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CONTESTED HERITAGE

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ABSTRACT

Neo liberalism emphasises the role of the market in allocating resources and making financial decisions. When neo liberalism is applied in a real estate context then land use is market driven by an optimisation decision making process. This process allocates land use according to the doctrine of "Highest and Best Use" in compliance with neoliberal and rational choice theories. In a socialist market economy such as New Zealand, society seeks to moderate this process by using legislation to constrain highest and best use in order to achieve societal objectives such as heritage preservation. These regulatory constraints are often strongly contested as they can have a negative financial impact on the private property owner seeking to either significantly alter or demolish their heritage building. The 'contest' is usually in the form of litigation aimed at reconciling the conflict between private owners and heritage advocates. This litigation is often acrimonious and expensive as each party seeks to optimise their competing objectives of profit maximisation and heritage conservation. This situation has been complicated and exacerbated by the recent passing of mandatory seismic safety laws. These laws have added a third objective in the form of building safety which must also be reconciled with heritage preservation and profit maximisation.

Herbert Simon developed the decision- making theory of satisficing as an alternative to the optimising approach of rational choice theory. Decision makers that apply satisficing theory seek to set satisfactory aspiration levels that suffice to achieve their goals when choosing from different alternatives. He also referred to this theory as bounded rationality. In this paper the contest between private property rights, heritage and safety is examined in three case studies where the owner has sought to demolish an earthquake-prone heritage building. The decision- making theory of satisficing is also examined and its application is considered as a way to achieve better decisions regarding the preservation of earthquake-prone heritage buildings.

Keywords: Property rights, heritage preservation, decision making

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INTRODUCTION

Neoliberalism is a term that has contested meanings and is one that has changed over the years. It is used to describe both economic doctrine and more fundamental philosophical ideology regarding the appropriate role of governments. Originally used to differentiate a middle ground approach between classical liberalism and socialist systems the term neoliberalism was used to describe a socialist market economy. A socialist market economy is a free market economy combined with a political system that corrects what are perceived as market 'failures'. Two examples of these market corrections are the welfare system and environmental legislation. New Zealand is a typical example of such a socialist market economy where the private property rights of the individual must be balanced with common good community outcomes. This balance is often shifting due to changes in political fortunes and changing public opinion.

The tension between neoliberal market based policies and environmental protection is particularly evident in New Zealand in relation to heritage conservation regulation. The imposition of heritage regulation is an approach that is often strongly opposed by neoliberals advocating for the protection of private property rights and can often trigger litigation with private property owners wishing to demolish their heritage listed buildings. Levels of litigation are likely to increase dramatically due to the passing of the Building (Earthquake-

prone buildings) Amendment Act in 2016. This significant piece of legislation requires the owners of earthquake-prone buildings to either seismically retrofit their buildings or demolish them to reduce any danger that they might collapse in an earthquake.

A detailed and technical definition of what constitutes an earthquake-prone building is contained in the legislation but in practical terms an earthquake-prone building is one that has a structural strength that is less than one third that of an equivalent new building that conforms with current building codes. Due to their age and the type of materials that they are typically constructed of, many heritage buildings will inevitably be classified as earthquake-prone buildings. In order to comply with the Building (Earthquake-prone Buildings) Amendment Act the owner may wish to demolish their building or parts of their building. However, if the building is deemed to be a heritage building then the option to demolish the building may potentially be prevented by heritage protection controls placed on the site under the Resource Management Act 1991.

The Resource Management Act was introduced with the overarching purpose of promoting the sustainable management of resources. As part of this objective one of its goals is to conserve heritage resources. The Resource Management Act requires that the protection of "Historic Heritage" from "inappropriate development" be considered as a "Matter of National Importance" that must be given considerable weight by planners and resource management decision makers.

This level of regulatory protection has not always existed in New Zealand and prior to the Resource Management Act the planning legislation was largely ineffective at preventing owners from demolishing their heritage buildings in order to maximise the economic potential of their sites. Even over the life of the Resource Management Act the balance between private property rights and heritage protection has shifted in response to changes in political power that have then resulted in amendments to the Act. The most recent example of this is the Resource Management Amendment Act 2017 which revoked the powers of a Body Corporate to place Heritage Orders on private property. When heritage protection is enforced by a Heritage Order the rights of the owner are clearly articulated and are analogous to the rights of an owner whose property is subject to a designation signalling that a property will be taken for a public work. However, the use of heritage Orders is highly uncommon and heritage protection is generally by means of district plan rules where the rights of the property owner are often far from clear.

The owner of an earthquake-prone heritage building is faced with a complicated decision in terms of how to achieve and reconcile the three potentially mutually exclusive objectives of heritage conservation, building safety and profit maximisation. The Building (Earthquake-prone Building) Amendment Act makes such decisions unavoidable and forces the owner to make the decision within strict deadlines that are externally imposed.

The decision requires a strong component of economic analysis in the form of a feasibility study. Traditional economic theory is based around the concept that economic decisions are made by a mythical decision maker characterised as *homo economicus* or economic man. Economic man is described by economists as being purely rational and also purely selfish such that decision making is based purely on self-interest. The three Case Studies presented later in this paper are all the result of the owner seeking to satisfy their economic goals of redeveloping their properties. Thus, the owners are examples of economic man pursuing their economic self-interest in the context of their individual private property rights.

