

IN THE MATTER OF

The Resource Management Act 1991

and

The City of Lower Hutt District Plan

And

An application for land use consent authorising the construction of a pergola structure on the roof top of the building at number 181 Jackson Street, Petone.

Hutt City Council Reference RM150082

DECISION OF HEARING PANEL

Applicant:	JSSC Limited
Site:	Number 181 Jackson Street, Petone, being a 370m ² site comprising Part Lot 1 DP355 (WN480/9). Access to the site is provided over adjoining land (Part Lot 2 DP6815, Lots 22 and 23 DP57).
Site Owner:	Jackson Holdings (2005) Ltd
District Plan Zoning:	The site is within the <i>Petone Commercial Activity Area</i> and is within the <i>Jackson Street Historic Area</i> overlay shown on District Plan map A5.
Consent Sought:	Restricted discretionary activity consent under District Plan Rules 5B2.1.1 (a) and 14F2.2 (a) to authorise an existing roof-top pergola structure that had been constructed without the necessary consent under those rules.

SUMMARY OF DECISION

Consent is granted subject to the condition specified in Part 13 and for the reasons summarised in Parts 12 and 13 of this decision.

Notification and Submissions:	The application was publicly notified on 25 th August 2015 and 146 submissions were received by the closing date of 23 rd October 2015. Nine submissions opposed the application and 137 submissions supported the application. 21 submitters asked to be heard in support of their submissions. Four submitters appeared in support of their submissions
Hearing Panel:	The Hearing Panel, comprising Councillor Campbell Barry and independent Commissioner Christine Foster, was appointed on 23 rd February 2016 with full delegated authority to hear and determine the application.
Hearing Details:	The hearing was held in the Hutt City Council's Wainuiomata Chambers, Queen Street (Wainuiomata), on Wednesday 16 th March 2016 commencing at 9.00 am. The hearing was closed on Monday 21 st March 2016 following the Panel's site visit and the receipt of further information from the applicant that was requested by the Hearing Panel at the hearing. The persons attending the hearing are listed in Attachment 1 to this decision.

Table of Contents

1	SITE HISTORY	3
2	THE UNAUTHORISED STRUCTURE.....	4
3	THE APPLICATION.....	6
4	REASON CONSENT IS REQUIRED UNDER THE DISTRICT PLAN	6
5	RELEVANT RMA PROVISIONS	7
6	ISSUES RAISED IN SUBMISSIONS.....	10
7	PRINCIPAL ISSUES IN CONTENTION	11
8	JACKSON STREET HISTORIC AREA.....	11
9	NECESSITY OF THE PERGOLA.....	15
10	PRECEDENT	16
11	NOISE	16
12	OVERALL CONCLUSION.....	17
13	GRANT OF CONSENT	17

1 Site History

- 1.1 The building on the site is a bar and restaurant known as the *Queen of Jackson*. It was built in 2014, authorised by resource consents granted in 2012 and 2013. RM110401, granted in 2012, authorised the demolition of the building that previously occupied the site and the construction of a new building. Consent was required, under the District Plan rules applying to the *Jackson Street Historic Area*, for the demolition of that former building and because the new building would be visible from the Jackson Street road frontage and would require a building consent (Rules 5B 2.1.2 and 14F2.2). That consent was granted non-notified under delegated authority. A decision was made, pursuant to sections 95A to 95E of the Act, that application RM110401 did not need to be publicly notified and that no person would be potentially affected by the proposal. In granting the consent, the consent authority noted the following:

‘Although the building to be demolished is located within a heritage precinct, the building does not carry any significant visible heritage characteristics and the proposed replacement building is consistent with the design of other neighbouring buildings on the Jackson Street frontage which carry some visible heritage characteristics. Any resulting heritage effects from the proposal are considered to be negligible.

The proposal has been assessed by Council’s Consultant Architect and Conservator who considers that the proposed demolition works and the construction of the replacement building would have little or no heritage effects as the replacement building is consistent in style with the existing building. As such, any potential heritage effects associated with the proposal are considered to be negligible.’

- 1.2 Whilst the former building was part of the *Jackson Street Historic Area*, it was not itself identified by the District Plan as a heritage building or historic place and was not registered as a heritage building under the Heritage New Zealand Pouhere Taonga Act 2014. Heritage New Zealand was consulted regarding the RM110401 proposal and confirmed in writing their support for the proposal.
- 1.3 RM110401 authorised the construction of retail premises on the ground first floors of the building and residential apartments on the first and second floors. The residential apartments proposed by RM110401 were not built.
- 1.4 Land use consent was subsequently granted in 2013 for the establishment of 7 residential apartment units and a retail space including a mezzanine floor (RM120338). The application proposed a three-storey building having a height of 9.9m. That proposal required consent under the Rules for the *Commercial Activity Area* because it proposed residential activity at ground floor level, proposed 8 fewer car parking spaces than the District Plan standard and because of a lack of loading space. A number of amendments were made to the design of the building, responding to comments by the Council’s Heritage Conservator and Urban Designer. The amendments included:
- lowering the height of the parapet (facing Jackson Street) over the roof deck above the retail space mezzanine;
 - removal of the roof gable to provide additional height for each floor whilst achieving the 10m height limit;

