BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 92

IN THE MATTER	of the Heritage New Zealand Pouhere Taonga Act 2014
AND	of an appeal under section 58 of the Act
BETWEEN	GOLDEN BAY GRANDSTAND COMMUNITY TRUST (INCORPORATED)
	(ENV-2016-WLG-000065)
	Appellant
AND	HERITAGE NEW ZEALAND POUHERE TAONGA
	Respondent
IN THE MATTER	of the Resource Management Act 1991
AND	of an application under section 316 of the Act
BETWEEN	GOLDEN BAY GRANDSTAND COMMUNITY TRUST (INCORPORATED)
	(ENV-2016-WLG-000066)
	Applicant
AND	TASMAN DISTRICT COUNCIL
	Respondent
AND	HERITAGE NEW ZEALAND POUHERE TAONGA
	Respondent

Court: Environment Judge B P Dwyer
Environment Commissioner J R Mills
Deputy Environment Commissioner D Kernohan

Hearing: In Nelson on 8 and 9 February 2017

Closing Submissions Received 20 March 2017

Appearances: W J Heal for Appellant
R M Devine for First Respondent
J G A Winchester and K E Viskovic for Second Respondent

Date of Decision: 29 June 2017

Date of Issue: 29 June 2017

DECISION OF THE ENVIRONMENT COURT

A: Appeal pursuant to s 58 Heritage New Zealand Pouhere Taonga Act 2014 dismissed and costs reserved

B: Application for enforcement orders declined with no reservation of costs

REASONS

Introduction

[1] We commence this decision by recording the contribution to these proceedings made by Mr Warwick Heal who sadly passed away between conclusion of the hearing and the issue of this decision. Mr Heal was obviously unwell during the hearing but nevertheless conducted his client's case with the acuity and wit which were his marks as an advocate. He was highly respected by all members of the Court before whom he appeared over many years. We offer our sincere sympathy to his family and client.

[2] This decision relates to two sets of proceedings[1] filed by Golden Bay Grandstand Community Trust (Incorporated) (the Trust) relating to an historic

[1] A third proceeding namely an application (ENV-2016-WLG-000067) seeking declarations relating to consultation requirements under the Heritage New Zealand Pouhere Taonga

grandstand building (the Grandstand) located at the Takaka Recreation Park (the Park) in Golden Bay.

[3] The proceedings before this Court are:

- Firstly, an appeal against a decision on the following matter:

> An application by the Tasman District Council to Heritage New Zealand Pouhere Taonga for permission under the provisions of the Heritage New Zealand Pouhere Taonga Act 2014 to demolish an historic building, namely the grandstand at Takaka Recreation Park, 2032 Takaka Valley Highway, Takaka, Golden Bay.

The decision of Heritage New Zealand Pouhere Taonga (HNZ) under appeal was a determination pursuant to s 48 of the Heritage New Zealand Pouhere Taonga Act 2014 (the Heritage Act) to grant a general authority to Tasman District Council (the Council) allowing the modification or destruction of an archaeological site (namely the Grandstand).

- Secondly, an (amended) application for an enforcement order and an interim enforcement order pursuant to the provisions of ss 314, 316 and 320 of the Resource Management Act 1991 (RMA) in the following terms:

That;

1. The Tasman District Council does not demolish, remove or disturb the Grandstand at Takaka Recreation Park Takaka until the further order of the Court;
2. That the Tasman District Council reinstate the Grandstand at the Takaka Recreation Park by replacing the stairs on the Northern and Southern sides of the Grandstand removed by the Council prior to May 2016, so that the public may have access to the upper tiers of the grandstand.
3. That the Court make interim orders as requested in paragraphs 1 and 2 hereof pending the further order of the Court.[2]

Act 2014 and the Local Government Act 2002 was struck out by the Court in the course of a judicial telephone conference on 3 February 2017 as the Court determined that there was no jurisdictional basis for that application.

[2] Early in the course of these proceedings, the Council gave an undertaking to the Court that it would not remove the Grandstand pending the Court's decision in these proceedings and accordingly the Court considered it was not necessary to consider the making of any interim orders.

Background

[4] Takaka is the largest community in Golden Bay situated in the north western corner of the Tasman District. Takaka itself has a population somewhere in the order of 1300 - 1400 people and the population of the entire Golden Bay area (including Takaka) is approximately 5000.

[5] Golden Bay constitutes a separate ward in the Council's district. It is represented by two members on the Council and additionally a four member Golden Bay Community Board has been established to represent and advocate for the Golden Bay community pursuant to Part 4 (subpart 2) of the Local Government Act 2002.

[6] The Park is situated on the main road into Takaka on the southern outskirts of the town and incorporates the showgrounds for the Golden Bay A&P Association (the A&P Association) as well as playing facilities for rugby, tennis, football, cricket and squash. A number of buildings associated with these various uses are established on the Park as well as the Grandstand. Ownership of the Park is divided between the Council, which owns about 6 hectares or so and the A&P Association which owns just over one hectare.

[7] The Grandstand is situated on the Council land on the north western side of the showground/rugby field contained in the Park, close to the boundary line between the Council land and the A&P Association land. A grandstand was initially erected in this position in 1899 and parts of that original building remain. Initially the Grandstand was an open structure but in 1911 a distinctive barrel-vaulted (curved) roof was constructed over the Grandstand and a roof of this shape remains in place today.

[8] The Grandstand is a two storey building whose upper storey contains seating for over 300 people. The ground floor is a combination timber (eastern side) and concrete block (western side) building containing the Takaka Rugby Football Club clubrooms and changing rooms which protrude out from the Grandstand building to various degrees on both sides. The clubrooms which were originally built in 1967 and extended in 1992 are now vacant. On its southern side the Grandstand abuts a two storied timber (upper) and concrete block (lower) squash court building which was constructed in 1975 but is also now vacant. Both the rugby clubrooms and the squash courts have been relocated to a new shared recreational facility (the Facility) containing a social lounge, meeting rooms, changing rooms, squash courts and indoor playing

surface for netball, basketball etc which has recently been completed on the Park approximately 10m or so to the north of the Grandstand. It appears that the original Grandstand would have had a footprint in the order of 190 square metres and the combined buildings about twice that. It was the intention of the Council that as part of the new development the combined Grandstand and squash courts buildings would be demolished and the area occupied by them used as car parking for the Facility. These proceedings seek to prevent demolition of the Grandstand.

[9] There are three obvious elements of incongruity to the current appearance of the Grandstand:

- The first is that the Grandstand sits in close proximity to the Facility in a situation where neither seems to complement or bear any relationship to the other. The intention that the Grandstand would be demolished seems apparent at first sight as is the unsatisfactory situation of the absence of a proper car parking arrangement close to the Facility. The fairly close proximity of the two buildings gives a somewhat cramped appearance to the southern entry into the Facility and there is a clearly discordant element to the juxtaposition of the two which detracts from both (particularly the Facility);
- The second is the appearance of the Grandstand itself. It contains an eclectic combination of old and more recent elements. Its distinctive barrel vaulted, corrugated iron roof is supported by a row of timber posts and steel angled roof framing. The upper interior wall boards are aged, rusticated timber which is possibly (but not certainly) original. All of this sits on top of the obviously more recent timber and concrete block rugby clubrooms. The northern end of the building is predominantly clad in somewhat dilapidated corrugated iron. There has been no apparent attempt to blend the old with the new so that much of the building's fittings comprise modern materials such as PVC gutters and downpipes and contemporary framing, linings etc;
- The third element is provided by the squash court building to the south which, due to its height, bulk and closed construction, seems to dominate the Grandstand although it is probably of similar size. Again there has been no attempt to blend the old with the new so that the two buildings sit awkwardly side by side. Removing the squash courts will reveal the southern profile of the grandstand.