Earthquake mitigation measures such as seismic retrofitting of existing buildings are seen as a rational response to the risk posed by earthquakes. Evidence from past studies on hazard

mitigation suggest that seismic retrofitting of earthquake prone buildings (EPBs) reduce loss of life and property, disaster relief costs, business interruption, and social and environmental losses from an earthquake disaster (Nuti and Vanzi 2003, Rose *et al.* 2007).

However, despite these benefits and the growth of the technical knowledge base on earthquake risk mitigation, property owners are often unwilling to retrofit their EPBs (Hopkins 2005). The unwillingness of owners of EPBs to retrofit their EPBs has been a critical issue in earthquake pre-disaster planning and management. For over 75 years there has been an awareness in New Zealand that unreinforced masonry buildings in particular are susceptible to earthquake damage and pose a potential danger to the communities that the buildings serve. This raises the question as to whether owners are acting irrationally by not earthquake strengthening their buildings or indeed what role does rationality play in their decision making?

The answer to this question can be found in the application of the theory behind land economics. Land economics is a branch of economics focussed on the economic decisions around land use and as such adopts a similar paradigm to the parent discipline regarding the actions of economic man. The land economics concept of Highest and Best Use and feasibility are both consistent with and supportive of the rational approach adopted by economic man. When left to the free market with no regulatory coercion of the owner to make their buildings safe it has been rational for many owners of earthquake-prone buildings in New Zealand to leave their buildings unstrengthened. Research has found that many factors such as cost, risk perception and efficacy of mitigation measures interact to influence seismic retrofit decisions (Egbelakin and Wilkinson 2010, Lindell and Prater 2000a) and that in the absence of significant 'market signals' (Nahkies,2009) the rational economic decision is often to leave buildings unstrengthened.

The new earthquake-prone building legislation in New Zealand seeks to change this behaviour by taking a two-pronged approach to force owners to carry out seismic mitigation. The first of these approaches is to try to create strong market signals by giving earthquake-prone buildings a structural 'grade' and making this grade publicly available in order to influence the decisions of consumers and tenants. The second approach is to require mandatory seismic mitigation within specific deadlines.

There has been increasing recognition that there must be reasons or impediments preventing owners from earthquake-strengthening their buildings. The seismic mitigation decision for economic man has at its core the concept of feasibility (Nahkies, 2015) and the process of feasibility analysis. Although the process of feasibility analysis can in theory be used as an optimisation process the work of Herbert Simon would suggest that in reality the owner will settle for something less than their theoretical optimum. Simon was a pioneer in the field of behavioural economics and formulated the idea of bounded rationality based on the idea that individuals must make their decisions within the boundaries of their cognitive powers and the time available to make the decision. He was of the opinion that decision makers would resort to heuristics and would give up attempting an unrealistic pursuit of the optimum and settle for a decision that meets the most needs (Simon, 1997).

Herbert Simon developed the decision-making theory of satisficing as an alternative to the optimising approach of rational choice theory. Decision makers that apply satisficing theory seek to set satisfactory aspiration levels that suffice to achieve their goals when choosing from different alternatives. Such an approach is well suited to the problem faced by the owners of earthquake-prone buildings particularly in the case of the many owners caste into the role of being an 'accidental' developer with limited knowledge and resources. Simon was

of the opinion that rational choice theory was an unrealistic description of human decision-making processes and lacked psychological realism. The concept of satisficing also has relevance to the concept of Highest and Best Use. Writers such as Wilson (Wilson, 1995) have argued that Highest and Best Use is a form of satisficing "appraisal heuristic" rather than an optimization exercise grounded in economic theory that can be represented by Lagrangian functions.

Proponents of sustainable urban development such as Mason have also embraced satisficing as they consider that maximisation is a tendency that is a serious obstacle to achieving a practical and sustainable balance between conservation and urbanization. Mason has used the term "Consurbanism" (Mason, 2018) to describe an urbanization which is clearly centred on the idea of conservation rather than having urbanism which incidentally allows it. Mason advocates a satisficing model of decision making to help overcome the maximising tendency which he considers damaging to good urbanism outcomes.

A key requirement of successfully applying a satisficing model of decision making is to decide on the aspiration level that is considered "good enough" for the decision maker. To avoid litigation this aspiration level should equal or exceed that sought by other significant stakeholders. As well as economic analysis this also requires analysis and judgement around the non-economic values relating to safety and heritage. Although the ultimate decision maker is the owner of the building, the building owner will be required to justify their decision to other stakeholders who may contest their decision at the resource consent hearing process and any litigation that follows.

In other words consideration must be given to the 'bottom line' requirements for heritage outcomes and levels of strengthening required for heritage buildings as well as to the extent to which an owner can legally be required to sacrifice economic returns to achieve them. However, defining a 'bottom line' is a difficult exercise for 'values' such as safety and heritage which are hard to measure and the subject of considerable debate even within the community of experts which attempt to measure them. In theory by relaxing the need to optimise outcomes and to settle for outcomes that satisfice it should be easier to make decisions that are a satisfactory compromise (or balance) between safety, heritage and property rights. However, the problem still remains as to what criteria or 'bottom line' to apply to each of these three objectives. These are discussed below.