- raising the floor-to-ceiling windows;
 - inclusion of display windows and a recessed entry at street level for the retail premises;
 - removal of the coverings from the decks of the apartment units.
- 1.5 As a result of those amendments, the Council’s consultant Heritage Conservator and Urban Designer considered the proposal met the intent of the relevant District Plan design guide. They concluded that it would be in keeping with the building previously located on the site and with the adjoining Empire building and the bank building on the opposite side of Jackson Street. The reporting planner’s conclusion was that the heritage effects of the building proposed by RM120338 would be less than minor. Consent was required as a discretionary activity and the application was processed non-notified. No persons were identified as being potentially affected by that proposal.
- 1.6 The retail building fronting Jackson Street and the rear residential units authorised by RM120338 have been built. The applicant commenced operation of the bar and restaurant in the authorised retail premises in April 2014. The bar occupies the ground floor and mezzanine area and, since October 2014, has also occupied part of the roof top of the building as a ‘garden bar’.
- 1.7 No consent is required for the occupation and use of the rooftop area as a restaurant and bar (*‘garden bar’*) because that is a commercial activity permitted by Rule 5B2.1.1 (e) of the *Petone Commercial Activity Area*.
- 1.8 Resource consents have also been granted for other activities on the site but those do not have any particular relevance for the current application¹.

2 The Unauthorised Structure

- 2.1 Mr Alexander Henderson is the sole director of the applicant company and is one of two shareholders of the company. The other shareholder is Ms Monique O’Meley. Both Mr Henderson and Ms O’Meley are responsible for the management of the *Queen of Jackson* bar and restaurant. Mr Henderson explained in evidence that the rooftop garden bar was the first of its kind in the Wellington region at that time and that a substantial part of the company’s trade is generated by the rooftop garden bar, particularly on warm sunny days.
- 2.2 Mr Henderson explained that it became immediately apparent that the weather would have a significant effect on the use of the rooftop garden bar. He therefore investigated options that could provide shelter whilst retaining the ability to let the sun into the rooftop area. He stated that it took him over 8 months to select a suitable structure that would have the structural strength to withstand local winds.
- 2.3 Mr Henderson is not familiar with District Plan requirements and had not been involved in such a building project before. He stated in evidence that he had assumed that a building consent would be required for the structure but had assumed that no resource consent would be required. Mr Henderson also explained that he assumed that the building consent would be sought by the engineer who designed the structure or by the

¹ RM100366 authorising a right of way over 175-179 Jackson Street; RM14002 authorising two advertising signs for the licensed premise; RM140274 authorising an additional residential unit.

builder. He was wrong. Neither the engineer nor the builder obtained the necessary building consent and land use consent is required.

- 2.4 Mr Henderson stated that he became aware there was an issue with the rooftop structure when a Council Officer visited the site in response to a complaint received by the Council. The Council applied to the Environment Court in January 2015 for an interim enforcement order, including an order requiring removal of the rooftop structure. The Court's minute issued on 12th February 2015 records its understanding that the applicant would seek retrospective consent for the unauthorised building work and that the Council was content to leave matters as they were provided that application was lodged and pursued with diligence. The applicant duly lodged this application for consent (RM150082).
- 2.5 It is relevant to note that on 18th August 2015 the Council issued to Jackson Holdings (2005) Ltd (the building owner) a certificate of acceptance under section 99 of the Building Act 2004 for building work described as a 'louvered rooftop pergola'. The application for a certificate of acceptance was lodged by Mr Philip Henderson (Mr Alexander Henderson's father). As we understand it, a certificate of acceptance is something different from a building consent issued under that Act. The Council's covering letter accompanying the certificate of acceptance notes that the building consent authority was not prepared to issue a code compliance certificate for the building because all of the required inspections were not carried out during construction and that the Council is now unable, for all practical purposes, to inspect the building fully to assure itself that all work covered by the building consent complies with the building code. We understand that no further consents are required, though, to authorise the structure under the Building Act 2004.
- 2.6 For completeness, we note that the owner of the building (Jackson Holdings (2005) Ltd) has provided a letter dated 17th March 2016 confirming that the company has consented to the construction of the louvered pergola structure. The letter also confirms that the company also consents to the implementation and construction of any mitigation measures that may be specified as a result of application RM150082.
- 2.7 Ms Sarah Clarke, the Council's Senior Resource Consents Planner who prepared the section 42A report, questioned whether the expression 'pergola' accurately describes the roof-top structure that is the subject of this application. It was her view that it should more accurately be described as a 'roof'. That is a little surprising given the Council's own description of the structure, in the certificate of acceptance, as a 'louvered rooftop pergola'. For the purposes of this decision, it is immaterial what we call the structure. It comprises a roof supported on columns, currently has no fixed walls and the roof incorporates louvres that can be opened or closed to provide shade or rain shelter depending on the weather. We note that the structure is attached to but otherwise leaves intact the decorative parapet along the Jackson Street edge of the building that was authorised by the earlier consent RM120338. This parapet wall is the outer wall of the rooftop garden bar.
- 2.8 According to Mr Alexander Henderson, the rooftop garden bar also provides a space for smokers to smoke cigarettes which they can't do elsewhere within the premises. According to Mr Henderson, the only alternative smoking opportunity for patrons is to stand on the street which he considered is 'not a good look'.

