

BEFORE THE ENVIRONMENT COURT

Decision No: [2017] NZEnvC 116

IN THE MATTER

of an appeal under clauses 14 and
29(6) of Schedule 1 to the Resource
Management Act 1991

BETWEEN

THE ARCHITECTURAL CENTRE
(ENV-2016-WLG-000024)
Appellant

AND

WELLINGTON CITY COUNCIL
Respondent

AND

VICTORIA UNIVERSITY OF
WELLINGTON
Requestor

Court: Environment Judge C J Thompson
Environment Commissioner J R Mills
Deputy Environment Commissioner D A Kernohan

Hearing: at Wellington 12 - 14 June 2017. Site visit 14 June 2017

Counsel: P J Milne and J B Gordon for The Architectural Centre
M J Slyfield for Victoria University of Wellington
S F Quinn and M E Yardley for the Wellington City Council

DECISION OF THE COURT

Decision issued: 9 August 2017

The appeal is allowed – see para [65]

Costs are reserved



Introduction

[1] This is an appeal against a decision of the Wellington City Council, made in May 2016, in which it accepted the recommendation of a Council Hearing Panel which in late 2015 had heard a request by the Victoria University of Wellington for a change to the Wellington City District Plan under Clause 21 of the First Schedule to the Act.

[2] In brief, the proposed Plan Change would rezone the land at 320 The Terrace from *Inner Residential* to *Institutional Precinct* and would delist the Gordon Wilson Flats, situated on that land, from the District Plan Heritage List. That would facilitate (but not directly authorise – a resource consent would be required) the University's proposal to demolish the building. There would also be a number of consequential amendments to the rules and standards relating to the site. The request for the Plan Change had been accepted by the Council under Clause 25(2)(b) of the Schedule and was publicly notified on 27 August 2015 as Plan Change 81(PC81) for submissions.

[3] This appeal focuses on the delisting of the building – the rezoning was not a real issue, and the consequential amendments were not directly addressed.

[4] The site is on the northwestern side of The Terrace, between Ghuznee Street and MacDonald Crescent. It has an area of 7,139m² and contains the Gordon Wilson Flats. The nearby McLean Flats building is on a now subdivided lot on the southern boundary of 320 The Terrace. The McLean Flats building, while also presently vacated because of structural issues, was not part of the sale to the University and is not involved in the proposed Plan Change.

[5] The site has two *platforms* on its lower part, near to The Terrace, and then rises steeply to the boundary of the University's Kelburn campus. The 11 storied Gordon Wilson Flats (GWF) building is on the rearmost of the two platforms and has the steep and heavily vegetated escarpment as its backdrop, when viewed from The Terrace.



[6] The campus has the *Institutional Precinct* zoning but the surrounding sites on The Terrace are zoned *Inner Residential* under the Plan. That land has a mix of standalone residential buildings, terrace houses and larger accommodation blocks.

[7] Very briefly, the history of the Gordon Wilson Flats is that they were completed in 1959 and contain 87 residential units, being 12 bedsit units on the ground floor (together with storage areas) and 75 *maisonette* style two-bedroom apartments on the upper floors. The roof level contains communal laundry washing and drying facilities. The property was built by the Crown and managed by Housing New Zealand Corporation and its predecessor organisations until the site was purchased by the University in 2014. Mr Gordon Wilson, the then Government Architect, and under whose management the building had been designed, died shortly before construction was complete and the building was named in memory of him.

[8] What prompted the sale to the University, and the debate about the building since, is that in 2011 engineering assessments identified structural issues with the facade of the building, indicating that the concrete in the façade was failing (*spalling*) and was a danger in earthquakes or even high winds because pieces of it could break off and fall. Those issues resulted in the building being declared *Earthquake Prone* and were so significant that they required the hurried and complete evacuation of the property in May 2012. Since then it has been unoccupied. Questions have since been raised about the integrity of its foundation piles, but there is no observed evidence of failure – in fact an inspection for the University by engineers from Beca Ltd observed no signs of subsidence or any other indication of foundation failure. Probably predictably, post-evacuation the building was the subject of vandalism and interference. The lower floors are now boarded-up and there is security fencing around the building, designed to prevent any access to it, as well as to keep people away from the danger of falling pieces of the façade.

The parties' general positions

[9] The Architectural Centre opposes PC81 seeing it, no doubt correctly, as but the first step to demolition of the building. There is some hint of criticism of the University in electing the plan change *route*, rather than an application for a resource consent to demolish the building, but there is nothing decisive in that. As the now (long-term) owner of the land, it is perfectly logical for it to wish to have the



same zoning rules for the whole of the Kelburn campus and combining that with delisting the GWF makes perfect sense from its point of view.

[10] The Centre takes the view that, while acknowledging the present condition of the building to be poor, there is nothing that cannot be repaired and reinstated, leaving a building that would be fit for purpose as housing for students, or staff, or even convertible to (perhaps) academic purposes. Alternatively, it also suggests that the University could enter into a partnership with a housing provider such as the Council or Housing New Zealand to return the building to public rental housing. As to the cost of so doing, compared to the cost of building an equivalent area of new space, the Centre takes the view that the heritage values of the Flats justify any imbalance that there might be. Those values are that the building is:

- one of only two large *maisonette* style public housing examples in the country, (the other being the contemporaneously, and very similarly, designed Upper Greys Avenue flats in central Auckland. That building has not had any reported signs of the spalling which has affected the subject building, and the flats are still occupied. It remains in the ownership of Housing New Zealand);
- a strong example of the *Modernist* or *Brutalist* style of building taken from European styles;
- a memorial to Gordon Wilson who had a strong influence on many New Zealand buildings and styles in his time as a senior architect in the public sector.