SATISFICING HERITAGE CONSERVATION

In terms of satisficing heritage conservation there is often debate around exactly what are the heritage values that need to be protected and conserved and the significance of these heritage values. There is no common methodology used by the various Territorial Local Authorities seeking to measure heritage values. The Resource Management Act lists the attributes of an item that might create heritage values but is silent in terms of how those attributes may be measured and weighted. Similarly, what development can be considered "inappropriate" is left up to the decision makers such as the Environment Court.

It can be argued that the Resource Management Act is a piece of overarching legislation and that it should not be overly prescriptive but to instead allow the implementation 'detail' to be incorporated into District Plan Rules depending on the needs of each local authority and their community. However, this has resulted in widely varying heritage rules and levels of protection across the country which is potentially problematic when heritage items of regional or national significance are left relatively unprotected by local planning rules. The lack of consistency in local heritage policies and the lack of clear legislative direction has led

to calls for the creation of a National Policy Statement regarding heritage conservation but as yet these calls have gone unanswered

In order to give clearer guidance around appropriate conservation strategies some TLAs have included in their district plan rules the need to consider other conservation assessment 'tools' such as heritage impact assessments, conservation plans and/or compliance with the ICOMOS New Zealand Charter.

The ICOMOS New Zealand Charter is based on the International Charter for the Conservation and Restoration of Monuments and Sites (also known as the Venice Charter 1964). It is useful as a guide to good conservation practice and significantly seeks "conservation" rather than "preservation" or "protection". Conservation is defined in the NZ Charter as follows:

"Conservation means all the processes of understanding and caring for a place so as to safeguard its cultural heritage value. Conservation is based on respect for the existing fabric, associations, meanings, and use of the place. It requires a cautious approach of doing as much work as necessary but as little as possible, and retaining authenticity and integrity, to ensure that the place and its values are passed on to future generations".

The ICOMOS NZ Charter also describes the various types of "intervention' that may be required in order to conserve a heritage building including preservation, restoration, reconstruction and adaptation.

Preservation involves the processes of stabilisation, maintenance and repair and is considered to encompass the least degree of intervention and is thus the preferred option.

Restoration is a higher level of intervention that typically requires reassembly and reinstatement to restore a building back to a former time or position and can require the removal of material due to advanced decay or because it detracts from the heritage value of the place. For example, modern additions may be removed.

The process of "reconstruction" is considered the next level of intervention and is distinguished from restoration because it introduces new material to the building to replace material that has been lost. Such reconstruction should be based on robust historical evidence and not conjecture.

Adaption of a place is considered to lead to the highest levels of intervention but is acceptable in situations where it is necessary to adapt the building so it may continue to be used.

In general terms the ICOMOS NZ Charter can be seen as a best practice guide to achieve the conservation of heritage buildings. In terms of providing conservation guidance for individual buildings then a conservation plan is the guiding document. A conservation plan is defined in the NZ ICOMOS Charter as "an objective report which documents the history, fabric, and cultural heritage value of a place, assesses its cultural heritage significance, describes the condition of the place, outlines conservation policies for managing the place and makes recommendations for the conservation of the place."

In the absence of a conservation plan an owner applying for a resource consent is likely to be required to supply a "Heritage Impact Assessment" as part of an overall "Assessment of Environmental Effects". Unfortunately there is no clear definition or guidance as to the appropriate content of Heritage Impact Assessments in New Zealand and they are prepared by consultants with varying backgrounds and skill levels.

The owner contemplating seismic retrofitting (or demolition) of a heritage building is often left in a position of uncertainty regarding both the intrinsic heritage value of their building

and acceptable levels of 'intervention'. This uncertainty adds to both the complexity and cost of their decision making process.

SATISFICING SAFETY

On the surface deciding on an appropriate level of strengthening appears considerably more straight forward than satisficing heritage but this is not the case. It is impossible to make our buildings and cities 100% safe from earthquakes. Thus, earthquake safety becomes an exercise in risk management and mitigation. Sociologists have studied the social aspects of earthquake risk mitigation. The idea that risk is essentially a cultural and social construct has been strongly argued by sociologists such as Douglas and Wildavsky (1982). As they put it "the measurement of risk is scientific, the acceptability of risk is political". Much of the current debate in New Zealand on seismic mitigation revolves around both the measurement of risk levels for different buildings in different parts of the country (a technical debate) and also the degree to which these risks should be accepted by the community (a political debate).

Prior to the Building (Earthquake-prone Buildings) Amendment Act 2016 the political debate was conducted at a local level and it was left up to each territorial local authority and their communities to decide on the type of earthquake-prone building policy they wished to pursue. There was considerable variation in policies around the country and also conflicting interpretation of the requirements of the legislation that was current at the time based on conflicting legal opinions. For example, some Local Authorities required that buildings be strengthened to 66.66% of NBS while others settled for 34% of NBS due to conflicting legal opinions. In 2014 this legal debate was finally settled in the Supreme Court which ruled that 34% was the appropriate interpretation and was the most that could be legally enforced.

Under the new legislation there is now a national policy that all Local Authorities must follow regardless of any views held by the local community regarding what they consider to be appropriate seismic mitigation measures or levels of public safety. However, the Government has at first glance adopted a clear strategy of satisficing safety by maintaining a comparatively low level of mandatory strengthening. To comply with the legislation a building must only be brought up to 34% of the standard of a comparable new building despite strong lobbying by the New Zealand Society of Earthquake Engineers for higher levels.