3 The Application

- 3.1 The application sought consent for not just the pergola structure. Anticipating that a range of mitigation measures might be required, the application also sought consent to:
- (a) Raise the balustrade (parapet) at the front of the building² to the same level as the pergola's roof; and
 - (b) Raise parts of the balustrade along the sides of the top of the building (forming part of the parapet structure) commensurate with raising the height of the front of the balustrade (parapet) along the building's frontage.
- 3.2 The application also sought consent for the use of the louvered pergola and raised balustrades (parapet) in association with the restaurant and bar activities at this site. The applicant also offered³, as mitigation, to repaint the pergola structure the same colour as the balance of the building (it is currently a dark grey colour whereas the balance of the building is a golden yellow colour).

4 Reason Consent is Required Under the District Plan

- 4.1 Consent is required as a restricted discretionary activity under both Rule 5B2.1.2 (a) and Rule 14F2.2 (a):

'5B2.1.2 Restricted Discretionary Activities

5B2.1.2 (a) All redevelopment, alterations, repairing or modifications of any building or structure, except the following:

- (i) Redecoration, repair or alterations which are internal and not visible from the road or from the road frontage; and*
- (ii) Minor repair or alterations or maintenance to the existing façade of a building or structure which does not require any building consent;*

which are Permitted Activities.'

- 4.2 The rooftop pergola structure is visible from Jackson Street and would require a building consent but for the certificate of acceptance issued in 2015 hence is captured by the above rule.

'14F2.2 Restricted Discretionary Activities

14F2.2 (a) Any other alteration, repair or modification of any building or structure listed in Appendix Heritage 1 & 2.'

² It was established, through questioning of witnesses for the Council and the applicant that they all understood the words in the application to mean that it is the parapet at the front and sides of the building that is to be raised.

³ Annexure 15 of the application

- 4.3 Appendix *Heritage 1* lists in part (ii): *Heritage Areas registered by the New Zealand Historic Places Trust* and includes:

'Jackson Street Historic Area, Petone

Described as those buildings located along both sides of Jackson Street, between the intersection with Victoria Street in the West and Cuba Street in the east.'

- 4.4 Even though the building at number 181 Jackson Street is not a listed heritage building, it is included by the above definition in Appendix *Heritage 1* and is therefore explicitly provided for in restricted discretionary activity Rule 14F2.2 (a).
- 4.5 Rules 5B2.1.2.1 and 14F2.2.1 list the matters over which the Council has restricted its discretion and Rule 5B2.1.2.1 also states that applications will be assessed in accordance with the standards and terms specified in Appendix *Petone Commercial 1*. We discuss our assessment of these matters later in this decision.
- 4.6 There was no dispute by any party that the rooftop pergola structure does not exceed the 10-metre height limit that applies to permitted activities in the *Petone Commercial Activity Area*.

5 Relevant RMA Provisions

- 5.1 The relevant provisions of the Act are sections 104, 104C and 108. Section 104 sets out the matters that we must have regard to when considering the application. Those matters are limited by Section 104C (1) which limits the matters we are able to consider to those matters specified in the District Plan over which the Council has restricted the exercise of discretion (that is, the Rule 5B2.1.2.1 and 14F2.2.1 restricted matters). Section 104 is also subject to Part 2 (the sustainable management purpose of the Act and the section 6, 7 and 8 matters). Mr Anastasiou's approach, explained in his legal submissions, is that the restricted discretion of section 104C does not constrain the dominance of Part 2 of the Act.
- 5.2 Section 104C (2) provides that we may grant or refuse the application. Section 108 provides the authority for imposing conditions of consent. Section 104C (3) limits the matters for which conditions of consent may be imposed to those over which the Council has restricted the exercise of discretion (the Rule 5B2.1.2.1 and 14F2.2.1 restricted matters).
- 5.3 For this application, the relevant section 104 matters are:
- (a) The actual and potential positive and adverse effects of allowing the rooftop pergola to remain; and
 - (b) The relevant provisions of the District Plan (within the scope of the restricted matters);
- 5.4 There was no dispute that there are no national environmental standards, national policy statements, regional policy or regional plan provisions that are directly relevant to the application.
- 5.5 The following provisions of Part 2 are potentially relevant:

- (a) The sustainable management purpose set out in section 5;
- (b) Section 6 (f) which requires that we must recognise and provide for the protection of historic heritage from inappropriate use and development. In this regard, all parties agreed that the building at number 181 Jackson Street is not itself an historic heritage building. The matter in dispute at the hearing was, rather, whether the rooftop pergola has a detrimental effect on the character of the heritage character of the *Jackson Street Historic Area*;
- (c) Section 7 which requires that we have particular regard to the efficient use and development of resources, the maintenance and enhancement of amenity values and to the maintenance and enhancement of the quality of the environment.

5.6 The relevant provisions of Chapters 5B and 14F were discussed in Ms Clarke's section 42A report and in the statement of evidence presented by Mr Ian Leary, a consultant planner called by the applicant and in their oral answers to our questions at the hearing. From that evidence, we identify the relevant provisions of the District Plan as being:

