

Before an Independent Hearings Panel
Appointed by Mackenzie District Council

under: the Resource Management Acct 1991

In the matter of: Proposed Plan change 28 to the Mackenzie District Plan

and: **Church Property Trustees**
(Submitter 43)

Legal submissions on behalf of Church Property Trustees

Dated: 16 May 2025

LEGAL SUBMISSIONS ON BEHALF OF CHURCH PROPERTY TRUSTEES

INTRODUCTION

- 1 These legal submissions are presented on behalf of Church Property Trustees (*CPT*) in relation to the hearing for proposed Plan Change 28 (*Historic Heritage*) (PC28) to the Mackenzie District Plan (*District Plan*).
- 2 The focus of these submissions will be on the proposed Church of the Good Shepherd Heritage Overlay (*Proposed Heritage Overlay*). CPT's submissions seeks that the extent of the Proposed Heritage Overlay surrounding the Church of the Good Shepherd (*Church*) and the Statute of the Sheepdog (*Statute*) be reduced to (at least) exclude the area on the landwards side of Pioneer Drive (*Area A*).

CPT's requested relief is supported by expert heritage evidence. **Mr David Pearson** has carefully and thoroughly considered the site, historical context and relevant planning requirements. Based on Mr Pearson's evidence it is clear that the restrictive outcomes of applying the Proposed Heritage Overlay in Area A does not align with the requirements of the District Plan or the Resource Management Act 1991.

- 3 In our submission, CPT's position should be preferred over the position taken by the Council witnesses, who oppose the reduction in the extent of the Proposed Heritage Overlay.

BACKGROUND

- 4 Mackenzie District Council (*Council*) propose a Heritage Overlay surrounding the Church of the Good Shepherd (existing heritage listed item H18) and the Statue of the Sheepdog (existing heritage listed item H45). The Church is listed as a Category 1 Historic Place on the New Zealand Heritage List.
- 5 CPT owns land within the Proposed Heritage Overlay, including the land occupied by the Church.
- 6 The extent of the Proposed Heritage Overlay and the land owned by CPT is shown in **Figure 1** below.



Figure 1: Figure shows previous Proposed Heritage Overlay outlined in purple, and land owned by CPT shaded in red.

- 7 The land owned by CPT is currently zoned Low Density Residential Zone in the Council Plan (*District Plan*), although the land occupied by the Church on the lakeward side of Pioneer Drive is proposed to be primarily zoned Open Space Zone through Plan Change 29.
- 8 CPT is not opposed to the use of heritage overlays in the District Plan as a means to protect the settings in the heritage items. However, CPT seek that the extent of the Proposed Heritage Overlay surrounding the Church of the Good Shepherd and the Statue of the Sheepdog be reduced to exclude (at least) the area landward of Pioneer Drive marked as Area A.
- 9 The evidence from CPT representative, **Mr Gavin Holley**, provides an overview of CPT's obligations in connection with the Church. In summary:
 - 9.1 CPT is the legal owner of all Diocesan property (including the land within the Proposed Heritage Overlay). It holds the property as trustee and in this case, must be administered by CPT for furtherance of ecclesiastical purposes and the benefit of the particular parish concerned (i.e. the Anglican participation in the Mackenzie Cooperating Parish).
 - 9.2 CPT's obligations can be distinguished from those of organisations or trusts dedicated exclusively to the protection of heritage values. The primary purpose of CPT is to administer the assets it holds in support of furthering the mission and ministry of the Anglican Diocese of Christchurch. Its statutory and common law duties to protect trust assets to support ecclesiastical objectives include taking reasonable steps to prevent losses, including material diminution in value.

9.3 The expert valuation prepared by Colliers concludes a \$2.17 million loss in value of land if Area A is included within the Proposed Heritage Overlay. CPT therefore cannot support the extent of the Proposed Heritage Overlay because doing so would be in conflict with its duties to act to protect the value of the land.