Many different disciplines have pondered the factors influencing seismic risk mitigation decisions. For example, many socio-psychologists have focused on the impact of risk perception on mitigation decisions, concluding that how people perceive and personalise earthquake risk significantly influences the types of protective decisions and behaviour adopted (Lepesteur *et al.* 2008, Lindell and Prater 2000b, Lindell and Prater 2002, Mulilis and Duval 1995, Tierney *et al.* 2001, Weinstein *et al.* 1998).

Clearly how the risk is communicated is an important factor in influencing decisions around the appropriate levels of building strengthening. Considerable debate has focussed around this issue with critics of the new legislation advocating for public policies that recognise relative risk. For example, comparing the risk of dying in an earthquake with the risk of being killed in a car accident or plane crash. It has been calculated that you are less at risk of dying in an earthquake-prone building located in Auckland than in non-earthquake-prone ('safe') buildings in Wellington thus challenging the need for a national policy of mandatory strengthening.

Due to the way that risk has been framed the mandated level of earthquake-strengthening has been deemed by many building tenants to be too low. As a result many owners are 'voluntarily' choosing to earthquake strengthen their buildings to higher levels than 34%

NBS in order to satisfy the requirements of commercial tenants worried about compliance with health and safety legislation. Thus, in order to satisfice the economic needs of the owner the needs to satisfice safety has also risen as a degree of market stigma has become attached to older buildings that remain below 100% of NBS.

A problem with earthquake strengthening heritage buildings is that it can result in damage to the heritage value of the building. Generally the higher the level of strengthening sought the higher will be the loss of heritage values as the engineering solutions become more invasive and structurally significant. To an extent this loss of heritage value can sometimes be mitigated but this mitigation usually comes at a significant increase in constructions costs.

To conserve the heritage building as well as protect lives there is clearly a need to provide for the survival of the building as well as the safety of people in and around the building. The challenge is how to protect the heritage buildings from earthquakes without destroying the very values that make the building a heritage building in the first place. The other challenge is in strengthening the building at a cost that satisfices the economic needs of the owner.

SATISFICING ECONOMIC RETURNS

In a free market situation satisficing economic returns revolves around the land economic concept of "Highest and Best Use". The concept of "Highest and Best Use" has its origins in classical economics. The importance of highest and best use is emphasised in the professional standards followed by real estate valuers and property analysts in New Zealand. For example the International Valuation Standards (IVS) define Highest and Best Use as follows:

'Highest and Best Use' is the most probable use of a property which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the property being valued

(IVS General Valuation Concepts and Principles).

In order to value a property, the valuer must study market behaviour and the way in which real estate investment decisions are made. Underpinning this analysis is the concept of Highest and Best Use. The valuer must also adopt a particular basis of value which is often but not always "market value".

As set out in the "IVS 104 Bases of Value" "a valuer must select the appropriate basis(es) of value when valuing real property interests. Under most bases of value, a valuer must consider the highest and best use of the real property, which may differ from its current use. This assessment is particularly important to real property interests which can be changed from one use to another or that have development potential".

Due to the current regulations forcing mandatory seismic mitigation earthquake-prone buildings inevitably fall within this category of being either ripe for a change of use or having development potential. The owner is faced with a situation where they must assess whether it is economic to seismically upgrade their earthquake-prone building or alternatively should they demolish it. This assessment becomes significantly more difficult if the earthquake-prone building has heritage protection as there is often uncertainty around what is "legally permissible" or indeed what is a "probable use".

The IVS confirms that "The Market Value of an asset will reflect its highest and best use (see paras 140.1-140.5). The highest and best use is the use of an asset that maximises its potential and that is possible, legally permissible and financially feasible. The highest and best use may be for continuation of an asset's existing use or for some alternative use. This is

determined by the use that a market participant would have in mind for the asset when formulating the price that it would be willing to bid".

When carrying out Highest and Best Use analysis the valuer considers two separate scenarios – the use and value of the land as though vacant and the use and value of the property as it currently is with existing buildings and improvements on the land. When the land actually is vacant then only the first scenario needs to be considered.

When considering the use (and hence value) of land as though vacant the analyst is asking the question as to what is the most appropriate or optimum use of the land in terms of improvements to the land. There is likely to be a range of potential and competing land uses which are then tested against the criteria contained in the definition.

When considering the value and use of the property as improved the analyst is effectively asking whether the existing improvements still add value to the land and also is the property 'ripe' for redevelopment in some way. For the owner of an earthquake-prone building the question will be whether they are better off economically to demolish the buildings or to strengthen them. This may also include questions around the economic benefits of refurbishment, additions or an adaptive change of use.

If the results of the analysis indicate that demolition is the best economic alternative then the owner may present their evidence to the Local Authority to support their application for demolition consent if it is a heritage building. Some case study examples of this are discussed below.

CASE STUDIES

A case study approach can be used to try and explain, explore and describe current or recent phenomena or situations and the context in which they occur (Yin, 2003). The phenomena or situation that is the subject of this research is the demolition of earthquake-prone heritage buildings and a case study approach was adopted as a suitable research approach. As the 3 Case Studies presented in this paper illustrate, the need to satisfy public safety, heritage conservation and the economic needs of the owner is extremely difficult and often impossible. As a result one of the three objectives is often severely compromised or abandoned as is illustrated by the case studies.