- (a) The following restricted matters set out in Rule 5B2.1.2.1:
 - Building shape;
 - Building modulation;
 - Wall materials and openings;
 - Silhouette, parapets and cornices;
 - Decoration and colour.
- (b) The statement in Rule 5B2.1.2.1 that *all resource consents will be assessed in accordance with the Standards and Terms specified in Appendix Petone Commercial 1.* This Appendix comprises 9 sections corresponding with the full list of Rule 5B1.2.1 restricted matters. For each matter, there is a discussion of background (the issues and outcomes desired) and a set of '*Design Performance Standards*'. The planners agreed that these are not 'standards' in the usual sense of that word. They are, rather, a set of assessment criteria addressing the restricted matters (e.g. '*the extent to which building designs emphasise the traditional strong horizontal elements....*' etc).
- (c) 5B1.2.1 Objective: '*To ensure that the distinctive built form, style and character of buildings and structures in the area between Victoria and Cuba Streets are retained and enhanced.*'
- (d) 5B1.2.1 Policy (a): '*External alterations, repairs, or modifications to existing buildings and structures plus the construction of new buildings and structures in the area bounded by Victoria and Cuba Streets must comply with the specified design performance standards.*'
- (e) 5B1.2.1 Explanation and Reasons: '*The area on both sides of Jackson Street bounded generally by Victoria and Cuba Streets consists of a mix of one and two storeyed buildings, with small frontage retail activities and commercial activities at road level, and residential flats or offices above. Many of the buildings in this area were built between 1926 and 1940. A large number of buildings have decorative parapets and present an imposing impression from the road.*

This area has a distinctive built form, style and character. It is important that these characteristics are retained and enhanced. Council does not seek to prevent or prohibit the repair, alteration, modification or redevelopment of

existing buildings or structures. Any such changes to the external façade of existing buildings or redevelopment must not compromise the existing built form and character of the area and will be assessed in accordance with the design performance standards specified in Appendix Petone Commercial 1. ...'

(f) The Rule 14F2.2.1 restricted matters which are:

(i) *The nature and extent of the works and the necessity of those works;*

(ii) *The effect of the works on the heritage value of the building or structure (and, for these purposes, the 'building or structure' referred to here is the Jackson Street Historic Area as listed in Appendix Heritage 1 (ii) specified in Rule 14F2.2 (a)). Rule 14F2.2.1 also states that assessment will be made of a number of factors including the extent to which the works comply with the guidelines in Appendix Heritage 3. Mr Leary and Ms Clarke agreed that Design Guidelines included in Appendix Heritage 3 are of limited value in considering this application. That is because they so clearly relate to the conservation and management of individual listed heritage buildings and very specifically to heritage houses.*

(g) 14F1.1 Objective: *'To ensure that the heritage values of identified heritage buildings and structures are not unnecessarily lost through demolition or relocation, or compromised by any additional work.'* Mr Leary's view was that this objective is not relevant because number 181 is not itself an identified heritage building. However, the issue statement refers to groups of buildings and the explanation that follows the objective clarifies that 'buildings and structures' includes groups of buildings. Also, the relevant Appendix (*Heritage 1*) specifically identifies the group of buildings along both sides of Jackson Street (that is, the group rather than individual buildings in isolation). Our view is that the objective is relevant in relation to additional work affecting the *Jackson Street Historic Area*. However, we agree that the policies that follow this objective are not relevant because they so clearly apply to the repair, alteration, addition to, demolition and relocation of individual heritage buildings. We agree with Mr Leary that the more relevant objective and policy, in relation to the group of buildings comprising the *Jackson Street Historic Area*, are those in Chapter 5B1.2.1.

5.7 Ms Alison Dangerfield is an architect employed by Heritage New Zealand as Heritage Advisor for Architecture who presented evidence in support of Heritage New Zealand's submission on the application. Ms Dangerfield included with her evidence excerpts from the original assessment approved by the Board of the Historic Places Trust when the *Jackson Street Historic Area* was registered by the Trust as a heritage area. Ms Dangerfield considered that this information is relevant in understanding the heritage values and heritage character of Jackson Street. We agree that, for the purposes of section 104 (1) (c) of the Act, that text is a relevant matter that is reasonably necessary to our understanding of the heritage values to which the District Plan objectives and policies relate.

5.8 Ms Dangerfield also referred in her statement of evidence to information sheets produced by Heritage New Zealand that offer advice on the sustainable management of historic heritage and the principles to be applied when assessing impacts on historic heritage and historic areas. We found those information sheets to have little direct relevance for this application. They address matters in a highly generalised way and

are not specific to the Jackson Street situation in the way that the District Plan provisions are.

- 5.9 Mr Leary considered that the objective and policy under 5B1.2.2, relating to the provision of verandahs to provide adequate weather protection, are also relevant. However, Mr Leary agreed that the focus of the objective and associated policies is on weather protection for pedestrians on the street, rather than on weather protection for people within private property. Whilst the weather protection provided by the roof of the pergola has acknowledged benefits for users of the rooftop garden bar, it has neutral effect for pedestrians on the street.
- 5.10 Mr Warwick Johnston, a submitter, referred in his statement to the hearing to a 'Jackson Street Design Guide'. Mr Tim Johnstone, the Council's Team Leader Resource Consents, clarified at the hearing that this document is one that informed the development of the District Plan design guides but that it has no statutory effect and has been superseded by the operative District Plan.
- 5.11 We discuss the relevant policy matters in our evaluation of the principal issues in contention later in this decision.