[11] The University wishes to demolish the building, taking the view that there is no viable use for it as accommodation or academic space. The building does not provide, and cannot be adapted to provide, the type of student accommodation in demand, which is fully-catered, dormitory style accommodation for first-year students. The University does not see it as its function to provide accommodation for more senior students, and still less so for staff. Nor does it have any interest in being a partner with any other organisation in providing rental accommodation for people who have no connection at all with the University. It regards the 2014 purchase as the acquisition of a strategic land asset that, longer term, will give it the opportunity to redevelop the site as part of its campus and so cater for the anticipated growth of the organisation as a whole. There is no definite time-line for that expansion. In the meantime, post-demolition, it would tidy the presently very



unkempt site and use it to provide pedestrian access from The Terrace directly to the existing campus.

[12] The City Council is content with its decision to proceed with the plan change, and supports it. In its role as one of the two significant providers of public housing in the City it regards the future use of the existing building for social or other types of rental housing as simply not viable from a cost/benefit point of view, given the likely costs of rehabilitation of the structure compared to the cost of building the equivalent area of new housing. It also has the clear opinion, as does Housing New Zealand Corporation, that such large blocks, with so many units and tenants in such close quarters, are socially undesirable and very difficult to manage.

[13] While not a party to the proceeding, the opinion of Heritage New Zealand Pouhere Taonga is obviously of some significance, given the issues. It did advise the Council of its position at the time of the first hearing, and there is nothing to suggest its view has altered since. It confirmed that the building is not entered on the *New Zealand Heritage List/Rarangi Korero*. That said, it notes that the building does have ...*a level of heritage value*, being noted for its *Modernist influences* and has *moderate significance* for aesthetic, architectural, technological and townscape values. Overall though, Heritage New Zealand Pouhere Taonga raised ...*no matters with its potential demolition*. In short, it took a neutral stance.

The Wellington City District Plan

[14] Because no application has been made to the Council to allow the residential use of the property to be resumed within two years of that use ceasing, any *existing use* rights that may have prevailed under s10 of the RMA have been lost. That means that any resumption of residential use of the building would require a resource consent as a *non-complying* activity, because it breaches a number of the parameters set by the *Inner Residential* zoning of the site. In particular, there is a substantial shortfall (78) in the number of carparks (assuming that the number of residential units remained the same); and a shortfall of some 3,000m² in the required area of ground-level usable open space. Mr Peter Coop, the consultant planner for the University, also notes that the scale, design, external appearance and siting of the building is not consistent with the District Plan and its Residential Design Guide. We do not understand there to be any substantive disagreement with those views. The University takes the view that the resource consent process



required for any resumption of accommodation in the building presents a considerable risk of an adverse result.

[15] The Heritage provisions of the District Plan are in Chapters 20 and 21 - which were prepared under the then operative Regional Policy Statement - in force from 1995 to 2013. Those provisions are set out in full at Appendix A, but it may be of assistance to note here the terms of the overall objective in relation to heritage. It is Objective 20.2.1:

To recognise the City's historic heritage and protect it from inappropriate subdivision use and development.

It is to immediately be noted that the *protection* requirement is not absolute – the significant word in disputes of this kind is ...*inappropriate*. There is too an issue about the timing of the coming into force of the various plan provisions, and we shall return to those points shortly.

[16] As regards a proposal to demolish a listed Heritage building, Policy 20.2.1.2 of the District Plan seeks to discourage demolition unless ...*there is no reasonable alternative*.

[17] The demolition of any listed Heritage building is a *restricted discretionary* activity with Rule 21A.2.1 providing that ...*in determining whether to grant consent and what conditions, if any, to impose the Council will have regard to but will not be restricted to the following criteria...* and then there is a list of 20 assessment criteria.

[18] Mr Coop expresses the view that the most relevant criteria for building demolition in the current situation are:

21A.2.1.14 Whether there is any change in circumstances that has resulted in a reduction of the building's heritage significance since the building was identified in the plan.

21A.2.1.21 Whether adaptive reuse of a listed building or object will enable the owners, occupiers or users of it to make reasonable and economic use of it.

[19] The proposed Plan Change would address the issue, according to Mr Coop, by assessing the present day heritage values of the Gordon Wilson Flats and the practicality, costs, risks and benefits of retaining the external design and appearance of the building and, secondly, giving consideration to the alternative



value to the community of enabling sustainable management of an expanded university campus.

The Proposed Plan Changes

[20] In summary, what is proposed under PC 81 is to remove the Gordon Wilson Flats from the Heritage List in Chapter 21 of the District Plan and to remove the Heritage notation 299 from the District Plan Map 16. Secondly, the zoning of 320 The Terrace will become *Institutional Precinct*, and so be consistent with the zoning of the University's Kelburn campus. Thirdly, it will include additional site-specific rules and standards to avoid, remedy or appropriately mitigate potential adverse effects.

[21] As approved by the Council the site-specific rules and standards will cover three principal matters:

First, there will be specific building standards to ensure that future university buildings will have an *acceptable relationship* with the streetscape of The Terrace and the wider area from which it will be possible to view the site:

- (a) to ensure that the amenity of residential neighbours will be appropriately provided for; and
- (b) the reasonable use of the site for the University is enabled.

Secondly, Rule 9.2.3 will enable the Council to control the (temporary) adverse effects of the demolition of the Flats building.

Thirdly, Rule 9.3.2 will enable Council control of the design, external appearance, siting, landscaping, vehicle parking, servicing and site access, of any future site development, which will be assessed using the *Victoria University Design Guide*, which has been developed to provide guidance for the use of the campus area for University purposes.

The regional policy statement

[22] It is plain, from s75(3) RMA, that a district plan must ...*give effect to...* a regional policy statement RPS). The relevant provisions of the RPS are set out in full at Appendix B.

[23] Objective 3 of the 1995-2013 Regional Policy Statement and associated Policies 5 and 6 were limited to buildings of *Regional Heritage Significance* which were defined as those contained in Category 1 entries in the Register of Historic



Places prepared by (what is now) Heritage New Zealand Pouhere Taonga. Given that the Flats never were in that category, those provisions were not applicable.