Case Study 1 – The Harcourts Building

The Harcourts Building was completed in 1928 for T&G, an Australian insurer. It comprised 7 storeys of office accommodation and a small rooftop flat. The ground floor was occupied by retail premises. It was listed for protection in the Wellington District Plan in 1994 and is a Category I listed building under The Heritage NZ Act.

The building had been assessed by the Wellington City Council as meeting only 17% of the new building standard (NBS) and thus was deemed to be an "earth-quake prone building." As a result the Council issued a section 124 notice on the 27th July 2012 to the owners requiring them to either strengthen the building or demolish it within 20 years.

The owner applied for a resource consent to allow demolition but the resource consent was declined. This was despite the fact that the Wellington City Council Planner recommended that consent for demolition be granted due to the risk posed to public safety and because she considered it was not reasonable to impose the costs of heritage preservation on a private owner/developer to achieve public benefits.

At the Environment Court hearing the owner took the position that he could not tenant the building due to the safety issues relating to the building and the market perception of the building post the earthquakes in Christchurch in 2011. In order to satisfy the market in terms of safety he argued that the building must be strengthened to 100% of NBS and that such strengthening while technically feasible was not economically feasible.

Alternatives to complete demolition were considered at some length with a total of 11 different options considered including some adaptive reuse options. There was argument around the extent to which the various options had been explored and the basis on which the owner had ruled them to be infeasible. Central to the argument was the 'site' value attributable to the land and building if used for an adaptive re-use as a high land value would make such alternatives uneconomic.

This point is highlighted under the cross examination of the owner, and reported in the Environment Court judgement at paragraph 77 where the owner admits that he turned down an offer of $5 million for the 'site' as part of a hotel conversion deal because he wanted $10 million. This was particularly damaging to the owners case as evidence had been presented that the "redevelopment value" for the site assuming a new development was only $3.17 million.

The Environment Court also commented on the "tension" between the Building Act which potentially encourages the demolition of heritage buildings on the grounds of safety and the RMA which seeks to prevent demolition. They say that it is ironical that the Wellington City Council must administer both the Building Act and the RMA. At paragraph 133 the Court states:

Is there a solution to the tension? We think not. It is another demonstration that the RMA provides mechanisms to manage development from the point of view of effects on the environment, and other statutes may independently govern other aspects of the use of resources.

In their judgement the Courts set out their conclusions and at paragraph 140 of the decision had the following to say:

We recognise that in its present state the building cannot support itself financially, let alone make an acceptable return on funds invested for its owner. But nor is that a reason, without more, to justify demolition. The District Plan, and s6, require the alternatives to be exhaustively and convincingly excluded before demolition can be justified.

While possible reuse as an office/retail building, and other adaptive reuses has been considered, we cannot be satisfied that they have been explored other than with a handicap imposed by a rigidly set bottom-line figure being demanded for the land and building as they are.

The Historic Places Trust, admittedly as a second best, has indicated that a sensitive retention of the building's facade may be acceptable, but that position has not been adequately explored.

Like the Commissioners before them the Environment Court therefore concluded that there had not been sufficient investigation of alternatives to total demolition and dismissed the appeal. However their decision was challenged by the owner in the High Court who found that the Environment Court had made two errors of law when it dismissed the appeal.

The first error in law was that the Environment Court applied the wrong test by stating that "the District Plan and s 6 [of the Resource Management Act] require the alternatives to be

exhaustively and convincingly excluded before demolition can be justified". The High Court considered that the Environment Court overstated the effect of s 6 of the RMA and may have misinterpreted the District Plan rules as shown by the omission of the word "reasonable" in paragraph 5 of their summary when discussing "alternatives". Thus in the opinion of the High Court the Environment Court by applying the wrong legal test acted unfairly by requiring the building owner to discharge too high a burden of proof.

The second error of law was committed by the Environment Court when they concluded that the relevant provisions of the Resource Management Act and the Building Act could not be reconciled. By doing this the High Court deemed that they had failed to give adequate consideration to the risk to public safety and surrounding buildings if the Harcourts Building remained as it was. The High Court considered that the provisions of the Building Act and consent provisions of the Resource Management Act are not completely irreconcilable and that it was clear that public safety is a factor that a consent authority needs to consider when assessing an application to demolish a heritage building.

The Court allowed the appeal and remitted the decision back to the Environment court for rehearing with direction that the Environment Court had to:

(1) Give consideration to demolition of the building only if convinced that there is no reasonable alternative to total demolition.
(2) Give consideration to the risk to public safety and surrounding buildings if the Harcourts Building remains as it is.

The 2nd Environment Court hearing took place in August 2014 and the entire case was heard *de novo.* It is interesting that two of the Environmental Commissioners hearing the case were engineers. It would appear that the composition of the Court was 'shaped' by the 'public safety issue" highlighted by the High Court. However, the engineering and safety arguments were largely pushed to the background by the economic arguments although this time little attention was paid to the potential for an adaptive re-use of the building. Instead the focus was clearly on whether the building could be rehabilitated for office use.

The owner, with the support of his valuation witness considered that the completed (strengthened) value of the building would be between $13.7m and $15m. Heritage New Zealand (previously known as The Historic Places Trust) countered this argument by providing evidence that the value was in the order of $20 - $22 million. The Court concluded that the owners view was "pessimistic" while that of Heritage New Zealand was "optimistic" and that a realistic value was likely to be between $18 and $20 million. Based on this value the Court then concluded that it would be economic to strengthen the building and thus the issue of public safety would be addressed. They therefore dismissed the appeal.