6 Issues Raised in Submissions

- 6.1 A large number of submissions expressed support for the application and referred to the benefits of allowing the pergola structure to remain, including the weather protection it provides to clientele, the value of the *Queen of Jackson* to the community and the positive experience of the rooftop garden bar. A number of supporting submissions endorsed the structure as being aesthetically attractive. Other submissions opposing the pergola structure raised the following issues of concern:
- (a) Adverse visual impacts of the pergola structure on the heritage character of Jackson Street and its lack of 'fit' with the heritage character of the *Jackson Street Historic Area*;
 - (b) The absence of evidence demonstrating the need for the pergola structure;
 - (c) The adverse visual impact the structure has on the design of the building at number 181 Jackson Street and its impact in adversely dominating the building's parapet and in introducing a visually discordant feature which interrupts the continuity of heritage character along this part of Jackson Street;
 - (d) The visible height of the pergola structure above the building;
 - (e) Concerns that a decision to allow the structure could set an adverse precedent for future similar unauthorised work or similar types of structures;
 - (f) Potential for noise arising from use of the rooftop garden bar;
 - (g) The lack of opportunity to influence the design of the structure, through a proper resource consent process, before it was built.
- 6.2 A number of opposing submitters requested that the application be declined. Heritage New Zealand suggested design amendments that it considered could mitigate the

adverse visual impacts on heritage values, including setting the pergola further from the Jackson Street frontage, adopting a different roof shape or use of different materials.

- 6.3 Some submissions questioned why the Council had not pursued the non-compliant building under the Building Act 2004. Ms Clarke clarified in her section 42A report that the Council did issue 'notices to fix' under the Building Act. Ms Clarke stated that the structure was first observed in December 2014 and that the Environment Court enforcement order proceedings were initiated in early 2015.

7 Principal Issues in Contention

- 7.1 The principal issue that was in contention at the hearing was whether the pergola structure can be reconciled with the objectives and policies for the *Jackson Street Historic Area*. In addition, submitters who presented statements to the hearing were concerned that the applicant had not sufficiently demonstrated the need for the pergola structure and were concerned about the potential precedent that would follow a grant of consent.
- 7.2 We discuss the evidence and our findings on these issues in the following sections:

8 Jackson Street Historic Area

- 8.1 Unlike many applications for consent, we are not faced with having to predict what the effects of the proposal will be. Although it is not authorised, the pergola is in place and we are able to assess with absolute clarity its effects and the extent to which it can be reconciled with the relevant District Plan objectives and policies.
- 8.2 The applicant offered, in Annexure 15 of the application, two mitigation measures that it would accept. The applicant does not propose those measures but is prepared to implement them if necessary to achieve a grant of consent. Those measures are:
- (a) Raising the parapet along the front of the building to the level of the pergola and raising the parapet along the sides to connect to that (and the applicant explicitly applied for consent for this work); and
 - (b) Repainting the pergola structure the same colour as the same as the building.
- 8.3 In response to our questions at the hearing, Mr Anastasiou forwarded a letter from the building owner confirming that the owner will allow these changes to be made to the parapet.
- 8.4 Our assessment therefore considers both the existing pergola and the mooted mitigation.
- 8.5 Expert evidence assessing the impacts of the pergola structure on heritage values was presented by:
- Mr David Pearson, a consultant architect specialising in heritage architecture called by the applicant;

- Ms Alison Dangerfield, heritage architect employed by Heritage New Zealand as Heritage Advisor for Architecture; and
- Ms Chessa Stevens, consultant heritage architect advising Ms Clarke.

8.6 Mr Pearson and Ms Dangerfield prepared pre-circulated written statements of evidence. In preparing her section 42A report, Ms Clarke sought specialist assessment from Ms Stevens and from Heritage New Zealand⁴ and included in her report a summary of the advice she had received from Ms Stevens⁵. However, Ms Stevens did not present a written statement of evidence addressing the proposal. Ms Stevens provided helpful answers to our questions but her contribution was impaired by the absence of a written statement clearly setting out her opinion.

8.7 Mr Pearson and Ms Dangerfield each addressed in their written statements the architectural and heritage character of Jackson Street. Mr Pearson included as an attachment a detailed streetscape analysis which we found helpful in characterising the heritage and architectural values of the street. Mr Pearson sought to demonstrate that there is a diversity of architectural eras and styles represented along both sides of the street, including some modern structures that have few heritage features at all. Mr Pearson acknowledged the discussion in Appendix *Petone Commercial 1 Parts 1, 3 and 5* relating to building shape, building modulation, silhouette, parapets and cornices. For example:

- Part 1 building shape: that *'new developments should reinforce the visual cohesion of the existing facades'*;
- Part 3 building modulation: that *'in Jackson Street, the pattern is often symmetrical and provides a rhythm along the street with horizontal bands overpowering the vertical. Strong horizontal lines define the levels of the building. These are particularly the line of the verandah, cornice line and parapet silhouette.'*;
- Part 3 silhouette, parapets and cornices: that *'due to the varied heights of buildings and their definite parapet patterns along the street, the silhouette is varied and interesting. It provides a vitality to the streetscape above the verandah which is very visible to the pedestrian at street level. Almost all the buildings have a strong cornice line applied to the face of the building. This strong horizontal line, emphasised by the shadow it created underneath, is a dominant feature.'*

8.8 Mr Pearson accepted that the majority of buildings in this section of Jackson Street have parapets (although there are some exceptions). It was Mr Pearson's view that the building at number 181 Jackson Street, as originally constructed, complied with the Appendix *Petone Commercial 1* design guidelines. It was his evidence that, although the parapet still remains, the louvered pergola above the parapet partly negates the silhouette effect of the parapet to an extent. In his opinion, this is exacerbated by the colour difference between the light-coloured parapet and the darker pergola. However, he also stated his opinion that the viewing angle within which the upper level of the building is visible is relatively narrow and that, in the overall context of Jackson Street, any adverse effect on heritage values is minor.