- 10 It is emphasised that CPT are generally supportive of the proposed provisions in the Historic Heritage chapter in the District Plan and the continued heritage listing of both the Church of Good Shepherd and the Statue of the Sheepdog. Its position in respect of Area A is that based on the expert advice of **Mr Pearson** that Area A does not significantly contribute to the protected heritage values.

Reduced Overlay

- 11 We note that as result of onsite discussions held with CPT, the Church of the Good Shepherd Tekapo Committee (*Church Committee*) and Heritage New Zealand Pouhere Taonga (*HNZPT*), the Reporting Officer has recommended reducing the extent of the Proposed Heritage Overlay to allow for a modest building to be constructed. This amendment responds to the Church Committee's submission that it may require a small tea room/toilet facility for employed guides in the future (*Reduced Overlay*).
- 12 The relationship between CPT and the Church Committee is explained in the evidence of **Mr Holley**.
- 13 The Church is a volunteer group which primary responsibility is facilitating the day-to-day operations of the Church on behalf of the Parish Council.
- 14 The Committee does not hold the same overriding legal duties in respect of the land held by CPT. CPT does not consider the Reduced Overlay to be sufficient in terms of its duty to protect the value of the land for the long term good of the Parish.

HERITAGE PROTECTION UNDER THE RMA

- 15 Section 74 of the Resource Manage Act 1991 (*RMA*) prescribes matters to be considered by the Council in preparing and changing its district plan. That section requires the Council to change its district plan in accordance with:

15.1 its functions under s 31;

15.2 the provisions of Part 2 (including ss 5 and 6);

15.3 its duty under s 32; and

15.4 any regulation.

- 16 Section 6 of RMA set out the matters which all persons exercising functions and powers under the Act must recognise and provide for as a matter of national importance. Under subsection 6(f) this includes:
- (f) the protection of historic heritage from inappropriate subdivision, use and development.*
- 17 The term 'historic heritage' is defined by section 2 as meaning:
- (a) *means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:*
- (i) *archaeological:*
- (ii) *architectural:*
- (iii) *cultural:*
- (iv) *historic:*
- (v) *scientific:*
- (vi) *technological; and*
- (b) *includes—*
- (i) *historic sites, structures, places, and areas; and*
- (ii) *archaeological sites; and*
- (iii) *sites of significance to Māori, including wāhi tapu; and*
- (iv) *surroundings associated with the natural and physical resources*
- 18 In our submission, the outcomes contemplated by s 6(f) and the Historic Heritage chapter of the District Plan (and in particular those expressed in objectives HH-O1 and HH-O2 above) can be achieved through a reduced extent of the Proposed Heritage Overlay.
- 19 We note that the objective HH-O1 which provides that the intent of the proposed provisions is to protect historic heritage items from inappropriate subdivision, use and development mirrors the language of section 6(f) of the RMA.

- 20 HH-O2 provides that the intent of the Proposed Heritage Overlay is to ensure that the heritage value of the Church and Sheep Dog statue is maintained. HH-O1 and HH-O2 are set out below:

HH-O1 Protection of Historic Heritage

Historic heritage items are protected from inappropriate subdivision, use and development.

HH-O2 Church of the Good Shepherd Heritage Overlay

The historic heritage value of the Church of the Good Shepherd and Sheep Dog Statute are maintained.

- 21 These legal submissions do not dispute the significance of the historic heritage of the Church and it is accepted that the protection afforded by s 6(f) may legitimately extend to the surrounding area that is significant for retaining and interpreting the heritage significance of the Church.¹
- 22 However, for the reasons set out below, in our submission the extent of the protection must be carefully considered so has not to impose restrictions that are beyond what is necessary to protect the heritage significance those items. Imposing restrictions beyond what is necessary would be contrary to the purpose of the legislation.