[24] In *King Salmon*¹ the Supreme Court emphasised the need to pay careful attention to the precise wording used in relevant higher-order plans. It said:

When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. ...It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[25] The Appellant submits that *King Salmon* is authority that considerable weight should be given to operative (or well advanced) plan provisions. That is not in doubt. However, it also submits that, in accordance with *King Salmon*, resort should not be had to Part 2 unless the exceptions stated in *King Salmon* apply. It submits the obiter comments in the decision provide very strong guidance that decision-makers should not allow the general words in s5 to overrule policy statement and plan provisions which give effect to the s6 directions.

[26] The Appellant argues that the Court should give full weight to both RPS Policy 21 and District Plan Policy 20.2.1.1. In particular, it should not apply criteria not found in either document. It argues that when the Council considers plan changes to add items to the list (or to remove items), it must apply its own criteria and Policy 21 of the RPS. The addition of criteria is a matter of policy and wider public interest which should be implemented by way of plan change or review. In the Appellant's view, Policy 21 RPS has primacy.

[27] In response, the University acknowledges that this is a plan change, and so the District Plan criterion and Policy (Policy 20.2.1.2 and criterion 21A.2.1.21) do not apply in the same direct way that they would apply to a consent application under Rule 21A.2.1. However, as an expression of the community's view on what constitutes "appropriate" demolition, they are more than just useful – they are an indispensable guide. The University therefore submits that it is relevant to the assessment of PC81 to consider whether there are reasonable alternatives to the demolition of GWF.



Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] 1 NZLR 593 (SC) at [129].

[28] The University also argues that it is Policy 46 which applies. The obligations to identify significant heritage in Policy 21 and the consequent obligation to protect significant heritage in Policy 22 are not triggered. The University argues that this is the only outcome supported by a careful reading of the provisions. In any case, if Policy 21 must be given effect to, then PC81 does that. Notably, Policy 21 allows that “additional criteria” may be used. For various reasons, the University argues that the functional utility of the GWF as well as financial and economic considerations may be taken into account.

[29] The RPS has interim and permanent heritage provisions. The current RPS containing policies 21, 22 and 46 became operative on 24 April 2013 and the District Plan has not, since then, been changed to list significant historic heritage items using the criteria in Policy 21. Policy 46 (see Appendix B) has effect until Policies 21 and 22 are given effect in a District Plan, which would require an express plan change. The primary regional provision would seem to be Policy 46, which has interim effect until the district plan is changed. Policy 46 contains its own criteria but, in the explanation paragraph contains the note that:

In determining whether an activity may affect places, sites and areas with historic heritage value the criteria in Policy 21 should be used.

The Policy 21 criteria come under the familiar headings of historic values, physical values and social values. The *explanation* paragraph for Policy 21 contains the note:

They [ie the criteria] provide the basis for describing and evaluating historic heritage, including the physical, historic, social and other values that people attach to historic heritage. Wellington Regional Council, district and city Councils are required to assess a place, site or area against all the criteria, *but may use additional criteria*.

[30] With respect to *King Salmon’s* comments on Part 2, the University maintains that the degree of prescription in the heritage policies of the RPS is distinguishable from the degree of prescription found in the relevant NZCPS policies. If the Court disagrees with that contention the University submits that Part 2 is still relevant as the relevant heritage provisions of the District Plan are incomplete.

[31] The members of the Court have come to differing views as to the outcome of this appeal, and each of those is explained below. It will follow that there are differing views about the planning documents and their provisions.



Section 290A – the first instance decision

[32] The Council adopted the recommendation of an appointed Panel of Commissioners to agree to the University's request for the Plan Change. Section 290A requires the Court, on appeal, to ...*have regard to...* that decision. That does not create an assumption that the decision was correct, or impose an onus on an appellant to demonstrate that it was wrong. It does mean that in considering the appeal the Court must give that decision open-minded attention and thought.

Majority view – Commissioner J R Mills and Deputy Commissioner D A Kernohan

[33] In his Submissions in Reply, Mr Slyfield stated "The University endorses Commissioner Mills' observation that there are two fundamental judgements for the Court to make:

- (a) A judgement on the heritage value of the Gordon Wilson Flats, and
- (b) A judgement on the practicalities, difficulties or costs of refurbishment (i.e. are there any reasonable alternatives to demolition?)."

At paragraph 14 he notes further "the appropriateness of the effects of demolition on the heritage value of the Building must be assessed at the first step".

[34] At paragraph 23, Mr Slyfield adds "Further, alternatives are not to be assessed from the perspective of the current owner, or the interests of a particular party. All reasonable alternatives must be taken into account."

[35] We shall focus our initial attention on the heritage value of the GWF, for if we find the building should not be de-listed, then that portion of the requested Plan Change fails and a resource consent will need to be applied for under the current zoning of the District Plan and the rules on listed heritage buildings. However, the Court notes as a preliminary view, that the building's use as social housing at least is feasible albeit at a cost. Affecting this early view, we note the range of Mr Sutherland's cost estimates are subject to estimating tolerances of +/- 20% (as reported in Croskery EIC 117) and the estimates of seismic performance of different parts of the building range from 80%NBS to less than 34%NBS (Wood EIC paras 24 – 28). We also acknowledge the reported potential for financial loss over time in rehabilitating the building to social housing or other use.

[36] The Court heard a number of submissions from heritage experts.



[37] Ms Rickard as WCC's heritage expert witness, explained the Council's processes in listing buildings. She noted the Heritage List had been first prepared in 1995 and the District Plan had become operational in 2000. She reported (EIC para 8), "All buildings on the Heritage List have recently (2012 – 2015) been researched and reviewed to a high standard, including the GWF".