⁴ Paragraph 7.10 of Ms Clarke's report

⁵ Paragraphs 7.11 and 7.12 of Ms Clarke's report

- 8.9 Mr Pearson had suggested to the applicant the mitigation measure of raising the parapet height to match the pergola. He presented in evidence perspective drawings showing the raised parapet along the front and parts of the sides. Along the front, the parapet incorporates three windows (at third storey level) similar to the existing three windows at second storey level. The altered parapet shape also mirrors the gabled shape of the existing parapet. Along the sides, the parapet would be stepped down from the front to the existing height part-way along each wall. It was Mr Pearson's opinion that raising the parapet in this way would reduce the effect on heritage values to less than minor.
- 8.10 Mr Anastasiou tabled a photograph of the former building on the site. It was a two-storey building with three windows along the second storey frontage and a tall parapet above. Mr Pearson estimated that the height of its parapet was 10 metres. The amended parapet shown on Mr Pearson's perspective drawings would be no higher than 10 metres. The photograph of the former building also shows that the rooftop parapet stepped down from the front level along the sides.
- 8.11 Ms Dangerfield explained that, although the building at number 181 Jackson Street is not itself a heritage building, it is a 'non-heritage contributing building' in that it contributes by its own architecture to maintaining the overall heritage character. For example, she explained, it has proportions consistent with those of heritage buildings, has windows facing the street, has an interface with the street (through the street-level windows and door), and presents the building well to the street in a manner that is modulated consistent with the street as a whole. Ms Dangerfield also noted with approval the adoption of a strong cornice line and parapet. Ms Dangerfield's opinion was that the pergola is noticeably dissimilar in character, location and style to the generality of buildings in the Jackson Street area. Its visual incongruence is heightened, in her opinion, by the fact that it covers most of the roof space and is emphasised by its dark colour, contrasting materials and strong vertical lines which differ from the silhouette created by the existing parapet. Ms Dangerfield explained that the pergola disrupts these qualities by adding a dark structure above the parapet that visually dominates the parapet and the otherwise horizontal lines of the upper part of the building. It adds space between the rooftop parapet and pergola roof in a way that is incongruent with the heritage styles along the street and it completely changes the building's silhouette.
- 8.12 Ms Dangerfield disagreed with Mr Pearson that the visibility of these contrasting features is narrow. It was her opinion that the visual dominance of the dark roof is clearly visible from opposite the site and for a considerable distance west of the site. She agreed that, in the context of the whole of Jackson Street, it is relatively narrow, but not absolutely narrow. Ms Dangerfield assessed the impact as more than minor but 'small'. Ms Dangerfield agreed with Mr Pearson that, if the parapet is raised in the manner proposed by Mr Pearson, there would be no adverse impact on heritage values.
- 8.13 Ms Claire Craig, General Manager of Heritage New Zealand's Central Region, also stated (in support of Ms Dangerfield's comments) that it is the industrial nature of the pergola structure that is incongruous with the heritage character of the surrounding area.
- 8.14 Ms Stevens's assessment was that the pergola structure fails to respond to many of the outcomes desired by the Appendix *Petone Commercial 1* design guidelines⁶. Ms Stevens agreed that raising the parapet height as proposed by Mr Pearson would

⁶ Reproduced comments of Chessa Stevens in paragraph 7.12 of Ms Clarke's section 42A report.

mitigate some aspects but did not consider it would fully mitigate the adverse effects on heritage values.

- 8.15 Ms Clarke had relied on advice from both Ms Stevens and Heritage New Zealand in forming her conclusion against a grant of consent. Noting that Heritage New Zealand's expert Heritage Architect endorsed Mr Pearson's proposed mitigation as fully addressing any adverse effects on heritage values, we asked Ms Clarke whether she still relied on that organisation's assessment. Her answer was that she did not. Ms Clarke's view was that Mr Pearson's proposed mitigation goes some way towards addressing adverse effects on heritage values but does not go far enough. Neither Ms Clarke nor Ms Stevens elaborated on what more needed to be done to mitigate the adverse effects on heritage values that they had identified other than to suggest that the entire rooftop area could be structurally enclosed⁷.
- 8.16 Ms Ruth Fletcher, a submitter who lives in Bay Street nearby, was clear in her view that the pergola structure is incongruent with the heritage character of Jackson Street and that it is able to be seen clearly from Jackson Street between Bay Street and Richmond Street.
- 8.17 Mr Graeme Lyon, a submitter, stated that he would have preferred the pergola to be set back further from the front of the building.
- 8.18 Mr Warwick Johnston is a submitter who has a keen interest in the heritage values and character of Jackson Street. Mr Johnston has undertaken two inventories of heritage buildings (in 2007 and 2011) and wrote a book titled '*Jackson Street*' describing the heritage values of the area. He has also conducted Jackson Street heritage tours over the past decade. Mr Johnston opposes the pergola which he considers to be utterly incongruous with the heritage character of the street. He stated that he was 'slightly neutral' to the mitigation proposed by Mr Pearson.
- 8.19 Mr Frank Sviatko is a Petone resident and a member of the Petone Planning Action Group Committee. He appeared at the hearing in support of the Group's submission opposing the pergola. Mr Sviatko echoed Ms Fletcher's concern that the pergola is clearly visible from Jackson Street and is not in keeping with the heritage character of Jackson Street because of its visual dominance. His particular concern was with potential cumulative effects. He described the pergola as an example of the type of discordance that may not itself directly affect the overall integrity of Jackson Street's heritage character, but would do if more sites were developed in similar fashion. We asked Mr Sviatko whether he considered Jackson Street was at a 'tipping point' in terms of these cumulative effects. His answer was that things have not yet reached that point. Mr Sviatko considered Mr Pearson's proposed mitigation, taken in isolation, to be an 'elegant solution' but was concerned that there might be future additional changes to the sides of the building.
- 8.20 Mr Anastasiou urged us to be wary of imposing the Appendix *Petone Commercial 1* design guidelines as performance standards. They are worded in a way that allows considerable scope for discretion and are not actually standards at all. For example, it was his approach that the design guidelines could not be used to constrain the 10-metre height allowed for permitted activity development within this activity area. Mr Leary considered that an overall assessment needs to be made, including consideration of the guideline matters, but that it would be inappropriate to adopt a 'tick and cross' approach to the long list of design guideline matters. It was his opinion that it would be difficult for

