of the RMA.
- 3.9** Resource consent is therefore required to authorise the presence of the sign on the Huddart Parker building (which is included in the list of heritage buildings in the PDP)<sup>5</sup> in accordance with PDP rule SIGN-R6. However, in our submission the activity for which consent was sought in relation to the Proposal has not been altered by rule SIGN-R6 taking immediate legal effect, and the approach to analysis that is to be taken in considering the Proposal has not been altered.
- 3.10** The Proposal is a restricted discretionary activity under both the ODP and PDP frameworks. Although the activity status has not changed, we refer to section 88A of the RMA which locks in the type of activity (i.e. its activity status) at the time the application was made. Section 88A provides:

**88A**                    ***Description of type of activity to remain the same***  
(1)                    *Subsection (1A) applies if—*  
                          (i)                    *an application for a resource consent has been made under section 88 or 145; and*  
                          (ii)                    *the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made, or that the application was treated as being made*

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<sup>3</sup> Resource Management Act 1991, s 43AAB.

<sup>4</sup> For example, in *Queenstown Lakes District Council v Allenby Farms Limited* [2017] NZDC 3251, the clearance of particular indigenous vegetation was in contravention of the proposed Queenstown Lakes District Plan rule and the defendant was convicted and sentenced accordingly.

<sup>5</sup> Schedule 1 Ref 155.

*under section 87B], is altered after the application was first lodged as a result of—*

- (i) a proposed plan being notified; or*
- (ii) a decision being made under clause 10(1) of the First Schedule;*  
*or*
- (iii) otherwise.*

*(1A) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.*

*(2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with section 104(1)(b).*

**3.11** Although the activity status that applies to the Proposal has not changed (and therefore section 88A is not directly engaged), in our submission section 88A should be read as meaning that the application should continue to be considered under the relevant rules of the ODP and that the Commissioner is to “have regard to” the relevant provisions of the PDP which will include SIGN-R6.

**3.12** When considering the Proposal under section 104 SIGN-R6 (and the relevant PDP objectives and policies) will be relevant. However, given the relatively early stage of the PDP process, we submit that more weight should be given to the relevant ODP provisions.

#### **4. CONSIDERATION OF PARTICULAR EFFECTS**

**4.1** From our review of the section 42A report prepared by the Council and matters raised by submitters, there appear to be three areas of concern relating to the consideration of the effects of the proposal<sup>6</sup>, which we wish to briefly touch on. These are:

- (a) Streetscape and visual amenity;
- (b) Heritage; and

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<sup>6</sup> Required in accordance with section 104(1)(a).

- (c) Positive effects of the proposal.

### **Streetscape and visual amenity**

- 4.2** Those who are opposed to the proposal appear to have adopted a starting point that the provision of an LED sign on the building is inherently negative, and will impact on the streetscape and visual amenity of any area where the sign can be seen.
- 4.3** In addition, the section 42A report refers to the proposed sign as adding to visual clutter and adding to an existing proliferation of signage<sup>7</sup>, based on there being one existing static billboard nearby, which later evidence points out has now been replaced with a local artwork (it is therefore not clear whether Mr Thornton maintains his view regarding visual clutter and proliferation of signage).
- 4.4** Mr Coolen's evidence includes a diagram that identifies the backdrop of the sign (Figure 12). The intent of including the figure seems to be to show a significant area where the backdrop of the sign will be the sky and therefore perceived effects will not be mitigated by buildings providing the backdrop. Read in conjunction with Mr Wild's conclusion that the high rooftop location of the Proposed Sign mitigates perceived immediate effects arising from the sign on both the Huddart Park Building and the Post Office Square Heritage Area,<sup>8</sup> it is submitted that what the figure shows is that the area where the backdrop would be sky is primarily a pedestrian area where people would not usually look up to view the top of the building. It also shows that the sign will not be visible at all from some locations in Post Office Square.
- 4.5** The Proposed Sign will be most apparent to traffic on Customhouse Quay, at some distance from the Huddart Parker Building, and the view is much less complete the closer one gets to the building, limiting the effect that the Proposed Sign may have on the heritage building and Post Office Square.<sup>9</sup>

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<sup>7</sup> Council Officer's s 42A report at [9] and [125].