We attach to this decision (Attachment 1) a photograph taken from the showground (approximate eastern) side of the buildings demonstrating our description. Notwithstanding the incongruities which we have identified, the form of the original Grandstand remains apparent as does the distinctive element provided by the barrel vaulted roof which is apparently one of only five such roofs on grandstand buildings remaining in New Zealand.

[10] Use of the Park for sporting and recreational activities initially began in the 19th Century under the auspices of the Takaka Athletic and Cycling Club. In 1894 the A&P Association acquired the Park (or at least part of it) from the Athletic and Cycling Club and the first A&P show was held. Shows have been held on the Park annually since then. Construction of the Grandstand was completed in time to enable spectators to watch the annual show on 1 February 1900. It was common ground that construction would have commenced sometime in 1899. The Grandstand remained in use up until the 2016 A&P show following which exterior stairs giving access to the north and south ends of the Grandstand were removed by a Council contractor, ostensibly to enable work on the Facility whose construction was underway.

[11] A formal proposal for the Facility first emerged in the Council's ten year plan (2009-2019) which proposed a new community recreation complex in Golden Bay. The ten year plan contained an allowance of $3.4 million dollars in the 2012/2013 year towards the cost of the complex with an additional 20 per cent of the cost to come from community fundraising. The proposal was a guide only and subject to the outcomes of a feasibility study, public consultation and Council approval.

[12] In August 2010 an advertised public meeting was held in Golden Bay to discuss the proposal. It was generally agreed at this meeting that many of the existing community and recreational facilities in Golden Bay were aged and unable to meet the needs of the community in the future and there was support for development of a shared multi-purpose community recreational complex.

[13] A process of meetings, consultation, presentations and publicity followed. The details of this process were contained in the evidence of Mr L R McKenzie[3], the Council's Chief Executive Officer and Mr D A Lund, Chairman of Golden Bay Shared

[3] We will refer to him as Mr L McKenzie to distinguish him from Mr D R McKenzie who gave evidence for the Trust to whom we will refer as Mr D McKenzie.

Recreational Facility Incorporated (GBSRF Inc) which was incorporated on 12 October 2011 to advance the Facility project.

[14] A feasibility report obtained by the Council and GBSRF Inc in February 2013 confirmed the desirability of a multi-use community complex (now being the Facility) being established on the Park. It is apparent from consideration of various documents provided to us[4] that demolition of the Grandstand was intended as part of the development of the Facility from early on in the process and that this intention was publicly and widely conveyed.

[15] Construction of the Facility, which commenced immediately after the 2016 A&P show, is now completed. However, a final code compliance certificate for the Facility cannot be given in terms of its building consent until such time as all carparks required to service it are available. The Grandstand currently occupies the space required for a number of the carparks which the Council is obliged to provide for the Facility[5]. Provision of those carparks has been curtailed by these proceedings which have prevented the planned demolition of the Grandstand. The Facility cannot be fully utilised until the issue of carparks is resolved. Use of the facility in conjunction with the 2017 A&P show was authorised by the issue of a temporary Certificate of Public Use but other clubs and organisations intending to use the Facility for their activities have been unable to do so.

[16] We will return to some of these matters in more detail elsewhere in this decision which we structure in two parts dealing firstly with the application for consent from HNZ under the Heritage Act and then addressing the enforcement proceedings under RMA.

The Heritage Act Application

[17] The Heritage Act came into force in New Zealand on 20 May 2014, replacing the Historic Places Act 1993. Its purpose is to "promote the identification, protection, preservation and conservation of the historical and cultural heritage of New Zealand."[6] Subpart 2 of Part 3 of the Heritage Act contains provisions relating to "Overarching protection for archaeological sites".

4 Eg: Lund EIC Attachments D, G, H, I and Q.
5 Witness estimates varying between 14 and 26.
6 Heritage Act s 3.

[18] Archaeological sites are defined in s 6 as meaning:

> 6. **Interpretation**
>
> In this Act, unless the context otherwise requires,-
>
> **archaeological site** means, subject to section 42(3),-
>
> (a) any place in New Zealand, including any building or structure (or part of a building or structure), that-
>
> (i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and
>
> (ii) provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and
>
> (b) includes a site for which a declaration is made under section 43(1)

[19] Section 42 of the Heritage Act contains provisions precluding the modification or destruction of archaeological sites, as follows:

> **42 Archaeological sites not to be modified or destroyed**
>
> (1) Unless an authority is granted under section 48, 56(1)(b), or 62 in respect of an archaeological site, no person may modify or destroy, or cause to be modified or destroyed, the whole or any part of that site if that person knows, or ought reasonably to have suspected, that the site is an archaeological site.
>
> (2) Subsection (1) applies whether or not an archaeological site is a recorded archaeological site or is entered on-
>
> (a) the New Zealand Heritage List/Rarangi Korero under subpart 1 of Part 4; or
>
> (b) the Landmarks list made under subpart 2 of Part 4.
>
> (3) Despite subsection (1), an authority is not required to permit work on a building that is an archaeological site unless the work will result in the demolition of the whole building.

[20] Because construction activity on the original part of the Grandstand commenced in 1899, that part of the building constitutes an archaeological site whose demolition is not permitted unless an authority has been obtained from HNZ under the Heritage Act.[7] Only a limited extent of building components remain from before 1900. These appear to be some original rimu framing elements and possibly the rusticated weatherboards lining the inside of the upper storey.

[7] Although the pre 1900 section of the Grandstand constitutes only part of the building, we assume that s 42(3) applies because all of the Grandstand building (pre and post 1900) is to be demolished.

[21] On 27 October 2016 the Council filed a belated application with HNZ pursuant to s 44 of the Heritage Act for authority to demolish the Grandstand. We say belated because although the Council had not actually commenced demolition (other than removal of the stairs), it had substantially completed construction of the Facility on the assumption that the Grandstand would be demolished to provide parking space for it.

[22] Mr L McKenzie deposed that the Council had not become aware that parts of the Grandstand were constructed in 1899 until May 2016, at which time construction of the Facility was well under way. When it did become aware of that matter it undertook a process of discussion with HNZ, archaeological investigation and consultation with tangata whenua, leading up to the October application. HNZ determined to grant an authority to demolish the Grandstand pursuant to s 48 of the Heritage Act on 21 November 2016 and it is that determination which is the subject of these appeal proceedings.

[23] We do not propose to discuss the merits of the Trust's appeal against the HNZ determination in any detail. The Trust failed to present any case at all on the archaeological basis of HNZ's decision and formally conceded that it did not challenge the archaeological evidence advanced in support of the application.[8] We simply record that we accept the evidence on the merits of the application advanced on behalf of HNZ by:

- Ms P J Bain (HNZ Senior Archaeologist) and in particular her conclusion that "it is appropriate to grant an archaeological authority to demolish the Grandstand."[9]
- Mr R W Maguire (archaeological consultant) that the values of the Grandstand as an archaeological site are "low"[10], primarily because of loss of pre 1900 fabric,and that it was appropriate to grant the authority.[11]

[24] Notwithstanding the absence of any case on the merits, in its opening submissions, the Trust challenged the ability of HNZ to grant the authority on the basis of two legal contentions:

> 6.4 It is the Trust's contention that HNZPT were under a statutory duty either to ensure that the applicant for consent the Tasman District Council, or NZHPT itself

8 Trust opening submissions para 6.2.
9 EIC para 54.
10 EiC para 25.
11 EiC paras 32-33.

by default, were obliged to consult with directly affected persons, and in particular the GB A&P Association before it made its decision. Both organisations failed to consult or even approach the GB A&P Association before making the application and making a decision on it. The Council simply made an assumption without proper enquiry or justification.

6.5 The second element of the Trust's challenge to the grant of an Authority under Section 48 is that the provisions of the *Reserves and Other Lands Disposal Act 1959* prevents the issue of an authority by NZHPT because that Act vests in the GB A&P Association certain statutory rights that it was not intended that the HNZPT Act 2014 intended or did revoke. ...