[38] At her EIC para 9 Ms Rickard stated "The GWF is no longer in use as social housing and it is unlikely that it will be in the near future. Although the majority of the external features remain, the exterior is in poor condition. She noted it is the exterior of the building that is listed in the District Plan and that "Taking into account the loss of the original function of the building, significant exterior damage, seismic issues and severing of community affiliations, I consider the building has diminished heritage values". She concluded the building to be of **moderate** heritage significance.

[39] Mr Wild (heritage expert for VUW) stated at para 19 of his rebuttal, "I accept that 'condition' is not a determinant of historic heritage value". Also in his EIC at para 16 he said "The Gordon Wilson Flats holds considerable historic and social significance" and at para 19 acknowledged that the GWF was planned and constructed conjointly with the Grays Avenue Flats in Auckland. At his para 32 he noted the Regional Policy Statement's Explanation uses the qualifier "significant" which in our view may be aligned with his use of the word 'considerable' in his assessment.

[40] However, in disputing the significance of naming the GWF for Gordon Wilson as support for its place on the Heritage List, at para 11 of his rebuttal Mr Wild's statement was unequivocal, "I am unconvinced that a poorly constructed, falling apart, and red-stickered building is an "important and fitting memorial" to one of our most important architects as Dr Schrader states".

[41] At his EIC para 41, Mr Wild noted that "the functional values of the building are nil because the building is unoccupied". This is part of Mr Wild's argument from his EIC para 40 that in accordance with conservation best practice "a place must be assessed as found." However he does not cite authority for this best practice approach and there is an implication that demolition by neglect can prevail. Mr Wild's statement that heritage values can alter over time is valid but 'condition' and



'functionality' even if acceptable as assessment criteria for assessing a building's heritage value are but two of the criteria to be considered, if at all. In his rebuttal evidence (para 27) Mr Wild affirms that in assessing the GWF he rates its "...overall significance as moderate."

[42] Mr Bowman (heritage expert for the Architectural Centre) was unequivocal too. At his EIC para 22 he stated the GWF is of "high national significance as a rare example of high-rise maisonette social housing in New Zealand".

[43] As an Appendix, Mr Bowman provided a copy of a draft "Heritage Assessment" report on the GWF prepared by Barbara Fill, heritage consultant, and Russell Murray, conservation architect, for Housing New Zealand in 2010. This was apparently obtained under the Official Information Act. The Fill/Murray report noted:

- The design for the flats was no doubt inspired by Le Corbusier's *Unite d'Habitation* in Marseille constructed between 1947 and 1952 in particular the adoption of the maisonette plan;
- The GWF are the only ones of this design and scale in Wellington. The only other similar building in New Zealand is the Upper Grays Avenue Flats in Auckland;
- The GWF are a rare example of government built multi storey maisonette type flats ;
- The GWF hold a very high level of authenticity with very few changes since they were completed in 1959;
- The GWF have national significance for their design and construction methods and their social values;
- In 1994 work was done on the fire protection system in the flats that included the installation of fire alarms and sprinklers, fire sealing of penetrations, installing of fire doors, hatches, electrical switchboard rooms and duct, and the enclosing of the bottoms of the balconies ie the exterior walkways clad with Hardieboard.

Fill and Murray concluded by recommending to Housing NZ they place a heritage covenant over the property.

[44] Mr Bowman's conclusions were similar. As with Fill and Murray, he noted:



- The stylistic influences of in particular Le Corbusier and the London County Council especially the use of the maisonette as apartment module;
- The structural innovation of the re-inforced structural frame and possibly the foundation system;
- The quality of finishes and fitting with the use of native timbers.

[45] Dr McCarthy, an architectural historian and currently President of the Architectural Centre, presented evidence primarily on the provenance of the GWF in terms of its place in the history of modern architecture internationally and the use of maisonettes in house design. She noted that while state housing as such was a promotion of the Labour party in the 1930s and the Dixon Street Flats of 1947 were built under a Labour government, she avers that the move to a maisonette design under a National government may have had a specific political function to differentiate National state housing from Labour State housing. More likely, is the recorded close association between NZ architects and Europe and the London County Council that she cites.

[46] Dr Schrader, a social historian, outlined the philosophy behind post-war social housing and the then perceived benefits of high rise inner city living. He averred that until it was closed down five years ago it was a relatively successful social housing unit. We note its sibling at Gray's Avenue apparently without some of the constructional problems of the GWF, remains in use under the ownership of Housing New Zealand.

[47] The Architectural Centre heritage witnesses (Bowman, Fill, Murray, Kelly, McCarthy and Schrader) all affirmed in as many words the view that the GWF is of "high national significance as a rare example of high-rise maisonette social housing in New Zealand".

[48] In particular, Dr McCarthy's evidence of the historic progression (philosophically but also through personal professional connections) from Unite d'Habitation in Marseille to the work of the London County Council to the GWF was compelling.



[49] In his affidavit Mr Kelly stated "My view has now changed in the light of further information. If there was a two tier ranking, I would now rank the building in the exceptional category". He cited further study of the Modern Movement in architecture and more information about the building and its history coming to light as reasons for him to update his assessment.

[50] We are persuaded by Mr Kelly's change of heart and by the evidence of Mr Bowman and Dr McCarthy as justifying the listing of the GWF.

[51] There can be no doubt the Plan Change request has promoted greater interest in the provenance, history and status of the GWF as never before. In our view this has provided information that raises the heritage significance architecturally, socially and technically at least of the GWF. Rather than diminishing the building's heritage value to a point where it might justifiably be de-listed it has in fact strengthened the reasons for it to be listed.

[52] We have not commented on the value of the historic information about seismic design and monitoring or the naming of the building for Gordon Wilson. We acknowledge both as interesting facts but not decisive to our deliberations.

[53] As discussed above there are two fundamental judgements for the Court to make:

- (a) A judgement on the heritage value of the Gordon Wilson Flats,
and
- (b) A judgement on the practicalities, difficulties or costs of refurbishment
(i.e. are there any reasonable alternatives to demolition?)."