<sup>8</sup> Evidence of Adam Wild at [7.4].

<sup>9</sup> Evidence of Adam Wild at [5.6].

**4.6** We also briefly wish to touch on the evidence of Mr Scott Hamilton for the Intercontinental Hotel. It is not disputed that the sign will be visible from within the hotel rooms. However, as Mr Hamilton discusses, the rooms it will be visible from have ocean views which is what makes them premium hotel spaces. The photographs in Mr Hamilton's evidence are all taken oriented towards the Huddart Parker building, and therefore in our submission overstate how significant the focus of the sign will be when viewed from those rooms. For the reasons set out in Mr Kern's evidence, the illumination of the sign will not create the level of light spill that Mr Hamilton has raised as a concern in his statement.

**4.7** Finally, on this topic, we record that Mr Knott has comprehensively considered the effects on streetscape and visual amenity in his evidence (refer to sections 6 and 7). This is also touched on by Mr Wild at section 7 of his evidence.

#### **Heritage effects**

**4.8** Concerns have been raised, particularly by Ms Chessa Stevens on behalf of the Council, as to the potential heritage effects of the Proposal. With respect to Ms Stevens' opinion, and noting she is not able to be present at the hearing<sup>10</sup>, we submit that her evidence takes an overly precautionary approach in considering the potential heritage effects of the Proposal.

**4.9** Both Mr Wild and Mr Knott have prepared technical reports and technical evidence considering the potential heritage effects of the proposal. As stated by Mr Aburn in his evidence, he has considered both the evidence the Council has provided and that provided by Mr Knott and Mr Wild. Mr Aburn notes that he prefers the evidence of Mr Wild and Mr Knott as it is more balanced, and appropriately recognises the long historical association of the sign to the building.

**4.10** Related to heritage, it appears that both the Council<sup>11</sup> and submitters<sup>12</sup> have recognised the historical relationship associated with the presence

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<sup>10</sup> We understand Mr Luzzi will be present at the hearing on behalf of the Council. However, we note that in his statement attached to the evidence Mr Luzzi stated that he "generally" agrees with the evidence of Ms Stevens. It is not clear which parts he may not agree with.

<sup>11</sup> Evidence of Chessa Stevens at [24(a)(iii)], [24(d)(ii)] and [25].

<sup>12</sup> Submissions of David Stevens, Steve Maitland, Kristy McDonald, Michael Gaffaney, David Paetz, Lenie Emmerson, Simon Hegarty, Alastair Hutchens and Wayne Kearse,



of a sign on the building. Parties also do not appear to object to the presence of a sign on this historical building *per se*.<sup>13</sup> In our submission, the proposed billboard provides a modern update to the sign that was originally erected and altered over many years. The Proposal provides a continuation of that history.

### Positive effects of the proposal

- 4.11** In his section 42A report, Mr Thornton expresses a view that the Proposal will have no positive effects, going on to dismiss all of the positive effects that have been identified by the applicant and by the 11 submitters in support. Mr Thornton states that the sign will have very limited economic benefits, but concludes that these are not public benefits.<sup>14</sup> In coming to his view Mr Thornton references<sup>15</sup> *Prime Property Group Limited v Wellington City Council* and suggests the Court found that billboards provide no public benefit.<sup>16</sup>
- 4.12** However, that case is not authority for a general proposition of that nature, and in any event is distinguishable from the Application. The proposed digital billboards in that case would have been situated on the Hutt Road, a very busy motorway, and in the “top 10% of roadway networks with the highest deaths and serious injuries in the country.”<sup>17</sup> Waka Kotahi NZ Transport Agency opposed the change from static to digital billboards, considering that the digital billboards would result in an adverse safety outcome. The significant factor in the Court’s view was traffic safety.<sup>18</sup> In its conclusion, the Court noted that the “proposed billboards will add a further element of risk to an already high-risk piece of the road network, without providing any public benefit.”<sup>19</sup>
- 4.13** The Proposal under consideration here is quite different; it is for a digital billboard installed near a low risk section of road, which will provide advertising for charitable causes, community events, time and weather information, and commercial products. The billboard in *Prime Property* was solely to advertise commercial goods. The Proposed Sign on the