[25] Before addressing those propositions it is necessary for us to consider a jurisdictional impediment which the Council and HNZ contend precludes the Trust from bringing the appeal at all. Both referred to the provisions of s 58 of the Heritage Act which limits appeals against decisions of HNZ on applications for an authority to persons who are "directly affected" by such decisions. They contended that the Trust did not meet the test of being a person who was directly affected. The Council largely adopted the submissions of HNZ on this issue.

[26] HNZ referred to the approach which should be taken when considering who might be directly affected identified by the High Court in *Campaign for a Better City Inc v New Zealand Historic Places Trust (Pouhere Taonga)*[12] as well as the examples of directly affected parties identified by this Court in the *Te Aro Heritage Trust v New Zealand Historic Places Trust (Pouhere Taonga)*[13] case.

[27] It is apparent from considering the various authorities to which we were referred that although the cases have identified broad principles applicable to determining whether or not a party may be directly affected and various examples of direct affect have been identified, application of the broad principles is dependent on the factual matrix surrounding each case. However, as a general principle, emotional connections to buildings or places of members of the public who enjoy, visit or use them and have developed an attachment to them, do not suffice to create a direct affect in terms of s 58. Some closer connection is required.

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12 *Campaign for a Better City Inc v New Zealand Historic Places Trust (Pouhere Taonga)* [2004] NZRMA 493 (HC) (a decision under the Historic Places Act 1993).

13 *Te Aro Heritage Trust v New Zealand Historic Places Trust (Pouhere Taonga)* Decision W 52/2003.

[28] The Trust was formed in July 2016 as a response by its founders to the Council's decision to proceed with demolition of the Grandstand. Mr Heal submitted that the narrow and specific purpose of the Trust (being the promotion of and assistance in the preservation and restoration of the Grandstand)[14] brings the Trust within the ambit of being directly affected by the proposal to demolish the Grandstand. We accept that, at the least, the narrow and specific purpose of the Trust overcomes the shortcomings of the general nature of the goals and functions of the purported appellant in the *Te Aro Heritage* case. Preservation and restoration of the Grandstand is the *raison d'etre* of the Trust. Mr Heal submitted that if the Grandstand is demolished the Trust loses its purpose and is therefore directly affected by HNZ's decision to grant the authority. The somewhat circular nature of that proposition is readily apparent.

[29] We express our reservations to the proposition that status to appeal may be acquired by strategic drafting of a deed when (in this case) the three parties to the Trust's deed[15], do not appear themselves to have standing as being directly affected. Furthermore, we are not satisfied on the basis of the evidence before us that the Trust can be said to be directly affected by the application under appeal in the sense required by s 58 of the Heritage Act.

[30] The application to HNZ was for an authority under s 44 of the Heritage Act to modify or destroy an archaeological site (the pre 1900 components of the Grandstand) to the extent that it "provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand."[16] Nowhere in the evidence of the Trust or its various witnesses was there any evidence as to how the Trust might be directly affected by any diminution in the archaeological value of the site in providing evidence relating to the history of New Zealand which might be occasioned by demolition of the pre 1900 components of the Grandstand.

[31] The only evidence before the Court on the archaeological issue was that of Ms Bain and Mr Maguire which we have summarised in para [23] (above). The Trust's expert witnesses on heritage/architecture issues (Messrs J C N Blackburne and I Bowman) both conceded that they were not qualified to assess archaeological values. None of the four current trustees[17] (Ms A R Grant, Mr D McKenzie, Ms H M Pearson or Ms J M Pearson) addressed archaeological issues in their affidavits. The Trust's

14 Trust's submissions in opposition to strike out paras 65 – 70.
15 Mr D McKenzie, Ms H Pearson and Ms J M Pearson.
16 Heritage Act s 6.
17 Increased from the initial three trustees.

evidence regarding the Grandstand was rather directed at historic heritage and amenity values associated with the Grandstand (including its post 1900 components) which are appropriate matters for consideration of the RMA (enforcement) element of these proceedings but in our view do not relate to the pre 1900 archaeological investigative issue which is the focus of enquiry under s 44 of the Heritage Act.

[32] Nor do we accept that the Trust represents other persons who have a direct interest as it contended in its opening submissions. The Trust is not a representative body. As Ms Devine observed "It is a charity established by a few individuals for a specific purpose".[18] The members of the Trust appear to be its (now) four trustees. A number of witnesses described themselves as "supporters" of the Trust but that did not make the Trust a mandated representative of those persons at the time the Trust filed its appeal, when it was required to have status. Nor did the evidence satisfy us that even if the Trust might be viewed as representing a wider group of persons, the members of that wider group were themselves directly affected by grant of the archaeological authority. With the exception of the A&P Association (to which we will refer shortly), the interests established by the evidence were interests of persons who have been involved in or attended A&P shows and who used the Grandstand from time to time. Even if those interests were accepted as creating a direct affect on the witnesses and s 274 parties (and we do not accept that), that does not operate to confer standing on the Trust which must have had standing in its own right to file an appeal at the time of filing.

[33] We conclude that the Trust has failed to establish that it is a person directly affected by the application for an archaeological authority and accordingly had no status to appeal against the grant of the authority. To the extent that our conclusion in that regard may be debateable, we address the Trust's legal contentions set out in para [24] (above) as well as the merits of the Council's application.

[34] The Trust's submission that the Council and/or HNZ were obliged to consult with directly affected persons (and in particular the A&P Association) was founded on the provisions of s 46(2)(h) of the Heritage Act which provides that an application to HNZ for an authority must contain:

> **46 Information that must be provided with application for authority**
> (2) An application must include the following information:

[18] HNZ submissions para 15(f)(i).

(h) a statement as to whether consultation with tangata whenua, the owner of the relevant land (if the applicant is not the owner), or any other person likely to be affected—

(i) has taken place, with details of the consultation, including the names of the parties and the tenor of the views expressed; or

(ii) has not taken place, with the reasons why consultation has not occurred.

[35] The Trust contended that the Council's application to HNZ "included no such statement".[19] That contention is incorrect as a statement of fact. Section C1 of the HNZ application form[20] as to consultation was completed by the Council. It answered "Yes" to the questions as to whether consultation had been undertaken with the parties identified in s 46(2)(h). Section B3 of the application form had previously provided a statement as to the extent of consultation undertaken.

[36] Mr Heal went on to contend that no consultation of a "legal acceptable nature"[21] had taken place between the Council and affected persons, particularly the A&P Association. That contention does not withstand scrutiny. The Heritage Act does not specify the extent of consultation which must be undertaken in any given case but we are satisfied from the evidence of Messrs Lund and L McKenzie that a wide ranging and comprehensive programme of consultation was undertaken as to the Facility proposal which clearly required removal of the Grandstand. Some of the consultation was undertaken by the Council and some by GBSRF Inc (a body on which the A&P Association was represented) which in turn reported to the Council.

[37] Mr Heal acknowledged that the Heritage Act does not state what was to happen in the event of there having been no or inadequate consultation but contended that there had to be a reason why Parliament had included s 46(2)(h) in the Heritage Act and that the process of granting the authority was "fatally flawed".[22] We do not accept Mr Heal's contentions in that regard for the reasons set out in paragraphs [35] and [36] (above). We find that the Council's application was in accordance with the requirements of s 46(2)(h) and an appropriate level of consultation had been undertaken.

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19 Trust's opening submissions para 8.2.
20 L McKenzie EiC Attachment L.
21 Trust's opening submissions para 8.2.
22 Trust's opening submissions para 8.5.