[54] It is our view that the GWF has significant heritage value and therefore should not be delisted. The answer to the second question is one that will be subject to close scrutiny in the future should there be a resource consent application to de-list GWF. We note the conflicting evidence on the cost of strengthening and refurbishing and in particular the Opus Report² introduced into evidence towards the end of the hearing.



[55] It seems to us that that in a time of apparent scarcity of social housing in Wellington and the increase in the level of homelessness reported in the media that great care should be taken before demolition. The fact that the proposed use of the site (post demolition) is the creation of a park/greenspace and a strategic land bank asset by Victoria University for some yet unidentified Victoria University purpose further strengthens our view.

Minority view – Judge C J Thompson

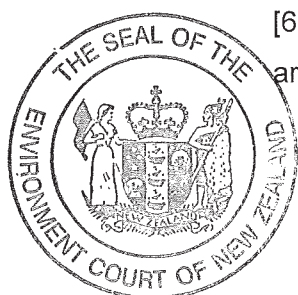
[56] Drawing the various threads together, as I see things what we have as the subject of this litigation is a building of *moderate* heritage value - ranked as such by the Council in its District Plan listing, and not by Heritage New Zealand Pouhere Taonga (which has not listed the building at all and has not sought to express any opinion on the issues). That same Council is supportive of the Plan Change application, knowing of course that the demolition of the building would be at least somewhat facilitated (but not authorised) by delisting it.

[57] The building is unusable for any purpose in its present state. Its external structure is unsafe, and led to its hurried evacuation five years ago. Internally, quite apart from its aesthetics and poor condition, its layout is, according to the evidence from people in a position to know, not suited to current needs and preferences.

[58] The building's owner, the University, has no wish to use it, whether for accommodation or academic purposes, because it does not meet the University's accommodation demand and cannot, at any reasonable cost, be adapted to do so. Nor is it adaptable for academic purposes – e.g. for research, teaching or study.

[59] The Council and Housing New Zealand are the only two plausible potential repairers, refurbishers, and users of the building for rental/social housing. Neither want anything to do with it - it simply does not fit their current needs. They both consider that the money required to be spent to bring it up to any usable state (if indeed that is possible) would be much better spent on the sort of housing that is currently required by their clientele.

[60] Nor is the possibility (raised by the appellant) of some sort of 'partnership' or arrangement between the University and a third party to convert/refurbish the



building and sell the apartments for privately owned accommodation a plausible proposition, for at least two fundamental reasons. The first is that the evidence put before us makes it clear that the likely cost of conversion and refurbishment to an acceptable design and standard, compared to the likely sale prices for the end-product, would make such a proposition a financial failure. Secondly, the building's owner, the University, bought the site with the intention of it (ie without the building) being incorporated into the adjoining Kelburn campus. Selling the building, whether as individual apartments, or (perhaps) as a conversion proposition to a developer, would obviously completely defeat that purpose.

[61] So, the ultimate question has to be whether the *moderate* heritage value attributed to the building in the District Plan is sufficient to require its retention, by an organisation or organisations who cannot presently use it, and see no feasible future use for it whether in its present form or in any presently conceivable adaptive form, when there is a perfectly sensible and productive alternative use for its site.

[62] The answer, very plainly in my view, is *No*. Readapted in some way, the building might be a *nice to have* on one narrow view of things, but the cost of doing that, and the lack of foreseeable utility mean, on any realistic evaluation, that the opportunity cost completely outweighs any benefit.

[63] In my view the most relevant plan criteria to be considered in deciding upon possible demolition of a listed building in the District Plan – ie in particular 21A.2.1.21 (see para [18] above) is met by an overwhelming margin. The evidence very strongly points to the owner of the building being unable to make any (and I emphasise *any*) reasonable and economic use of it. Further, I am unable to imagine what further relevant evidence might be brought to light in a hearing about a demolition resource consent that is not available to a decision maker now.

[64] For those reasons, I agree with the first instance decision and I would decline the appeal. I accept that the other members of the Court hold the opposite view and I must respect that.

Result

[65] For the reasons expressed by the majority of the Court, the appeal is allowed, at least to the extent that the delisting of the building should not proceed. It may be



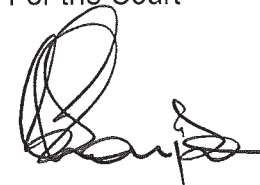
that the plan change, to the extent of the change of zoning, might be allowed. We would be grateful if the parties could express their views on that point within 15 working days from the issuing of this decision.

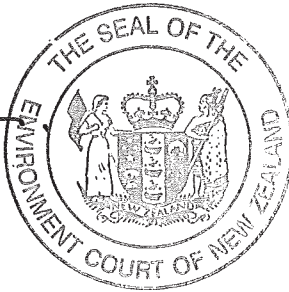
Costs

[66] The issue of costs is reserved. Any application should be lodged and served within 15 working days of the finalising of the terms of the decision as per para [65], and any response should be lodged and served within a further 10 days.

Dated at Wellington the 9th day of August 2017

For the Court


C J Thompson
Environment Judge



Appendix A – District Plan provisions

20.2 Heritage Objectives and Policies

OBJECTIVE

20.2.1 To recognise the City's historic heritage and protect it from inappropriate subdivision use and development

POLICIES

To achieve this objective, Council will:

20.2.1.1 Identify, record and list the city's significant historic heritage.

METHODS

- Maintain and update the District Plan heritage schedule.
- Application of non-statutory Council policy, such as the Built Heritage Policy (2005)
- Maintaining and updating the Council's Heritage Inventory.

The listing of buildings, objects and areas of heritage value in the District Plan provides the primary means of identifying places of heritage value. Council is undertaking work on identifying significant archaeological sites. Council maintains the Built Heritage Inventory, which provides information on the heritage significance of buildings, objects and areas that are listed in the District Plan. The Built Heritage Policy 2005 includes a range of incentives to property owners to encourage listing in the District Plan.