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13 Section 42A report at [144]; Heritage Assessment attached to section 42A report by Chessa Stevens at [103]; Evidence of Hamish Wesney at [5.3].

14 Section 42A report at [84].

15 Section 42A report at [86].

16 [2021] NZEnvC 169.

17 *Prime Property Group Ltd v Wellington City Council* [2021] NZEnvC 169 at [47].

18 *Prime Property Group Ltd v Wellington City Council* [2021] NZEnvC 169 at [23].

19 *Prime Property Group Ltd v Wellington City Council* [2021] NZEnvC 169 at [55].

Huddart Parker building will provide community benefits, as well as helping support the maintenance of a heritage building. This was established as a positive effect in Auckland in *JBH Investments Limited v Auckland City Council*<sup>20</sup> where a proposed neon sign was erected on a heritage building and was found to increase the commercial viability of the building.

- 4.14** The Proposed Sign on top of the Huddart Parker Building will increase its commercial viability, noting Mr Mackenzie's evidence at section 6 about the extensive work needed to maintain its heritage nature. Secondly, the Proposed Sign is not in an area where it is likely to cause problematic traffic effects, as noted in the evidence of Mr Harries.<sup>21</sup>
- 4.15** Mr Thornton also considered that the positive effect of viewing the time and temperature was not particularly relevant, despite a number of submissions referring to it as a benefit. Mr Thornton's approach is surprisingly dismissive of those submissions. The s42A report also fails to acknowledge the Council's recognition, in its own heritage inventory, of the signage (including time and temperature information) having heritage significance.<sup>22</sup> It is submitted that the reinstatement of a sign (albeit with modern technology) contributes to this ongoing heritage.

## **5. EXISTING USE RIGHTS**

- 5.1** The third minute from the Commissioner raised questions about the existing use rights associated with the Proposed Sign and framing on the building. At the hearing Mr Aburn will discuss the planning framework that applied when the sign was originally erected.
- 5.2** As discussed in the evidence of Mr Wild<sup>23</sup> a sign was originally erected on the building in 1963. Over the years the sign was updated a number of times, and the most recent version was the More FM sign that was removed from the building in 2012 to enable earthquake strengthening.<sup>24</sup> NZFCT is not aware of any issues being raised regarding the legality of the presence of the sign at any time. It is therefore considered that the

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20 ENC Auckland A029/07, 24 April 2007 at [47].

21 Evidence of Brett Harries at [12.4].

22 Evidence of Adam Wild at [5.2] and [10.4].

23 Evidence of Adam Wild at [5.3].

24 Evidence of Keith Mackenzie at [4.3].

sign was lawfully erected and held existing use rights following the introduction of the Resource Management Act 1991 (**RMA**).