[38] The Trust's contentions as to the effect of the Reserves and Other Lands Disposal Act 1959 (The ROLD Act) arise out of the Council's acquisition of its part of the Park from the A&P Association (in part) and the Athletic and Cycling Club (in part) in 1959 pursuant to that Act. Section 18(3) of the ROLD Act contained the following reservation in favour of the A&P Association:

> (3) The Association shall be entitled to use free of charge the buildings on the said land for the purpose of holding meetings and for storage of fittings and equipment to the same extent as immediately prior to the coming into force of this Act.

[39] Mr Heal submitted that s 18(3) "creates an exclusive code with regard to the use of the land and buildings at the Takaka Showgrounds originally owned and occupied by the Golden Bay A&P Association (Inc) which includes the Grandstand. This code prevents both the destruction of the Grandstand without the express written consent of the Association so as to have the effect of depriving it of its statutory and contractual rights by the Tasman District Council and the granting of a demolition authority by HNZPT."[23]

[40] Arguably the interest reserved by the ROLD Act in "buildings" at the Park might operate so as to make the A&P Association a person directly affected by the application for an authority to demolish the Grandstand. Although the reservation does not constitute a proprietorial or registerable interest, we accept that in any given instance some lesser or other rights may suffice to create a direct interest. However, we do not consider that this Court (or HNZ) is the appropriate forum to determine whether the statutory and/or contractual rights created by the reservation contained in s 18(3) of the ROLD Act operate so as to preclude the Council from ever demolishing the Grandstand (or any other buildings on the Park used by the A&P Association) as contended by the Trust.

[41] Our view in that regard is reinforced by the submissions of Mr Winchester on behalf of the Council as to the interest reserved to the A&P Association.[24] We concur with his submission that the interest is in the nature of a licence which creates a personal right against the Council as licensor rather than any proprietary right or interest in the land of the Park acquired by the Council. The evidence before us does not enable us to precisely define the extent of that licensee interest (limited to the

23 Trust's opening submissions para 9.1.
24 Council submissions paras 3.8 - 3.10.

extent of usage for meetings and storage which existed immediately prior to the ROLD ACT coming into force in 1959) even if we were inclined to do so.

[42] In resolving the s 44 application on its merits, we consider that the determinative factor is the uncontested evidence set out in para [23] (above) that the archaeological values of the pre 1900 component of the Grandstand are low and that it is appropriate to grant the authority. In reaching that conclusion we have specifically had regard to s 59(1)(a)(iv) Heritage Act insofar as the interests of the A&P Association are concerned.

[43] For all of the reasons set out in paragraphs [17] – [42] (above) we determine that:

- The Trust had no status to bring this appeal and the decision of HNZ stands accordingly;
- Alternatively, the appeal fails on its merits and the decision of HNZ is confirmed.

[44] This is a final decision in respect of the appeal pursuant to s 58 Heritage Act. We consider that it is appropriate to reserve costs in favour of HNZ in respect of this aspect of the proceedings. Any costs application to be filed and responded to in accordance with the Environment Court Practice Note 2014. We leave resolution of costs for the Council to be dealt with by further direction on determination of the enforcement proceedings which we now address.

The Enforcement Order Application

[45] The Trust seeks the enforcement orders set out in para [3] (above) to prevent demolition, removal or disturbance of the Grandstand and reinstatement of the external stairs which were removed in May 2016.

[46] In addressing the enforcement order application we will:

- Briefly consider some preliminary legal matters;
- Identify the appropriate test to be applied in determining whether or not the proposed demolition meets the requirements of s 314(1)(a)(ii) RMA for making an enforcement order;
- Identify the relevant issues as we see them and set out various agreements and/or conclusions reached by the relevant expert witnesses;

- Undertake the four steps of inquiry identified by the Court of Appeal in *Watercare Services Ltd v Minhinnick*;[25]
- Determine whether or not to make an enforcement order as requested by the Trust.

Preliminary legal issues

[47] There are three preliminary legal issues which we address briefly for the sake of completeness although they were *givens* in these proceedings:

- Firstly, the question of status which we addressed in relation to the Heritage Act appeal is not an issue in respect of enforcement proceedings. Section 316(1) RMA enables "any person" to make an application of the kind specified in s 314(1)(a) and does not contain any requirement for an applicant to be directly affected by the subject matter of an application for enforcement order;
- Secondly, we note that the Council is/was not required to obtain a resource consent to demolish the Grandstand. The demolition is a permitted activity under the Tasman Resource Management Plan as the building is not listed in that Plan's Schedule of Heritage Buildings and Structures (the Schedule) which would trigger the need for a resource consent, although non inclusion in the Schedule does not preclude the Court from making findings of fact as to the historic heritage value of the Grandstand which warrant its protection. Interestingly, Ms C S H Craig (General Manager, Central for HNZ) who gave evidence for the Council, expressed the view that the Grandstand should have been included in the Schedule[26] but that is not something that can be resolved in these proceedings;
- Thirdly, that the pre 1900 element required to comprise an archaeological site and trigger the need for an archaeological authority pursuant to s 42 Heritage Act is not a requirement for historic heritage considerations to apply under RMA (nor indeed, under Part 4 Heritage Act).

[25] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 304 (We will refer to this as *Watercare*).

[26] NoE page 195.

Test for making an enforcement order

[48] The Trust's application was made pursuant to s 314(1)(a)(ii) RMA which relevantly provides:

> **314 Scope of enforcement order**
>
> (1) An enforcement order is an order made under section 319 by the Environment Court that may do any one or more of the following:
>
> (a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the Court,—
>
> (ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:

[49] It was the Trust's position that demolition of the Grandstand constituted something which was offensive and/or objectionable to many people and would have an adverse effect on the environment.[27]

[50] We will consider application of the these provisions further in due course, however a matter which we address at the outset arose from the submissions of Mr Winchester for the Council where he contended:

- There is certainly no reliable evidence which demonstrates that the majority of the community, whether within Golden Bay or the district as a whole, considers that the effect on heritage and/or amenity values of the removal of the Grandstand would be offensive and objectionable.[28]
- While it is accepted by the Council that the views of the Trust (as outlined in the affidavits of Trust witnesses) and section 274 parties are genuine, they are submitted to be the views of a vocal minority that is not truly representative of the views of the community.[29]
- This is submitted to be relevant in the present proceedings, because the test for offensive and objectionable effects as being the basis for an enforcement order is an objective one. It is not enough for the trust to assert, even *bona fide*, that something is offensive or objectionable (and indeed it is doubtful that the evidence does assert that in any event). There must be some external standard against which the assertion can be measured. The

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27 We note that enforcement order 2 sought by the Trust appears to rely on s 314(1)(b) although nothing presently turns on that and the Court may make any appropriate order under s 314 (s 319(1)(a)).

28 Council's submissions para 1.11.

29 Council's submissions para 1.16.

> external standard which should be applied in this instance is whether there is probative evidence that the majority of the community opposes the removal of the Grandstand because it is concerned about heritage and/or amenity impacts. It is submitted that such evidence is not before the Court.[30]

[51] These submissions appeared to advance the proposition that the question of whether demolition of the Grandstand is offensive or objectionable so as to trigger the Court's enforcement powers is to be determined by enquiry as to whether the majority of the community supports or opposes the demolition. In the course of a sometimes vigorous discussion with the Court on this issue, Mr Winchester confirmed on a number of occasions that it was his submission that if a majority of the population of Golden Bay supported the demolition of the Grandstand then it was not offensive or objectionable.[31] We consider that that proposition founders on both legal and factual bases.

[52] Legally, it is inconsistent with the provisions of s 314(1)(a) itself which authorises the Court to (relevantly in this case) "prohibit a person from commencing anything done or to be done by or on behalf of that person, that, **in the opinion of the Environment Court** ... is or is likely to be ... offensive, or objectionable" (our emphasis). It is clear from this provision that it is the opinion of the Court which is determinative as to whether or not an order is made, not the opinion of the majority of the population of Golden Bay as contended by Mr Winchester.