⁷ Sarah Clarke oral answer to a question from the Hearing Panel

any development to completely fulfil all of those requirements. He emphasised that they are not standards but should be applied as assessment considerations.

Finding: 'Fit' With Jackson Street Historic Area

- 8.21 We are comfortable adopting the approach recommended by Mr Anastasiou and Mr Leary. The design performance standards contained in Appendix *Petone Commercial 1* can only reasonably be applied as guidelines in our view. Taking that approach, we find that the existing pergola is a structure that is incongruous with the outcomes expressed in the general and specific terms of the guidelines and in the relevant objective and policy. That is because it has the effects identified by Ms Dangerfield, Mr Pearson, Ms Stevens and submitters of visually dominating the building at number 181 Jackson Street in a manner that is inconsistent with the heritage character of the historic area. It introduces a contrasting and incongruous shape, colour and materials palette that interrupt the patterns of the building itself and conflict with the heritage character generally. We are satisfied that the structure is sufficiently inconsistent with the relevant policy framework that, without mitigation, consent for the structure should be declined.
- 8.22 However, we are satisfied that the proposed changes to the parapet (along the front and sides) proposed by Mr Pearson will effectively address the identified adverse effects on heritage values. We note that no part of the pergola structure appears in Mr Pearson's drawings to be higher than any part of the parapet and our expectation is that this is the outcome that the mitigation would achieve. We do not consider that repainting the pergola structure will be necessary if the parapet is raised as described by Mr Pearson. Mitigated as proposed by Mr Pearson, the building's façade will in some ways bear a stronger resemblance to the former building in our view, particularly in relation to the parapet height and side treatment of the parapet (although we acknowledge that the former building had only two and not three occupied storeys).

9 Necessity of the Pergola

- 9.1 Mr Alexander Henderson and Ms Monique O'Meley included in their written statements information describing why the success of the rooftop garden bar is critical to the operation of the *Queen of Jackson*. Ms Fletcher and Mr Sviatko did not consider the applicant had sufficiently demonstrated the necessity for the pergola to the success of the business. However, whilst they questioned the information presented by the applicant, they did not themselves provide any information that refuted the applicant's depiction of 'need' for the pergola.
- 9.2 The question of necessity is relevant because Rule 14F2.2.1 ((i), within the chapter concerned with heritage buildings and structures, states that one of the matters over which the Council has restricted its discretion is '*the nature and extent of the works and the necessity of those works*'. We established, through questioning of Mr Leary and Ms Clarke, that necessity is not constrained to considerations of necessity to achieve heritage outcomes. Necessity, in this context, has a potentially wide meaning and can include necessity to allow reasonable use of a building.

Finding: Necessity of the Pergola

- 9.3 We have no basis for concluding that the pergola structure is not needed to allow the business to optimise use of the rooftop. The rule 14F2.2.1 (i) discretionary matter does not set any threshold of necessity that an applicant must reach. For example, it does not require the applicant to prove beyond reasonable doubt that the pergola is so necessary that, without it, the business would fail. It is a discretionary matter that we

are free to consider if it is relevant in this particular case. It is relevant only to the extent of understanding how the pergola came about. It is not a matter that has been determinative in our decision.

10 Precedent

- 10.1 Mr Anastasiou noted the well-established point that there can be no issue of 'precedent' where an application is for a discretionary activity (in this case a restricted discretionary activity). All such applications must be considered on their merits and a consent authority has discretion to grant or refuse consent.
- 10.2 There was some confusion in the submissions and evidence of submitters between the notion of cumulative adverse effects and their fear that a grant of consent may provide a precedent encouraging other developers to propose similar built features. Ms Dangerfield and Mr Sviatko expressed the view that Jackson Street is not currently at any kind of 'tipping point' in terms of the adverse effects associated with the pergola structure. In any event, they agreed that the mitigation proposed by Mr Pearson would address the adverse heritage impacts.