20.2.1.2 To discourage demolition, partial demolition and relocation of listed buildings and objects while:

- acknowledging that the demolition or relocation of some parts of buildings and objects may be appropriate to provide for modifications that will result in no more than an insignificant loss of heritage values; and
- giving consideration to total demolition or relocation only where the Council is convinced that there is no reasonable alternative to total demolition or relocation.

METHODS

- Rules
- Heritage Orders

The demolition, destruction or relocation of listed buildings or objects (in whole or in part) requires a resource consent to ensure that all the effects of any application can be assessed and considered against the objectives and policies of the Plan and Part 2 of the Act.



The Council's overriding desire is to retain listed buildings or objects in their entirety, but it accepts that to ensure ongoing use some demolition or destruction of the existing structure may be required to allow modifications. Resulting modifications will be determined with reference to Policy 20.2.1.3.

Where the total demolition, destruction or relocation of a listed building or object is proposed the Council will need to be convinced that there is no reasonable alternative option to losing the listed item.

As the purpose of the rules giving effect to Policy 20.2.1.2 is to assess the effects on historic heritage, the Discretionary (Restricted) activity classification has been used. This is consistent with the structure of the District Plan in that the Heritage chapter is focused on the assessment of effects on historic heritage and the other area-based chapters of the Plan still apply to all other elements of land use.

In order to avoid the argument that the activity classification of Discretionary (Restricted) creates a perception or signal that the Plan has created a 'lesser hurdle' for applications than might have otherwise applied if a fully Discretionary activity classification were used, it is specifically recorded that this is not the case. The classification has been selected to limit the Council's discretion to heritage matters only, but in no way to diminish the significance of the assessment of heritage issues. Each application must meet the requirements of the RMA to obtain a resource consent.

The Discretionary (Restricted) activity classification enables the use of a non-notification clause. Such a clause has been used for modifications under rules 21A.2.1 and 21A.2.3 due to the scale of the proposals provided for under that rule. For all other applications, no such clause is provided and the statutory test for notification will apply.

The environmental result will be the retention of listed items that constitute a significant proportion of Wellington's heritage.

20.2.1.3 Promote the conservation and sustainable use of listed buildings and objects while ensuring that any modification avoids, remedies or mitigates, effects on heritage values of the listed buildings or objects and where relevant:

- ensures that modifications to the main elevations are minimised, or if possible are unaltered;
- any modifications respect the scale of the building or object; and
- any modifications maintain the relationship of the building or object with its setting.



METHODS

- Rules
- Application of non-statutory Council policy, such as the Built Heritage Policy (2005)
- Other mechanisms (promotion, grants and advice)

The Council recognises that to ensure the ongoing use of listed buildings some additions and alterations may be required. In some circumstances however, changes to a listed heritage item may be inappropriate therefore, additions and alterations to listed heritage buildings require a resource consent to ensure that work affecting the listed building can be fully evaluated and assessed to ensure the heritage values of the item are maintained.

As the purpose of the rules giving effect to Policy 20.2.1.3 is to assess the effects on historic heritage, the Discretionary (Restricted) activity classification has been used. This is consistent with the structure of the District Plan in that the Heritage chapter is focused on the assessment of effects on historic heritage and the other area-based chapters of the Plan still apply to all other elements of land use.

In order to avoid the argument that the activity classification of Discretionary (Restricted) creates a perception or signal that the Plan has created a 'lesser hurdle' for applications than might have otherwise applied if a fully Discretionary activity classification were used, it is specifically recorded that this is not the case. The classification has been selected to limit the Council's discretion to heritage matters only, but in no way to diminish the significance of the assessment of heritage issues. Each application must meet the requirements of the RMA to obtain a resource consent.

The Discretionary (Restricted) activity classification enables the use of a non-notification clause. Such a clause has been used for modifications under rule 21A.2.1 and 21A.2.3 due to the scale of the proposals provided for under that rule. For all other applications, no such clause is provided and the statutory test for notification will apply.

The environmental result will be the retention of listed items that maintain their heritage values.

- 20.2.1.4 Protect the heritage values of listed buildings and objects by ensuring that the effects of subdivision and development on the same site as any listed building or object are avoided, remedied and mitigated.



METHODS

- Rules

The Council recognises that the protection of historic heritage in Section 6(f) of the Resource Management Act extends to the surroundings associated with the heritage items. This does not mean that all areas in the locality will be included in the definition of historic heritage. It will require an assessment of the extent to which the area that surrounds an item of heritage significance is significant for retaining and interpreting the particular heritage item.

Council has not at this stage undertaken such an assessment for all listed heritage items. Under the heritage rules, it will assess the impact of any subdivision or development of any site (as defined in the District Plan) on which there is a listed heritage building or object. In some instances Council may also have jurisdiction to consider the effects of development on a site that adjoins a site containing a heritage building or object under other area-based rules (e.g. the Central Area).

The environmental result will be the retention of listed items on a site within an appropriate setting.

- 20.2.1.5 Identify heritage areas to cover groups of buildings, structures, spaces and other features, which collectively have significant historic heritage value.
- 20.2.1.6 Protect buildings, structures, spaces and other features integral to the significance of a heritage area and allow demolition, destruction or relocation, where there are no significant effects on heritage values.
- 20.2.1.7 Ensure additions and alterations to existing buildings, any new buildings or subdivision within a heritage area avoid, remedy or mitigate the adverse effects on the heritage values of the heritage area.
- 20.2.1.8 Maintain and enhance the heritage values, qualities and character of listed heritage areas.