[53] It is correct that in forming its opinion the Court "must transpose itself into the ordinary person, representative of the community at large, and so decide the matter"[32], however that is more than just a polling exercise to determine what the majority may or may not want. The Court is obliged to act in an objective fashion discarding any prejudices or fixed positions which may influence any particular views. In order to act objectively we consider that the Court is obliged to fully acquaint itself with all relevant information pertaining to the subject matter of the proceedings so that it makes its determination as to whether or not any proposed action is offensive or objectionable to a fully informed reasonable person. In forming its opinion the Court acts as the representative of New Zealand society as a whole[33] rather than any narrow or local sector of the community.

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30 Council's submissions para 1.17.
31 NOE pages 97 – 107.
32 *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC) at 708.
33 *Watercare* at 305.

[54] We consider that approach is entirely consistent with the observations of Judge Bollard in *Otorohanga Heritage Protection Group v Otorohanga District Council* [34] to which Mr Winchester referred in support of his proposition. It is clear from reading that decision that Judge Bollard determined that a "reasonable person test"[35] was the appropriate test, not what a substantial portion of the public might regard as offensive or objectionable. In making those observations we do not suggest that clearly expressed views (for or against) of sections of a local community may not be a relevant factor for the Court to take into account when forming its own opinion, simply that those views are not determinative. The Court is obliged to form its own objective view.

[55] Finally on this topic, we say that we do not accept that the evidence provided to us establishes as a fact whether the majority of the local community supports or opposes removal of the Grandstand in any event. There is certainly evidence of strong community support for the Facility but it is not clear if that translates automatically into support for removal of the Grandstand, even acknowledging that removal of the Grandstand has always been a part of the Facility proposal. The ambiguity in that regard is demonstrated by the apparent position of the A&P Association, gleaned from the evidence of its President Mr D McKenzie, which supported development of the Facility as proposed (including demolition of the Grandstand) if another viewing platform or area was provided. Even if it was accepted that a majority of the community supported demolition, it is impossible to say whether or not that position would be maintained if those holding it had objectively considered the evidence as to the historical heritage value of the Grandstand tendered by the expert witnesses for the Trust.

[56] It seems from the evidence which we heard that there is a division of opinion in the Golden Bay community as to the merits of demolition with strongly expressed views both ways. There is certainly no evidence of appropriately conducted surveys satisfying the criteria identified in *Shirley Primary School v Christchurch City Council* [36] which might enable us to accurately gauge where the balance of local opinion might lie.

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34 *Otorohanga Heritage Protection Group v Otorohanga District Council* Decision A083/94.
35 *Otorohanga Heritage Protection Group v Otorohanga District Council* Decision A083/94 page 7.
36 *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (NZEnvC).

The Issues

[57] The case presented by the Trust essentially had two component parts. The first relating to the amenity aspect of the grandstand, and the second to the historic heritage aspect.

[58] We deal with the first aspect only briefly although it was the subject of a considerable volume of evidence by witnesses for the Trust. This aspect arises out of concerns that demolition of the Grandstand removes the only elevated and sheltered viewing platform for persons wishing to view the annual A&P show. The evidence establishes that the Grandstand has satisfactorily fulfilled that function for over 100 years and was doing so as recently as the 2016 show. It is used for that purpose one day per year. The Grandstand may also provide sheltered viewing for rugby matches played on the main playing ground but it was plain from the evidence which we heard and our own observations that its use for rugby was limited in extent and is now further restricted because the Facility cuts off views from the Grandstand to the north west corner of the rugby ground.

[59] Although there was some suggestion made by the Council that there is an elevated viewing area available on the mezzanine floor of the Facility, inspection shows that to be a limited view for a very limited number of people without adequate (if any) seating.

[60] We recognise that the Grandstand possesses amenity values which will be lost as the result of its demolition. Additionally, we recognise that the use of the Grandstand for over 100 years is something which contributes substantially to the heritage component of that building.

[61] The heritage value of the Grandstand was subject to conferencing by heritage and architectural witnesses Messrs Blackburne and Bowman (for the Trust), Ms Coats and Ms Craig (for the Council) held by teleconference on Monday 6 and Tuesday 7 March 2017. An expert conferencing statement dated 7 March 2017 (JWS) was issued by these witnesses.

[62] The Trust's position regarding the heritage value of the Grandstand can be found in the Heritage Values Assessment which comprised Annexure A of Mr Bowman's Affidavit where he stated:[37]

> The Takaka grandstand has **high regional** significance as a nationally rare pre 1900 grandstand building that has remained on its original site. It is the second oldest of those not associated with horse racing. The barrel vault roof and steel angle construction are also very rare forms of construction for this building type.
>
> The building has had a 117 year association with many local sporting codes, the A&P show and has seen the commemoration of international events such as the end of the Boer and First World War.
>
> While there have been many additions to the building and internal alterations on the ground floor, the majority of the building can be considered as authentic.
>
> The building is worthy of listing with Heritage New Zealand and on the Tasman District Regional Plan. It also fulfils the criteria for listing, at least at local level, with the New South Wales Heritage Office.

These conclusions were the basis of Mr Heal's submission "that once the Court has balanced the cost to the community of losing a wonderful old building with such high heritage values it will outweigh the minor and largely illusory disadvantages now promoted by the Council."[38]

[63] The Council's position was based on the evidence of Ms Coats who concluded in her report to the Council:[39]

> Preservation of the existing facility will, in our view include substantial rebuilding of the Grandstand at the ground floor level to address the structural deficiencies with a flow on affect to the 1899/1911 authenticity and heritage value of the building. This is somewhat unavoidable if current building legislation is to be complied with to make the building made safe for use by future generations.

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37 Affidavit 17 January 2017 Annexure A Summary statement of heritage significance para 4.4.

38 Trust's opening submissions para 16.6.

39 Coats' EiC Appendix A.

> On balance, while it is entirely feasible to retain the 1899/1911 portion of the building, the current level of authenticity and the increasing level of obsolescence of the building in 2016 makes it difficult to make this recommendation.

[64] In considering the opposing views of the witnesses we have had regard to the issues of the historic built elements and heritage values of the Grandstand together with its current seismic status and the general condition of its older components. These issues were addressed in the JWS of the heritage/architecture witnesses and in evidence as to the physical condition of the Grandstand from engineers and Ms Coats.

[65] In terms of the historic built elements, matters agreed by the experts were:[40]

1. To date the original architect or engineer of the 1899 Grandstand is unknown
2. To date no original drawings of the 1899 Grandstand have been found
3. To date the original builder of the 1899 Grandstand is unknown
4. The 1911 alterations to the 1899 Grandstand [including the barrel vaulted roof] were undertaken by John Smith Builder
5. To date no original drawings for the 1967-68 internal remodel of the clubrooms, the 1968 lean-to additions between grid A and B, or the 1975 squash court addition have been found. There is some information in Foster (2016) but it is difficult to read and interpret.
6. The extent of the 1899 lean-to the rear is unknown. Figure 6 page 10, Blackburne (2017) shows elevation looking towards NE 2 high level windows and canopy beyond. With reference to (SOE Amanda Coats) Appendix C – Cross Section the ceiling to the existing classroom between Grid B and C is assumed by the experts to have been introduced later as it appears to horizontally transect the high level windows shown in the photograph.
7. That the age of various parts of the building shown in Appendix C – Plan View and Appendix C – Cross Section are accepted.
8. Existing Posts EP1 – EP3 exist at ground floor level and support laminated beam on gridline.
9. If the 1975 Squash Courts were demolished it would improve the visual appearance of the remaining building.

There were no areas of disagreement amongst the heritage/architecture experts with regard to the historic built elements.

[40] JWS para 3a.