Range of considerations relevant

- 23 It is apparent from caselaw that s 6(f) applies to the protection of a specific heritage site and its surrounding. However, the degree to which surroundings are to be protected must be determined by reference to a range of considerations including Part 2 of the RMA.
- 24 We note the High Court Decision of *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* set aside Auckland Council's decision to publicly notify resource consent application to remove a 1880s villa.²
- 25 In that case, the Hearings Committee decided that the removal of the villa should be publicly notified because it had heritage and historic significance within its local context, and it considered that the removal of the building had the potential to destroy the historic connection between the heritage building and the local area.
- 26 The Court set aside that notification decision because it did not refer to any evidence which supported its view. Furthermore, the Court found that the heritage values of the community were not matters which elected members of a local authority were best placed to

¹ *Oriental Parade (Clyde Quay) Planning Society v Wellington City Council* ENC Wellington W63/05, 2 August 2000.

² *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, [2015] NZRMA 11.

determine without reference to evidence and the purposes of the legislation.³

27 Although it is acknowledged that this decision is made in a different factual context than the present case, in our submission it is relevant in so far as it demonstrates that decisions relating to the protection of historic heritage must be supported by evidence and provided for in conjunction with other considerations contemplated by the legislation.

28 Thus, the decision on the appropriate extent of the Proposed Heritage Overlay is a matter of weighing all the relevant factors to determine whether protection afforded by the Proposed Heritage Overlay promotes the sustainable management purpose of the RMA.⁴

29 In our submission, those factors include the social and economic well-being of owners of the land, noting the definition of sustainable management' in s 5(2) of the Act below:⁵

*[...] 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 well-being** [...]*

30 *Gavin H Wallace Limited v Auckland Council* provides further support for this approach.⁶ This case involved a dispute as to the extent to which an acknowledged landscape, cultural and heritage value should prevent the prospect of land being developed for urban purposes. The appellants in this case argued that the sensitive characteristics of the land could be protected while enabling careful development through a long-term planning approach.

31 Here, the Environment Court held that in order to make a decision to exclude land from development for the purpose protecting characteristics protected by s 6, it must be satisfied that such decision better achieves the purpose of the Act. This assessment involves:⁷

[...] the balancing of the landowner's interests in providing for their social and economic well-being, and providing urban zoned

³ *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, [2015] NZRMA 11 at [57]-[66]

⁴ *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC at [82].

⁵ Resource Management Act 1991, s 5(2).

⁶ *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120.

⁷ *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [125].

land against locking the land up from any urban development to protect heritage and landscape characteristics.

- 32 Overall, the Court favoured the evidence of the appellant which showed that development could be undertaken in a way that did not detract from the protected heritage, cultural and historic values. Therefore, total restraint of development in that area could not be justified because it did not better give effect to the purpose of the Act. For completeness, we note relevant paragraphs of the decision below:

[83] *In our view the protection afforded under Section 6 of the Act has been overstated by the Council witnesses. The protection is from inappropriate subdivision, use, and development.*

[...]

[86] *Identified heritage values under Section 6(f) are similarly, in part, protected by the Stonefields Reserve. The heritage characteristics of the subject land could also be protected, provided the land is developed in a manner that is sympathetic to relevant heritage aspects.*

[87] *Amenity and landscape values could equally be accommodated by appropriate development. We discuss the parameters of such development later in this decision. We are satisfied that, subject to the constraints imposed by those parameters, and the need for them to be satisfied in any Plan Change or resource consent application, that future urban development could satisfy relevant directions contained in Sections 6, 7 and 8 of the Act.*

[88] *This would, unlike a development exclusion approach, enable the owners of the land to also provide their social and economic well-being in accordance with Section 5 of the Act. This would also enable the value of the land to reflect its potential for appropriate development.*

Overall finding on Landscape, Culture and Heritage

[89] *We therefore find that a degree of sensitive urban development, appropriately constrained, would better give effect to the single purpose of the Act, than a total restraint on future development. We discuss the appropriate constraints later in this decision.*

- 33 In our submission, the heritage assessment undertaken by Council advisor, Mr Richard Knott, does not provide adequate rationale to explain why 'Area A' should be included as part of the Heritage Overlay.