- 5.3** Although the sign was removed to facilitate earthquake strengthening, the intention was always to reinstate the sign on the building, which is why the framing has remained in place. As discussed by Mr Mackenzie, unfortunately the earthquake strengthening of the building took longer than anticipated and the sign was removed from the building for more than 12 months.
- 5.4** NZFCT acknowledges that it has lost existing use rights in respect of the sign itself. However, NZFCT considers that the framing remains lawfully erected on the roof of the building in accordance with section 10 of the RMA.
- 5.5** Section 10(1) of the RMA addresses existing use rights for land use. Under this section, land may be used in a manner that contravenes a rule in a district plan or proposed district plan if both:
- (a) the use was lawfully established before the rule became operative or the proposed plan was notified
  - (b) the effects of the use are the same or similar in character, intensity and scale.
- 5.6** The framing structure was originally erected in 1963 to support the original sign on the building. It has been updated and upgraded to support the subsequent signs over the years.
- 5.7** Section 10 of the RMA does not apply to activities that have been discontinued for a continuous period of more than 12 months after the new rule became operative or the proposed plan was notified. As noted above, the framing has not been removed from the building.
- 5.8** We therefore disagree with the submission that stated that the current framework for the sign should have been removed.<sup>25</sup> As the framing was not removed at any point it retained its existing use right. It also continued to indicate the building owner's intent to reinstate signage on the building.

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<sup>25</sup> Submission of Morgan Slyfield of Stout Street Chambers.

- 5.9** One submission has raised that there is concern about the existing frame not being able to support the Proposed Sign.<sup>26</sup> Mr Costello's evidence notes that some strengthening may be necessary to support the LED screens, but this would be bespoke to the sign, and designed to work within the characteristics of the building.<sup>27</sup> Furthermore, we note that any strengthening work on the framing would be designed to be of the same character, intensity and scale to the existing framing and would fall within the existing use right of the frame. As shown by the concept drawings provided as part of the Dunning Thornton assessment (Attachment 2 to the application), any strengthening required to the existing framework will be to either replace existing members or to provide additional bracing in keeping with the nature of the existing frame.
- 5.10** Regardless, a separate resource consent would not be required for framing as a distinct activity separate from the sign; instead, if consent is granted for the sign, any upgrading work to strengthen the frame to provide for the sign would fall within the ambit of the consent.
- 5.11** We note that NZFCT has emphasised the presence of a sign on the Huddart Parker Building for over 60 years not for the purpose of asserting any remaining existing use right for the sign itself, but to provide the historical context for the application and to explain the history of signage on the building. NZFCT acknowledges the heritage importance of the Huddart Parker building, and has designed its proposal to link back to historical elements of the signs that are recognised as forming part of the building's heritage significance, including the time and weather information.

## **6. CONSENT CONDITIONS**

- 6.1** Appendix 6 to the section 42A report included proposed conditions that could be imposed on the consent should it be granted. We will provide an updated set of those conditions at the hearing. The key amendments noted in the applicant's evidence are as follows:

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<sup>26</sup> Submission from Hamish Wesney of Boffa Miskell.

<sup>27</sup> Evidence of Frank Costello at [4.2]. The evidence of Keith Mackenzie also refers to this at section 7.

- (a) Condition 12(e) – for the reasons set out in the evidence of Messrs Harries<sup>28</sup>, Wild<sup>29</sup> and Costello<sup>30</sup> an 8 second dwell time is considered to be appropriate;
- (b) Conditions 13(b) and (g) – are proposed to be deleted for the reasons set out Mr Harries' evidence;<sup>31</sup>
- (c) Condition 15 – as discussed by Mr Kern<sup>32</sup>, NZFCT proposes a lower nighttime luminance of 175cds/m<sup>2</sup> than the 250cds/m<sup>2</sup> proposed in the section 42A Report.

## 7. CONCLUSION

- 7.1 For the reasons set out in the original application, the evidence of NZFCT and these submissions, we submit that consent for the Proposed Sign should be granted subject to the conditions to be tabled at the hearing.

**DATED** at Wellington this 2<sup>nd</sup> day of December 2022



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Matt Conway / Katherine Viskovic  
Counsel for New Zealand  
Fruitgrowers' Charitable Trust (the  
Applicant)

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28 Evidence of Brett Harries at [11.3] - [11.9].  
29 Evidence of Adam Wild at [8.2(f)].  
30 Evidence of Frank Costello at [5.8] - [5.9].  
31 Evidence of Brett Harries at [11.10] - [11.20].  
32 Evidence of Russ Kern at [7.6].