The owner had threatened to leave the building to suffer demolition by neglect and to thus create an unacceptable threat to public safety. This was clearly seen as a 'bluff' by the Court who stated the following at paragraph 124 of their decision:

The owner indicated that it would do nothing if a demolition consent is not granted. Our conclusion is that this is an unlikely outcome. Given the value of the site and holding costs, we consider demolition by neglect is most unlikely because:

(a) *The council is likely to review the Building Act notices and take action if necessary;*
(b) *The building is relatively sound and watertight;*
(c) *Its proximity to the HSBC Building is likely to affect the future tenants of that building if the Harcourts Building is neglected: and*

(d) *Its prime position in the central city will militate against waiting 13 years until the Notice expires.*

Case Study 2 – Hydro Grand- Timaru

The Hydro Grand Hotel was built in 1912 and was designed by architects Hall and Marchant on a prominent corner site overlooking Caroline Bay. With a distinctive circular observatory at its corner the hotel became an icon of Timaru that was featured extensively on postcards in its early days. It became a well-known landmark in the city and was initially well patronised and popular for its hotel accommodation and dining. It was listed as a category 2 Heritage Building by the Historic Places Trust. It was also listed as a Category 2 Heritage Building in the Timaru District Plan. It was purchased by DB Breweries in 1970 and the emphasis changed from providing hotel accommodation and food to servicing the bar trade. The property then went through numerous changes of owners and according to local historian Jeff Elston suffered a "less than reputable" perception through the 1970's and 1980's with a reputation for under-age drinking, fights and police raids.

It was closed in 2003 after being purchased by a syndicate of Timaru businessmen who eventually announced plans in 2009 to demolish the hotel and replace it with a new $60 million hotel and apartment complex. The syndicate never followed through with their plan although they applied for a consent to demolish the hotel in March 2011 but the application was sent back by the Council with a request for more information. This additional information was not forthcoming and in November 2011 the Hotel was put back on the market. During their period of ownership of the hotel the syndicate had been able to purchase two adjoining which were combined with the hotel site to create a large development site of 2529sm with dual access from The Bay Hill and Sefton Street East.

After being on the market for nearly 18 months the site sold in March 2013 to a local businessman Allan Booth who was initially expected to be the saviour of the Hydro Grand. He stated upon purchase that he was keen to retain the building “if feasible”. However, by January 2014 he appears to have decided that retention was not feasible as he considered the building “not retrievable” and that it had become a “safety issue”.

On the 6th August 2016 a resource consent was filed to demolish the hotel and replace it with a new hotel, apartment and office complex expected to cost about $42 million and to be completed within 3 years. The plan was for the construction of three separate buildings linked by a public courtyard in the middle. The development was planned to be done in stages with the 68 room hotel expected to be the final stage. There was to be 3 floors of parking comprising 90 parking spaces as part of the Hotel Building.

The case is interesting for a number of reasons and illustrates some of the issues and challenges around preserving heritage buildings and particularly those that are earthquake-prone.

The first of these issues is around earthquake- strengthening strategies. The assumption was made and appeared to be accepted by all parties that nothing short of 100% of NBS was required to meet market expectations regardless of the statutory requirements. There was also considerable debate between the engineering experts about appropriate strengthening methodology with significant differences in cost both in terms of the impact on heritage values and the financial costs.

There was considerable debate around both the heritage value of the buildings and the merits of the heritage evidence presented. The applicant called a well-known conservation architect as an expert witness who presented a report which he admitted was not a heritage impact

assessment and gave evidence that he considered the building a significant heritage building in the Timaru CBD landscape. He then went on however to say that conversion of the building to a contemporary hotel would effectively result in gutting the interior and result in "facadism" which could not be seen as an appropriate conservation option for the building.

A Council commissioned heritage expert raised doubts as to whether sufficient heritage assessment had been provided. This view was accepted by the Commissioner and as a result an architect was commissioned by the Timaru District Council to provide an independent heritage impact assessment report. This report found favour with the Commissioner who stated that he found the report "detailed and extensive but more importantly objective". This comment was largely in response to criticisms levelled at the report by the Council commissioned heritage conservation consultant who had been critical in his peer review of the report. Indeed the Commissioner went on to say that he considered this criticism of the Heritage Impact Assessment to be "a little over the top and at times inaccurate". In the end the heritage value of the building appears to have been largely discounted as the Commissioner notes in his decision that "the building is only listed as a Category 2 and Group 2 building and is not of national importance".

The applicant presented significant amounts of evidence around the exploration of different options with costings provided for 7 options of which 6 were facade retentions. Evidence was given that these cost had been run through a detailed financial feasibility model which resulted in poor returns but neither the methodology or results of these models were provided. Never the less the Commissioner appeared to be impressed by the economic evidence despite a number of obvious shortcomings in it. In his decision he concludes that "the applicant has undertaken very extensive and costly design studies and costings into options for retention and redevelopment of the existing building". He appears to miss the point that these options seem largely directed at façade retention only. Also at no stage is consideration given to the fact that the heritage building only occupies 38% of the site and that the viability of any development of the building should be assessed in relation to the whole site and not just the part of the site occupied by the building. The economic decision making of the applicant and their proposed development appears to be clearly focussed on maximising the amount of building constructed on the site and not on adaptive re-use or rehabilitation of the existing building. Evidence of this maximisation of development potential is illustrated by the non-compliance issues relating to the proposed new development.