- 34 In this case, the 'developer', is a trust whose primary purpose is to enhance the social and cultural well-being of the community by providing church services and safeguarding the long-term interests of the Parish. CPT's role in supporting ecclesiastical objectives is also distinct from that of a trust or organisation established solely for the protection of heritage values.
- 35 The evidence of **Mr Pearson** includes a detailed analysis of the relevant planning provisions and the realistic development that could occur in Area A under the existing planning controls. In summary:
- 35.1 The Proposed Heritage Overlay should be limited to all the land between Pioneer Drive and the lake and extend southwards to the bridge and to the east to incorporate the dog statue.
- 35.2 There is little merit in including Area A in the Proposed Heritage Overlay as in its current state does not make significant contribution to the heritage landscape because:
- (a) In its present state, the empty land detracts somewhat from the church and its immediate surrounds. However, if it were to be sensitively developed with appropriate uses, it could make a positive contribution to the amenity of the area.
 - (b) The current urban development beyond Area 'A', which comprises small scale dwellings in a well-maintained and planted landscape provides an appropriate and not unattractive backdrop to the church and the sheepdog statue. Area 'A' could be developed in a similar fashion without compromising the areas heritage values.
 - (c) The application existing planning controls on any future development of the Area A land will ensure that it remains as an attractive environment and one that will not detract from the proposed heritage overlay or the heritage values of the two heritage items.
 - (d) The view of the church would also not be impacted by any development on Area 'A', providing the boundary setbacks and other controls in the underlying zone are complied with.
 - (e) Area 'A' makes little contribution to the heritage values of the area. Visitors to the church will take little cognisance of an area of land across the road that is essentially bare and covered with grass. Rather, they will be concentrating on the view towards the church to

the north and its location within a spectacular landscape.

- 36 Overall, **Mr Pearson** concludes that objectives of the Proposed Heritage Overlay can still be achieved without the inclusion of this piece of land area.
- 37 Applying the principles in the caselaw described above, it is submitted the extent of the proposed Heritage Overlay should be reduced to exclude Area A because:
 - 37.1 The social and economic wellbeing of the landowners and their purpose being to function as a church is to be weighed against the direction in s 6(f) to protect historic heritage from inappropriate development.
 - 37.2 Imposing the Proposed Heritage Overlay in Area A would in effect lock up the land from future development. The evidence of **Mr Holley** shows that this would affect the value of the land, to the detriment of the owners.
 - 37.3 The heritage characteristics of the Church and the Statue can be adequately protected, provided Area A is developed in a manner that is sympathetic to relevant heritage aspects. The evidence of **Mr Pearson** shows that the existing controls are achieve this.
 - 37.4 The imposition of the Proposed Heritage Overlay in Area A therefore goes beyond what is necessary to protect the heritage significance of the protected items.
 - 37.5 The reduced extent of the Proposed Heritage Overlay sought by CPT will provide adequate protection for the heritage values while at the same time ensuring that CPT is not subjected to unreasonable restrictions on its ability to use and develop the land.
 - 37.6 It better reflects the sustainable management purpose of the RMA.

EVIDENCE/WITNESSES TO BE PRESENTED

- 38 Evidence has been provided for CPT by:
 - 38.1 Mr David Pearson (Heritage); and
 - 38.2 Mr Gavin Holley (CPT Representative).

CONCLUSION

- 39 In conclusion, CPT submits that the Proposed Heritage Overlay should be reduced to exclude Area A.
- 40 The evidence provided by **Mr Pearson** and **Mr Holley** demonstrates that the existing planning controls adequately protect the heritage values of the Church and the Statue without imposing unreasonable restrictions on CPT's ability to use and develop the land. Therefore, CPT's position should be preferred, ensuring both heritage preservation and practical land use.