Finding: Precedent

- 10.3 The application is for a restricted discretionary activity consent. That is, it is broadly provided for by the District Plan and is not an activity that inherently challenges the integrity of the Plan. The evidence confirms that the circumstances that gave rise to this application are specific to this site. There is, in our view, no issue of precedent or potential erosion of the integrity of the District Plan. A grant of consent will not impair the ability of the Council to administer the provisions of the District Plan as intended by the Plan's policy framework. Our conclusion is that, mitigated as proposed, this application is not inconsistent with that framework, including the objectives and policies earlier identified.

11 Noise

- 11.1 The potential for noise disturbance arising from use of the rooftop garden bar was a concern raised by some submitters (although not particularly pursued by submitters at the hearing). As earlier noted, the *use* of the rooftop space as a restaurant and bar is permitted by the District Plan and noise is controlled by the rules for this activity area. We note that the applicant has, on a 'belts and braces' basis, also sought consent for the use of the pergola structure in association with the rooftop bar and restaurant activity. We do not consider that consent is strictly necessary but, for completeness, refer to the structure and its use in Part 13 of this decision.
- 11.2 Ms Clarke referred to historical noise complaints about activities at this site but it was not clear why that information was included. Ms Clarke stated in her evidence that no consent is required for the use of space for the activities currently undertaken. If there are issues of noise in the future, those must be addressed in the usual manner by inspection and verification and, if necessary, enforcement.

12 Overall Conclusion

- 12.1 Our conclusion is that, without mitigation, the pergola structure does not give effect to and is inconsistent with the clear policy intention for the *Jackson Street Historic Area*. However, the applicant has proposed a means of addressing the adverse heritage impacts identified by the submitters and experts. Mitigated as proposed, any residual adverse effects on heritage character will in our view be less than minor. The heritage values of the *Jackson Street Historic Area* will be protected from inappropriate development. On that basis, the building work will align with the policy intention for the *Jackson Street Historic Area*. We acknowledge the positive benefits that retention of the pergola structure will have for the *Queen of Jackson* business, for its clientele and for the community by creating employment and by its charitable activities.
- 12.2 We are satisfied that the mitigation proposed is necessary to ensure that appropriate protection is given to the heritage character and values of this heritage area to ensure that the wider community can continue to also provide for their social and cultural wellbeing. We note that the mitigation work was volunteered by the applicant in any event.
- 12.3 We are satisfied that a grant of consent, subject to the condition we propose, represents a more efficient use of resources than would a refusal of consent.
- 12.4 A grant of consent, subject to a condition requiring the mitigation proposed by Mr Pearson, is consistent with the sustainable management purpose of the Act.

13 Grant of Consent

- 13.1 In accordance with the authority delegated by the Hutt City Council and pursuant to sections 104C and 108 of the Resource Management Act 1991, we **grant consent** to the application by JSSC Limited authorising the existing louvered pergola structure on the rooftop of number 181 Jackson Street and the use of that structure in association with the restaurant and bar activities on that part of the site, subject to the following condition:

That the consent holder shall within 6 months of the grant of this consent implement the changes to the parapet depicted in Annexure 'E' attached to the evidence of Mr David Pearson to the hearing (reference A502 dated 15 March 2016). Those changes shall be implemented to ensure that no part of the pergola structure is higher than any part of the finished parapet.

- 13.2 Our reasons for granting consent are detailed in Parts 8 to 12 of this decision and can be summarised in the following terms:
- (a) The existing pergola introduces incongruent design features which are incompatible with the heritage character of the *Jackson Street Historic Area* and is an inappropriate form of development that adversely affects the heritage character and values of the *Jackson Street Historic Area* in a manner inconsistent with the clear policy intention for that area;
 - (b) Although the existing pergola structure introduces materially adverse visual effects on the heritage character of the *Jackson Street Historic Area*, the applicant has proposed mitigation measures that will overcome those adverse effects;

- (c) Implementation of the mitigation measures proposed by the applicant is necessary to protect the heritage character and values of the *Jackson Street Historic Area* from inappropriate development;
- (d) Subject to implementation of the mitigation measures proposed by the applicant, a grant of consent is consistent with the sustainable management purpose of the Act.



Christine Foster
(Independent Commissioner)



Councillor Campbell Barry

12th April 2016

ATTACHMENT 1

**LIST OF PERSONS WHO ATTENDED AND
PRESENTED SUBMISSIONS OR EVIDENCE TO
THE HEARING****For the Applicant:**

- Mr Con Anastasiou, Legal Counsel
- Mr Alexander Henderson, co-shareholder and sole Director of JSSC Limited (the applicant company)
- Ms Monique O'Meley, co-shareholder (with Alexander Henderson) of JSSC Limited
- Mr Philip Henderson, agent responsible for obtaining the certificate of acceptance for the pergola structure under s. 99 of the Building Act 2004
- Mr David Pearson, consultant Architect specialising in heritage architecture
- Mr Ian Leary, consultant Land Surveyor and Resource Management Planner and Director of Spencer Holmes Ltd

Submitters:

- Ms Claire Craig, General Manager of Heritage New Zealand's Central Region
- Ms Alison Dangerfield, Heritage Advisor for Architecture - Heritage New Zealand
- Ms Ruth Fletcher
- Mr Graeme Lyon
- Mr Warwick Johnston
- Mr Frank Sviatko on behalf of the Petone Planning Action Group and member of that Group's Committee

For Hutt City Council:

- Ms Sarah Clarke, Senior Resource Consents Planner
- Ms Chessa Stevens, consultant Heritage Architect
- Mr Tim Johnstone, Team Leader Resource Consents