[66] With regard to the heritage value of the Grandstand, matters agreed by the experts in conference included:

- In the building's current state and with the historic information to hand Mr Blackburne, Ms Craig and Ms Coats agreed that the building does not attain a Category 1 or Category 2 threshold in terms of HNZ listing criteria but all acknowledged (to various degrees) that the building exhibits heritage values which are specific to the Golden Bay region (and to the Nelson/Tasman region in Mr Bowman's case);
- In the absence of any unified national heritage criteria the experts adopted the framework written by Mr Bowman in his statement of evidence at Appendix 1 which contained a series of values to be given a high, moderate or low score. Table 1 of the JWS was a HERITAGE VALUE RE-ASSESSMENT with rankings reflecting each expert's re-assessment of heritage value of the Grandstand in the context of the Tasman region.
- The re-assessments using Mr Bowman's 'Framework" were recorded in Table 1 as follows:
    a. Events value was rated 'high' by all experts;
    b. Architecture, Technology, Rarity and Education values were all rated 'high' by every witness other than Ms Coats who recorded each as having 'low' value;
    c. Patterns was rated 'high' by all experts save Mr Bowman who rated it 'moderate';
    d. Context or Group values were rated 'moderate' by all but Mr Bowman who rated them as 'high';
    e. Representativeness, Identity, People, Commemorative and Public Esteem values were rated 'moderate' by all experts;
    f. Scientific and Integrity values were rated 'low' by all experts.
- Messrs Blackburne and Bowman noted the possible 'Rarity Value' of the Grandstand and suggested that these points would be subject to detailed investigation should a Conservation Plan be commissioned;
- In Messrs Bowman's and Blackburne's and Ms Craig's view the 1967-68, 1975, 1977 and 1992 elements reduce heritage value by obscuring the original form and character and remove some original fabric of the 1899/1911 portion of the building. In Ms Coats' view the authenticity of the remaining parts of that portion and its value are affected and diminished due to the other parts. She agreed that the removal of significant parts of

the building to recapture its 1899/1911 form could be used as a tool to re-establish and increase value through a process of reconstruction and restoration.

[67] It is unfortunate that the process of development of the Facility was undertaken in the way that it was, without a detailed appraisal of the heritage values of the Grandstand and the feasibility of its retention. It was apparent from the responses which Mr L McKenzie gave to questions from members of the Court that the Council's approach to these considerations was driven by non inclusion of the Grandstand in the Schedule and a lack of knowledge as to its history. He acknowledged that had the Council become aware earlier of the heritage issues which have been raised it would have taken a more detailed appraisal.[41] It is apparent that all the experts agree that such an appraisal should have included preparation of a Conservation Plan for the Grandstand.[42]

[68] Mr Bowman and Ms Craig agreed "that a Conservation Plan proportionate to the heritage significance of the building shall include the following:

(a) Preparation of accurate measured drawings of the existing building
(b) a historical record of the building
(c) a heritage inventory of all fabric and an assessment of authenticity
(d) an assessment of heritage values and summary of significance
(e) consideration of risks associated with the building
(f) policies that will ensure the heritage values of the building are maintained accepting appropriate adaptation
(g) means of implementation of the policies"[43]

[69] Evidence or information with respect to the physical condition of the Grandstand was provided by engineer Mr P C Smith, an Aurecon report and Ms Coats.

[70] The evidence of Mr Smith, (a consultant structural and civil engineer who provided evidence for the Trust), was taken in by the Court without him being cross examined. His conclusions were:[44]

41 NOE pages 156-161.
42 JWS- **Issue 4: CONSERVATION PLAN.**
43 JWS page 8.
44 Affidavit 20 February 2017 para 8.

1. The Grandstand building at Golden Bay Recreation Park Takaka has been assessed to have a seismic lateral load capacity of approximately 45% New Building Standard (NBS).
2. The assessment undertaken on the building is higher than the 33% threshold for an earthquake risk building but lower than the 67% NBS threshold risk building, meaning that the building would not be classed as being earthquake prone.
3. There is no legal requirement to strengthen the Grandstand

[71] Mr Smith noted in his Appendix A - Structural Assessment (Scope and Limitations) - that his structural assessment was based on a limited visual inspection of the building and drawings included in the report *Archaeological Assessment of the Grandstand, Golden Bay Recreation Park, Takaka, Deb Foster Archaeological Consultancy, July 2016.* He noted further that where the structure was not able to be sighted, the structure shown on the drawings has been assumed to be as constructed. No destructive tests or geotechnical investigations had been undertaken by him.

[72] An earlier Initial Seismic Assessment (IEP) carried out by Aurecon NZ Ltd (25 October 2012)[45] determined that the overall "provisional rating" for what is described as the "Takaka Rugby Club C1970's" is 31 per cent New Building Standard (NBS). That is less than 34 per cent NBS and is potentially earthquake prone according to the Building Act 2004. Aurecon recommended detailed assessment of the building structure.

[73] Ms Coats' assessment of the physical condition of the building was easily the most in-depth of any of the witnesses or reports. Paragraphs 6.3 – 6.19 of her evidence contain a detailed summary of the possible extent of work required to preserve the Grandstand, including the following information:

- The grandstand floor appears to be concrete on top of timber and/or concrete directly on top of dirt;
- A substantial portion of the ground floor walls will require rebuilding;
- The grandstand appears to have minimal clearance from the existing ground floor level;
- The corrugated cladding material appears to be fixed hard to the rough sawn timber framing (ungraded, untreated timber, no building paper, no insulation);

45 J M Pearson Affidavit 7 January 2017 Attachment L, Appendix A.

- The condition of the external wall on grid 3 is unknown as it could not be viewed;
- The condition of stud walls is variable with evidence of lack of proper fixings and poor construction;
- A number of load bearing walls required regrading or rebuilding and new foundations.

Ms Coats concluded that[46] "The building as a whole requires extensive maintenance if it or any part of it is to be retained. When I looked at options to retain/rebuild the 1899/1911 portion of the Grandstand I examined the implications of the deteriorating state of the building, the age of the materiality, and requirements for bringing it up to current day and found that the cost was prohibitive as I record on page 41 of Coats (2016), *"it is difficult to recommend"*.

[74] Mr Blackburne challenged Ms Coats' assessment as to the extent to which the ground floor might need rebuilding and the costs of doing so. He made the point that Ms Coats was not an engineer. However it must be said that Mr Blackburne offered no convincing counter evidence to Ms Coats other than the contention that a number of the issues identified by her required detailed structural analysis, consideration by a qualified engineer and a quantity surveyor and the preparation of a full Conservation Plan in order to identify what needs to be done to preserve the Grandstand and the costs of doing so.

[75] We will return to a number of these issues in our consideration as to whether or not to make the enforcement orders sought.

Watercare inquiry

[76] In *Watercare* the Court of Appeal identified four steps of inquiry which it considered ought to be undertaken in determining whether the subject matter of enforcement proceedings is firstly, offensive and objectionable and secondly whether that offensive and objectionable aspect is of such an extent that it is likely to have an adverse effect on the environment.

[46] EiC para 6.19.

[77] The first inquiry is as to whether the assertion of the applicant that the subject matter is offensive or objectionable is honestly made. We find that to be the case. There can be no doubt as to the genuineness of the concerns expressed by the members of the Trust and its various witnesses. Those concerns were validated, at least insofar as historic heritage aspects of the application are concerned, by the evidence of the expert witnesses as to the age of the Grandstand, its continuous community use over many years and its remaining heritage features.

[78] In his submissions for the Council Mr Winchester conceded that the Trust and its supporters were bona fide in their desire to keep the Grandstand although he contended that it is not clear whether their primary motivation was maintenance of the Grandstand for amenity reasons or retention of the remaining heritage value. Clearly there were elements of both.