METHODS

- Rules
- Other mechanisms (promotion, financial incentives including grants and advice)
- Application of non-statutory Council policy such as the Built Heritage Policy (2005)



Heritage areas cover a variety of features including clusters of commercial or residential buildings or structures (some of which may be listed buildings), areas of land containing

special buildings or structures or individual items such as roads, tracks and steps. While heritage areas often contain a concentration of listed heritage items, they also contain other 'contributing buildings' that contribute to the character and coherence of the heritage area. Because of their contribution to the value of the heritage area the contributor buildings warrant the same treatment and control as listed heritage items in terms of building demolition, and the design of additions and alterations.

The construction of any new buildings and changes to existing buildings (other than repair and maintenance, internal additions and alterations, and some small scale accessory buildings) has been made a Discretionary (Restricted) activity to ensure that the proposed work can be fully assessed to maintain the character and qualities of the heritage area. New development should respect the design of its neighbours and the character of the area generally by considering scale, massing, materials, details, orientation and setbacks. New development need not attempt to mimic historical architectural styles, but should distil the essential elements of the established character so that new interpretations will be consistent with, and contribute to, the heritage area's established character.

Heritage areas also contain buildings or structures that have been identified as having no heritage value. Identified non-heritage buildings or structures will be controlled to ensure that any future modifications enhance the values of the heritage area but their demolition or relocation will be permitted.

The Council's priority is to maintain the integrity of heritage areas by avoiding the loss of the features that comprise the heritage area. For this reason the demolition or removal of buildings or other features, is a Discretionary (Restricted) activity.

As the purpose of the rules giving effect to Policies 20.2.1.6-8 is to assess the effects of historic heritage, the Discretionary (Restricted) activity classification has been used. This is consistent with the structure of the District Plan in that the Heritage chapter is focused on the assessment of effects on historic heritage and the other Area based chapters of the Plan still apply to all other elements of land use.

In order to avoid the argument that the activity classification of Discretionary (Restricted) creates a perception or signal that the Plan has created a 'lesser hurdle' for applications than might have otherwise applied if a fully Discretionary activity classification were used, it is specifically recorded that this is not the case. The classification has been selected to limit the Council's discretion to heritage matters only, but in no way to diminish the significance of the assessment of heritage issues. Each application must meet the requirements of the RMA to obtain a resource consent.



The Discretionary (Restricted) activity classification enables the use of a non-notification clause. Such a clause has been used for works under rule 21B.2.1 due to the scale of the proposals provided for under that rule. For all other applications, no such clause is provided and the statutory test for notification will apply.'

The environmental result will be heritage areas that retain their character, coherence and heritage values.

- 20.2.1.9 Ensure that signs on listed heritage buildings or objects (or sites on which they are located) or within Heritage Areas do not adversely affect heritage values and qualities and avoid unnecessary or inappropriate signage.

METHODS

- Rules
- Design Guide for Signs

The placement or erection of signs can adversely affect the heritage values. Considering signs as a Discretionary (Restricted) activity will enable the number, size, placement and means of fixing to be evaluated and assessed.

The environmental result will be heritage buildings, objects or areas that are not cluttered with signs.

- 20.2.1.10 Protect listed trees from destruction and loss, and control the effects of trimming and changes to ground levels or other activities within the dripline of trees, to only allow these activities when they maintain or enhance the heritage values recognised in the listing of trees in section 20.1.3.

Council seeks to protect listed trees from destruction or loss. The minor trimming of trees that will not affect the health or appearance is permitted. The destruction, removal or partial removal of any listed tree is a Discretionary Activity (Unrestricted). Any activity within the dripline of a listed tree is also a Discretionary Activity (Unrestricted). This is to ensure that any development proposed can be fully evaluated and assessed.

The environmental result will be the retention of listed trees.

- 20.2.1.11 Avoid, remedy or mitigate the adverse effects of development on the archaeological values of any site.

METHODS



- Archaeological Authority process under the Historic Places Act 1993 administered by the New Zealand Historic Places Trust.
- Advocacy
- Rules (where resource consent is required and Council's jurisdiction is not limited in a way that precludes consideration of archaeological values)
- Section 17 Resource Management Act 1991

Archaeological values and sites are a part of the definition of historic heritage. Their protection from inappropriate subdivision use and development under s6(f) of the Resource Management Act 1991 is in addition to the controls on archaeological sites under the Historic Places Act 1993.

The Council has not at this stage identified in sufficient detail particular archaeological sites to enable consideration of whether the District Plan should control the effects on such sites using rules (similar to that for buildings, objects and areas). This work will be undertaken in the future.

In the meantime the Council will use non-regulatory measures and existing rules where possible to control the adverse effects on archaeological sites.

The environmental result will be the protection of, or the appropriate excavation of archaeological sites.

OBJECTIVE

20.2.2 To facilitate and enable the exercise of tino rangatiratanga and kaitiakitanga by Wellington's tangata whenua and other Maori.

Maori concepts present a different view for the management of the city's natural and physical resources. In particular, kaitiakitanga is a specific concept of resource management. By acknowledging the ancestral relationships to the land and natural world, a basis can be constructed for addressing modern forms of cultural activities.

POLICIES

To achieve this objective, Council will:

20.2.2.1 Identify, define and protect sites and precincts of significance to tangata whenua and other Maori using methods acceptable to tangata whenua and other Maori.



METHODS

- Rules
- Information

Particular features of the natural and cultural landscape hold significance to tangata whenua and other Maori. The identification of specific sites (such as waahi tapu/sacred sites and waahi tupuna/ancestral sites) and precincts will ensure that this significance is respected.

The environmental result will be the retention of a significant proportion of heritage sites that are of significance to tangata whenua and other Maori.

20.2.2.2 Require that the tangata whenua be consulted where a resource consent is required for an activity within a Maori precinct.

20.2.2.3 Facilitate the development of appropriate design guidelines that ensure that tangata whenua involvement in the Maori precincts is reflected in new development.

METHODS

- Rules
- Other mechanisms

Consultation can play a significant role in addressing tangata whenua and Maori concerns. Council therefore requires consultation where issues of significance to Maori have been identified.