The case study also illustrates the issue of demolition by neglect which can result in both a loss of heritage value and an increase in the cost of retaining the building. From as early as 1998 there were concerns expressed in the media about the standard of maintenance of the Hydro Grand and with the building left vacant from 2003 the building was left to deteriorate and became vulnerable to both vandals and the elements. This lack of maintenance resulted in what was described in the Heritage Impact Assessment as an extreme state of disrepair. The state of the building also increased political pressure on the Council to do something about what had become an eyesore and a symbol to many people of a CBD in decline.

Case Study 3 – Erskin College - Wellington

Erskin College was a private girls secondary school located in the southern Wellington suburb of Island Bay. The School was closed and purchased by a developer who had plans to demolish it. However, a group of concerned citizens formed themselves into a body corporate group called Save Erskin College Trust (SECT). Under the legislation at the time this group were granted Heritage Protection Authority status in 1992 for the purpose of protecting the buildings and grounds of the former Erskin College. SECT gave a notice of

requirement to the Wellington City Council in 1993 for a Heritage Order under section 189 of the Resource Management Act.

The Wellington Company purchased the site in 2000 and after considering numerous proposals for the site applied to have it declared a Special Housing Area under the Housing Accords and Special Housing Areas Act 2013 (HASHAA) and this was done by Order in Council in June 2015. The Wellington Company then obtained resource consent from the Wellington City Council to develop the entire site and to demolish numerous heritage structures. Their belief was that this consent overrode any protection afforded by section 193 of the RMA. This proofed incorrect and the two parties were then directed to undertake mediation but no agreement could be reached. This was despite the fact that SECT gave permission for the bulk of the site to be developed while requiring the retention of the two most important heritage buildings on the site being the Chapel and the main school building. This was not considered an acceptable compromise for the Wellington Company who wished to also demolish the main school building although they were willing to retain the Chapel.

This proposal was refused by SECT in September 2017 and The Wellington Company appealed to the Environment Court with the hearing taking place in late December 2017. Heritage New Zealand participated in the appeal in support of SECT. The entire Erskin site including its buildings are listed as a Category 1 Historic Place. The main block building which was the original convent building built in 1906 and the Erskin Chapel of the sacred heart built in 1929 were also both individually listed on the Wellington City District Plan heritage Inventory. As well as the main building there are numerous other buildings on the site and of special heritage value was the Reverend Mothers Garden.

The main school building and Chapel were declared to be earthquake-prone by the council in 2012. There was also some damage to the buildings as a result of the Kaikoura Earthquakes in November 2016. The true level of damage was the cause of considerable debate between opposing engineering experts along with the level of risk posed by the buildings if they were to remain. Engineering evidence for The Wellington Company was that the Chapel was a "public hazard" due to its original construction, damage suffered from the Kaikoura earthquakes and the current period of high seismicity. Initially the building had been cordoned off by WCC but these had then been subsequently removed. SECT engineers disputed this assessment but the Court seemed very concerned about public safety and the dangers of the building collapsing in a "severe earthquake" hence the need to establish either a drop zone or to provide "temporary stabilisation". Temporary stabilisation was costed out at $400,000 by the HNZ witness and at more than double that by the TWC witness.

The key heritage issue identified by the Court was whether it was appropriate to sacrifice one of the buildings (the main convent building) in order to secure the future of the chapel or alternatively to decline consent to demolish either of the buildings which would be left to their fate in the hope that someone might rescue them in the future.

Other areas of heritage debate were around what constituted an appropriate conservation plan and the role and significance of the ICOMOS Charter. The Court stated at paragraph 42 of their decision that the ICOMOS Charter "focusses strongly on retention and preservation of places of cultural heritage value in quite a pure sense. It does not provide guidance for coping with situations where resource appears not to be forthcoming to save a place".

The Wellington Company presented substantial feasibility analysis material in an attempt to prove that retention of the buildings were not economically viable. The feasibility analysis presented appears to be based around utilizing the high density potential made possible by the Housing Accord negotiated with the Crown. SECT and HNZ did not provide any evidence

that challenged the applicants feasibility analysis or provide alternative development options. There was some discussion by the Court of the legal tests around "reasonable use" which is a factor to be considered in the Resource Management Act in terms of challenging Heritage Orders.

The Wellington Company threatened to only partially develop the site for housing and to leave the main building and Chapel to deteriorate and to be a safety risk. This appears to have swayed the Judge who granted partial nullification of the heritage order and allowed the demolition of the main school building.

SUMMARY AND CONCLUSIONS

The need to satisfice the triple objectives of heritage conservation, public safety and economic viability for the private owners of earthquake-prone heritage buildings is a serious challenge for heritage conservation in New Zealand. A Case Study approach was used to explore this issue in some depth. In two of the three case studies the result was the loss of significant heritage buildings where safety and economic returns were achieved at the expense of heritage conservation. In the third case study on the Harcourts Building, demolition consent was declined and the heritage building was adapted to a new use that was commercially viable thus providing an example of successful satisficing.