[79] We consider the second, third and fourth steps together as we consider that in this case they are intertwined:

- Secondly, whether in the opinion of the Court the demolition is or is likely to be offensive or objectionable (We refer to our earlier comments as to the nature of that inquiry[47]);
- Thirdly, if so, is the offensive and objectionable aspect of such an extent that it is likely to have an adverse effect on the environment;
- Fourthly, whether in all the circumstances the Court's discretion should be exercised in favour of making the enforcement order sought or otherwise.

[80] In his opening submissions for the Trust Mr Heal made a number of comparisons between the situation in this case and that considered by the Court in *Donnelly v Gisborne District Council*[48], a case dealing with an enforcement order seeking to prohibit demolition of an historic public toilet building in Gisborne. Mr Winchester identified a number of factual distinctions between that case and this. However, significantly in that case, Judge Whiting found that demolition of an historic building is something which "could be offensive and objectionable to the community in that it is either undesirable, displeasing, annoying or open to objection and that such

47 Paras [50]-[56] above.
48 *Donnelly v Gisborne District Council* (1999) 5 ELRNZ 138 (NZEnvC).

offence and objection could have an adverse effect on the environment contrary to the single purpose of the Act as set out in section 5."

[81] In *Tasman Action Group Inc v Inglis Horticulture Ltd*[49] the Court applied a somewhat more stringent test, defining offensive as meaning "disgusting, nauseous, repulsive, causing anger or annoyance" and objectionable as meaning "unpleasant, offensive, repugnant".[50] It observed that the expression "is a stronger meaning than simply that people may be offended by the subject matter, or object to it."[51]

[82] Whichever standard of offensiveness and objectionableness is ultimately applied, we concur with the proposition established in *Donnelly* that the demolition of a historic building is something which potentially could be offensive or objectionable so as to have an adverse effect on the environment.

[83] We note that the word "environment" includes "(a) ... people and communities", "(b) All natural and physical resources" (including buildings) and "(c) The social ... aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters."[52] The adverse effect on members of the community which might be occasioned by demolition of the Grandstand as a result of the loss of amenity and historic heritage is an adverse effect on the environment for the purposes of this application.

[84] There was no dispute as to the use which has been made of the Grandstand as a viewing place for those attending the A&P show since 1899. We find the Grandstand to be part of the "physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes"[53] by providing a distinctive, sheltered place to enjoy the cultural and recreational attractions of the annual A&P show over a very long period of time. As such it is a contributor to the amenity values of the Takaka area.

[85] The evidence establishes that notwithstanding the omission of the Grandstand from the Schedule, it has historic heritage values at a district or regional level. Particular factors which lead us to that conclusion are:

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49 *Tasman Action Group Inc v Inglis Horticulture Ltd* Decision C126/2007.
50 *Tasman Action Group Inc v Inglis Horticulture Ltd* Decision C126/2007 at [82].
51 *Tasman Action Group Inc v Inglis Horticulture Ltd* Decision C126/2007 at [103].
52 RMA s 2.
53 RMA s 2.

- Its 117 year history of use in conjunction with the A&P show;
- Its distinctive appearance (particularly due to the barrel vaulted roof) and the obvious age of parts of it;
- Its rarity both as an example of this type of construction technique and as one of the very few grandstands of this form remaining in New Zealand.

[86] We consider that because it possesses these amenity and historic heritage values the Grandstand is a building whose demolition could potentially be found to be offensive or objectionable to the extent that it might cause anger or annoyance and/or be repugnant (being the standard applied in the *Tasman Action Group* case). However whether or not it is in fact offensive or objectionable or alternatively whether the Court should exercise its discretion to grant the Trust's application require the Court to "weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole."[54] That weighing requires us to have regard to a number of factors as well as the amenity and historic heritage values that we have identified.

[87] In terms of the amenity value of the Grandstand, we consider that the loss of its use one day per year in order to provide the amenity of a modern community recreational complex was a factor which was part of the Council's consideration and the community consultation process which was undertaken in determining to proceed with the Facility. As we have noted, it was clear from the plans and other information we have seen that demolition of the Grandstand was proposed as part of the proposal from early on in its development. The site of the Grandstand was initially to be netball courts and the plans showed that. The netball courts were re-sited on land provided by the A&P Association and replaced with carparks. If retention of the Grandstand was the issue which the Trust now contends it to be, that matter could have been resolved (one way or the other) at the time the A&P Association agreed to make land available for netball courts. In reaching our decision it is appropriate that we have at least some regard to the consultation process undertaken in determining to proceed with the Facility in the form and position that it is. We are hesitant to interfere with the outcome of that process solely on the basis of the loss of amenity arising from demolition of the Grandstand when that loss is counter balanced (and arguably outweighed) by the amenity value of the Facility.

[54] *Watercare*, page 305.

[88] Insofar as historic heritage factors are concerned, we find that the historic heritage values of the Grandstand have been substantially diminished by the various unsympathetic additions which have been made to it over the years. The difference between the experts in that regard revolved around the extent of diminution in terms of their assessment of historic heritage values and what might be required to restore those values.

[89] While we acknowledge that the building remains of historic heritage significance, we concur with Ms Coats' view that the 1968, 1977 and 1992 additions to the Grandstand (including the squash courts, although they are separate to the Grandstand itself) have seriously diminished its visual amenity and architectural values and its aesthetic integrity or authenticity in an historic heritage sense. She recommended that these additions should be demolished if the Grandstand is to be retained. We agree that demolition of the rugby clubrooms would be necessary to restore a further degree of authenticity to the Grandstand if it is to be retained for its historic heritage values.

[90] As we observed previously, the building comprises an eclectic combination of old and more recent elements with no apparent attempt to blend old and new. The squash courts and rugby clubrooms are utilitarian features of no architectural merit. Removal of the squash courts will expose the southern wall of the Grandstand, which will presumably need recladding if the building is to remain. The only purpose of retaining the clubrooms would be to support the historic upper floor viewing area but that support is provided at the expense of authenticity.

[91] Those observations raise the factor of the structural integrity of the building in its present configuration and what is actually required to preserve it as sought by the Trust. Paragraphs 6.9 – 6.19 of Ms Coats evidence in chief raise questions as to the condition of the older components of the Grandstand, whether they comply with current building code requirements and whether the building continues to be suitable for use as a public building. We note the various observations which she has made.

[92] Although Ms Coats is not an engineer, she is an experienced architect with a high degree of familiarity with building standards and codes. She testified that she is familiar with the general principles of load transfer and bracing requirements in NZS3604:2011 Timber-framed buildings. She was the only witness to have undertaken a detailed technical analysis of what might be required to preserve the Grandstand.

Subsequent intrusive investigation by a builder confirmed at least some of the assumptions which she had made as part of her initial investigation of the building. Her conclusion "that significant parts of the Grandstand would need to be reconstructed if it was going to continue to be used"[55] was not challenged in cross examination, nor was it directly contradicted by any other expert witness. We accept that conclusion.

[93] The position of both Messrs Blackburne and Bowman appeared to be that further investigations by way of engineering reports and a Conservation Plan were required to ascertain precisely what was required to enable reconstruction and how much it would cost. That is consistent with Ms Coats' evidence and the views expressed in the JWS.

[94] It is apparent from the form of the application, the evidence of the Trust's expert witnesses and the Trust's submissions that the purpose of these proceedings is to retain the Grandstand to enable a detailed analysis to be undertaken by way of Conservation Plan and engineering calculations as to what might be required to enable not merely its retention but also its reconstruction and possible relocation forward to restore sightlines and the practicality and costs of doing so. Although Mr Heal did not use the word reconstruction in his closing submissions, but rather the terms "repairing, renovation, restoring or rehabilitating"[56] we consider that what is being sought is the ability to investigate reconstruction as identified in the evidence of Ms Coats.

[95] We understand reconstruction to mean the restoration of a building by the use of new material to the same design[57] and that reconstruction can be an appropriate response to preserve historic heritage. Reconstruction of the Grandstand on its present site would preserve both the amenity and historic heritage values which we have identified.