Applicants for resource consents will be required to consult with Roopu Kaitiaki/Management or Guardian Groups where these groups have been established in precincts. Consultation will help to ensure that the proposal meets the objectives of the precinct and that any effects are addressed.

The environmental result will be the recognition of Maori heritage by development proposals in their design or by contribution through the development process



Appendix B

Relevant Regional policy statement provisions:

Policy 21: Identifying places, sites and areas with significant historic heritage values – district and regional plans

District and regional plans shall identify places, sites and areas with significant historic heritage values that contribute to an understanding and appreciation of history and culture under one or more of the following criteria:

- (a) historic values: these relate to the history of a place and how it demonstrates important historical themes, events, people or experiences.
 - (i) themes: the place is associated with important themes in history or patterns of development.
 - (ii) events: the place has an association with an important event or events in local, regional or national history.
 - (iii) people: the place is associated with the life or works of an individual, group or organisation that has made a significant contribution to the district, region or nation.
 - (iv) social: the place is associated with everyday experiences from the past and contributes to our understanding of the culture and life of the district, region or nation.
- (b) physical values: these values relate to the physical evidence present.
 - (i) archaeological: there is potential for archaeological investigation to contribute new or important information about the human history of the district, region or nation.
 - (ii) architectural: the place is notable for its style, design, form, scale, materials, ornamentation, period, craftsmanship or other architectural values.
 - (iii) technological: the place provides evidence of the history of technological development or demonstrates innovation or important methods of construction or design.
 - (iv) integrity: the significant physical values of the place have been largely unmodified.
 - (v) age: the place is particularly old in the context of human occupation of the Wellington region.
 - (vi) group or townscape values: the place is strongly associated with other natural or cultural features in the landscape or townscape, and /or contributes to the heritage values of a wider townscape or landscape setting, and/or it is a landmark.
- (c) social values: these values relate to the meanings that a place has for a particular community or communities.
 - (i) sentiment: the place has a strong or special associations with a particular cultural group or community for spiritual, political, social, religious, ethnic, national, symbolic or commemorative reasons.



- (ii) recognition: the place is held in high public esteem for its historic heritage values, or its contribution to the sense of identity of a community, to the extent that if it was damaged or destroyed it would cause a sense of loss.
- (d) tangata whenua values: the place is sacred or important to Māori for spiritual, cultural or historical reasons.
- (e) surroundings: the setting or context of the place contributes to an appreciation and understanding of its character, history and/or development.
- (f) rarity: the place is unique or rare within the district or region.
- (g) representativeness: the place is a good example of its type or era

Explanation

Policy 21 provides criteria to ensure significant *historic heritage* resources are identified in district and regional plans in a consistent way. The criteria are based on the Resource Management Act definition of historic heritage and commonly used assessment methodologies. They provide the basis for describing and evaluating historic heritage, including the physical, historic, social and other values that people attach to historic heritage. Wellington Regional Council, district and city councils are required to assess a place, site or area against all the criteria, but may use additional criteria. A place, site or area identified must, however, fit one or more of the listed criteria in terms of contributing to an understanding and appreciation of history and culture in a district in order to have significant historic heritage values.

Regional plans will identify significant historic heritage in the coastal marine area and the beds of lakes and rivers; district plans will identify significant historic heritage for all other land.

Method 20 is to provide guidance with using the criteria in policy 21 to identify places, sites and areas with significant historic heritage values.

Policy 22: Protecting historic heritage values – district and regional plans

District and regional plans shall include policies, rules and/or other methods that:

- (a) protect the significant historic heritage values associated with places, sites and areas identified in accordance with policy 21, from inappropriate subdivision, use, and development; and
- (b) avoid the destruction of unidentified archaeological sites and wāhi tapu with significant historic heritage values.

Explanation

Appropriate subdivision, use and development respects *historic heritage* values. Planning for, developing and using a historic place, site or area must be done with full understanding



of its value. In addition, destruction of, or damage to, places, sites and areas of historic heritage needs to be avoided when unidentified sites are discovered.

Policy 22(a) is not intended to prevent change to historic heritage, but rather to ensure that change is carefully considered. The places, sites or areas with significant historic heritage values identified in policy 21, and the degree of significance of those values, will influence what activities would be deemed to be appropriate or inappropriate.

Policy 22(b) requires district and regional plans assess which activities could destroy unidentified archaeological sites or *wāhi tapu* with significant historic heritage values and ensure such activities avoid adverse effects.

Policy 46 will need to be considered alongside policy 22 when changing, varying or reviewing a district or regional plan.

Policy 46: Managing effects on historic heritage values – consideration

When considering an application for a resource consent, notice of requirement, or a change, variation or review of a district or regional plan, a determination shall be made as to whether an activity may affect a place, site or area with historic heritage value, and in determining whether an activity is inappropriate particular regard shall be given to:

- (a) the degree to which historic heritage values will be lost, damaged or destroyed;
- (b) the irreversibility of adverse effects on heritage values;
- (c) the opportunities to remedy or mitigate any previous damage to heritage values;
- (d) the degree to which previous changes that have heritage value in their own right are respected and retained;
- (e) the probability of damage to immediate or adjacent heritage values;
- (f) the magnitude or scale of any effect on heritage values;
- (g) the degree to which unique or special materials and/or craftsmanship are retained;
- (h) whether the activity will lead to cumulative adverse effects on historic heritage; and
- (i) whether the relationships between distinct elements of an historic place, site or area will be maintained.

Explanation

Policy 46 provides an interim assessment framework prior to the identification of places, areas and sites with significant *historic heritage* value in accordance with policy 21, and the adoption of plan provisions for protection of these sites and management of effects on unidentified sites in accordance with policy 22.

In determining whether an activity may affect places, sites and areas with historic heritage value the criteria in policy 21 should be used.



This policy shall cease to have effect once policies 21 and 22 are in place in the relevant district or regional plans.