A significant finding from comparing the Case Studies and other case law is the apparent unpredictability of any resource consent application relating to an earthquake-prone heritage buildings. Prior to the hearings over the Harcourts Building interest was high amongst both the property industry and the heritage community regarding what was seen as potentially a precedent setting case of national significance which would reduce this uncertainty. Unfortunately this was not to be the case as spelt out by the Environment Court in their first decision where at paragraph 136 they said:

The Wellington Civic trust saw this as a test case with national implications beyond those of the urban form of central Wellington and was concerned about precedent around demolition of category I listed buildings...We agree with the Civic Trusts position that overturning a listing through total demolition of the building in question should not be undertaken lightly. In a case where, as here, the proposed demolition is a restricted discretionary activity, concern about setting a precedent can be overstated. A consideration of the Court's decisions about heritage will show that there is no precedent in a true sense. Every application has to be assessed on its merits, measured against the provisions of the Act and the relevant planning documents

Although many thought the Harcourts Case would be a clear test of whether safety trumped heritage or vice versa it is clear that each case must be judged on the particular planning context of the relevant district plan rules and the individual attributes of the building and location. This is probably cold comfort for those owners who go to the expense of applying for resource consent and then are declined. In the case of the Harcourts Building the owner was quoted as having spent about $1.4 million on consultants and lawyers fees in his failed attempt to gain a resource consent.

A large part of the uncertainty around resource consents revolves around what is considered to be sufficient in terms of feasibility analysis for the retention of the heritage building. The 'bar' appeared to have been set quite high based on the Harcourts Case but based on analysis of the two case studies that were subsequent to the Harcourts Case it is still not clear as to what constitutes a "reasonable" alternative or the degree to which an owner must identify and investigate the feasibility of various different options. Where the owner is clearly intent on maximising the development potential of their site by demolishing the existing buildings it is

unlikely that they will strive to find a feasible option for heritage building retention. The evidence presented by owners in such situations can often be presented in the form of a "straw man" argument rather than serious efforts to find a feasible option. This puts the onus on heritage advocates such as Heritage New Zealand to investigate these feasible solutions and to robustly examine such "straw men" arguments.

Unfortunately a lack of expertise and resources in terms of real estate development expertise means that the evidence presented around the feasibility options for heritage buildings by heritage advocates tends to be weak. Thus the economic arguments put forward in litigation tend to be one sided and in favour of demolition. Heritage New Zealand has an important role to play as shown by a comparison between the Harcourts case and the Hydro Grand case. In the Harcourts case Heritage New Zealand vigorously opposed the original Resource Consent application and then stayed the course in terms of the Environment Court and High Court Appeals. This is in contrast to the Hydro Grand where they did not oppose the Resource Consent as such but requested that more detailed information on the heritage value of the building be obtained along with additional engineering assessment. The weak opposition by Heritage New Zealand was noted by the Commissioner in his decision at page 25 as follows:

"What I do know is that HNZ did not attend the hearing and their submission seemed rather ambivalent, merely requesting that further information on heritage values and engineering matters be obtained before an informed judgement is made."

It is unclear why there was the lack of opposition to the proposal although it may be related to the fact that the Hydro Grand was a Category II building while the Harcourts Building was a Category I building. If this is the case then this has significant implications for Category II buildings and the listing process in general.

As stated it is clear that resource consent applications regarding heritage must be considered on a case by case basis and the result will vary depending on the context provided by the particular district plan rules that are applicable. This raises concerns over the weakness and vagaries of many district plan rules and reinforces the need for the introduction of either a National Policy Statement or National Environmental Standards in terms of heritage conservation.

The question as to the extent to which public benefits (of safety and heritage) can be provided at personal cost also remains unclear and has relevance to the acceptable rate of return to be factored into any financial feasibility analysis and the extent to which subsidies of various types should be provided as partial compensation. This need to balance private and public costs and benefits remains a major impediment to the acceptance of mandatory seismic retrofitting policies and heritage conservation.

The tension between the Resource Management Act and the Building Act remains problematic. The decision in the Harcourts case clearly upset the Minister of Building at the time Maurice Williamson who stated in the media (The Christchurch Press, 2012) that the case highlighted conflicting government requirements relating to building safety and heritage protection. He was quoted as saying:

"We can't leave a situation where we are wanting buildings right across the country to be strengthened or demolished in the interests of public safety… and then for another form of officialdom to say sorry, we are not going to let you do that."

"You can't have various forms of government administration having different views on the same issue where there is no solution" and "one of the things I've never ceased to be amazed

with is the number of people who want to protect heritage buildings but aren't prepared to stump up with any money."

Clearly the Minister was not happy with the decision and was in support of the owner. It was reported at the time "that as a result of his views Government building and heritage officials had been asked to report on possible legislative changes in about a month". It is not clear what the outcome of this report was although it may have factored into changes to the Resource Management Act around the use of Heritage Orders.

The three cases also illustrate the significant vulnerability of heritage building to demolition by neglect. This increases the costs of building retention options and also allows the owner to 'frame' the demolition consent as removing a dangerous eyesore. The Courts also appear to be concerned about decisions that retain the status quo as this is effectively seen as potentially a demolition by neglect situation where the owner refuses to maintain their building which therefore continues to degrade and is vulnerable to damage and vandalism.

What is evident from the 3 case studies and other recent case law is that the current regulation and management of heritage resources in New Zealand is in need of reform to avoid a situation where money that should be spent on mitigation is spent on litigation.

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