[96] However, the Court does not have power to order the Council to undertake reconstruction or relocation of the Grandstand even if investigation establishes that it is practically feasible (in both the technical and financial senses). Mr Heal acknowledged that.[58] The current condition of the Grandstand which requires its reconstruction is not something which has been caused by the Council but arises out of the age of the building, the methods of and materials used in its construction and the unsympathetic

55 EiC para 13.1.
56 Trust's closing submissions para 13.
57 Bowman NoE - page 18.
58 Trust's closing submissions para 11.

alterations which have been legally made to it over the years. We can certainly make an order prohibiting demolition of the Grandstand[59], but we ask to what end if the outcome which the Trust ultimately seeks is not one which is open to us to direct?

[97] A further factor in our considerations is the advanced state of development of the Facility at the time these proceedings were commenced. As we have observed, final plans for development of the Facility were drawn on the basis that the area occupied by the Grandstand would be used to provide car parking necessary for the Facility and construction was commenced and has been completed accordingly. A significant and related factor is that the Council was fully entitled to proceed on that basis as construction of the Facility and demolition of the Grandstand are both permitted activities which the Council could legally undertake without resource consent.

[98] If the Trust had sought the orders which it now does at commencement of construction of the Facility instead of when it was near completion, we may have been more open to exercising our discretion to make an enforcement order rather than in the situation where the Council and community have legally expended some millions of dollars in constructing a complex which sits discordantly with the nearby Grandstand and which currently cannot be used. Even if proceedings had been commenced earlier however, we would still have been confronted with the factors which we have identified in paragraphs [94] – [96] (above).

Conclusion

[99] In determining whether or not to exercise our discretion to make the orders sought by the Trust, we are obliged to recognise and provide for the protection of historic heritage from inappropriate use and development as a matter of national importance[60] and to have particular regard to the maintenance and enhancement of amenity values.[61]

[100] The first of those obligations has been to the forefront of our considerations in this case. After extensive debate amongst the members of the Court, we have reached the conclusion that the factors which we have identified in paragraphs [88] – [98] (above) make it inappropriate to grant this application for enforcement orders, notwithstanding the national importance aspect of the historic heritage issue.

59 RMA s 314(1)(a)(i).
60 Section 6(f) RMA.
61 Section 7(c) RMA.

[101] We have acknowledged the amenity value of the Grandstand as a site for viewing the annual A&P show but consider that there is a counter balancing factor arising from the provision of a modern community recreational complex for use 12 months of the year which we must also take into account in considering the amenity values aspect of these proceedings.

[102] Having regard to all of these matters we decline to exercise our discretion to make the enforcement orders sought by the Trust. The application is declined.

Costs

[103] In the normal course of events our determination to decline the application would lead to a reservation of costs in favour of the Council. Whether or not costs were actually awarded would be determined by the Court pursuant to s 285 RMA. However, in this case there are two matters which we have considered in determining whether to reserve costs.

[104] Firstly, because the Trust's proceedings sought to (ultimately) procure the preservation through reconstruction of the Grandstand building which the evidence established has amenity values and historic heritage values at a district level. We consider that the Trust was advancing a matter of public interest and acting in good faith in doing so. Although that of itself does not absolve the Trust from liability for costs, it is a relevant factor for us to consider.

[105] Secondly, although we have found that the Council was legally entitled to act in the manner which it has, it is apparent that its consideration of historic heritage matters relevant to the Grandstand was perfunctory at best. Mr L McKenzie acknowledged that had the Council been aware of these matters it would have undertaken a more detailed examination of them[62]. This is a very old building of considerable significance in the context of the Park whose proposed demolition obviously warranted such a detailed examination to see if it could be preserved even if the ultimate outcome may have been that identified by Ms Coats.

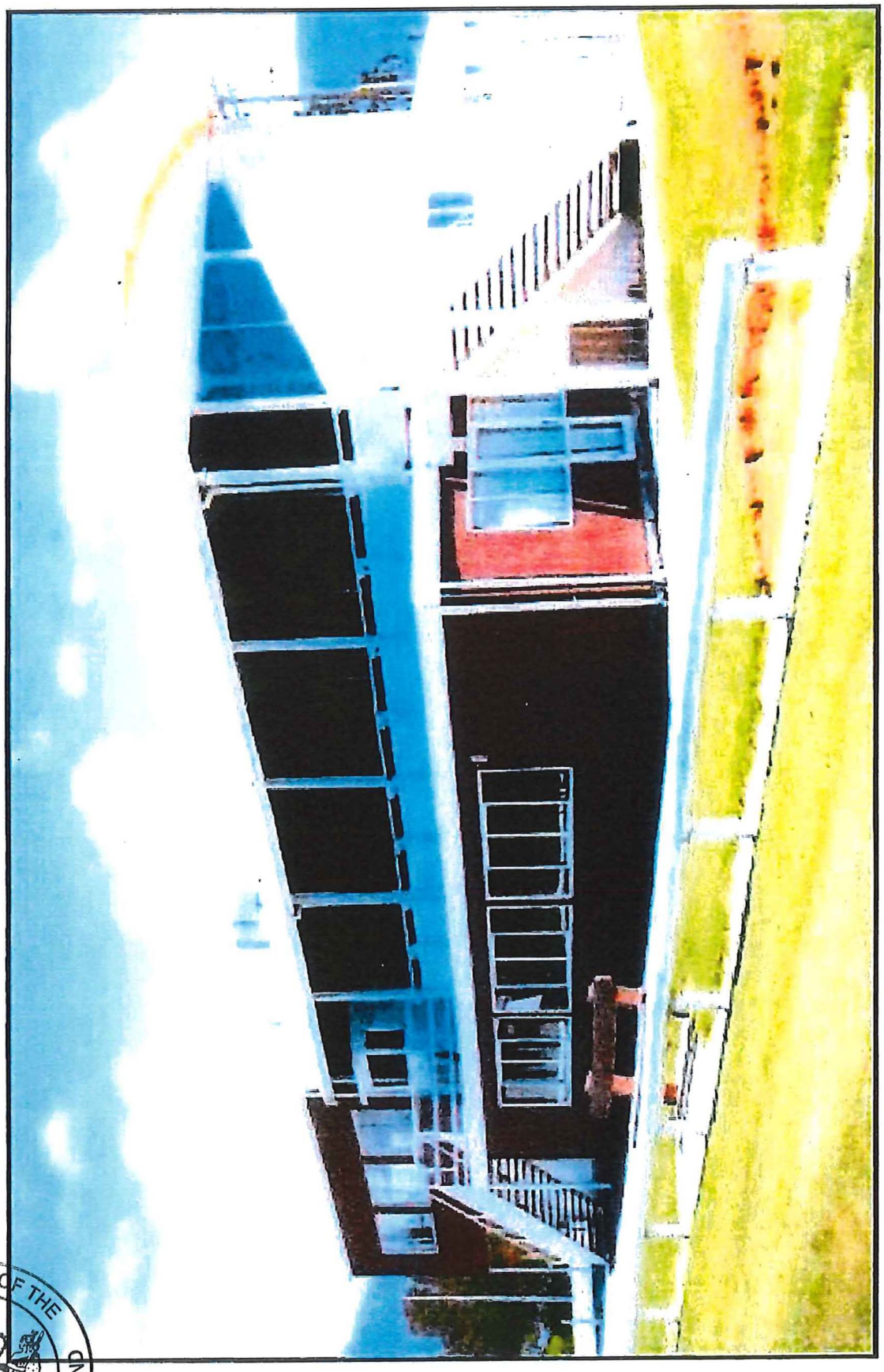
62 Para [67] (above).

[106] The combination of these two considerations leads us to the view that we should not reserve costs in favour of the Council.

For the Court:

B P Dwyer
Environment Judge

APPENDIX 1



THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND