

IN THE MATTER OF

the Resource Management Act 1991

AND

IN THE MATTER OF

an Application to the **GORE DISTRICT
COUNCIL** by **J D PHILLIPS (LU 2018/357)**

**DECISION OF COMMISSIONERS ROBERT CHARLES NIXON AND GLENYS
DICKSON JULY 2018**

The Hearing and Appearances

Hearing Date:	Tuesday 5 June in Gore
Appearances for the Applicant:	Mr Rex Chapman, Cruickshank Pryde, Barristers and Solicitors Mr William J Watt, William J Watt Consulting Limited Ms Shari Kay-Smith, Southern Estate Properties
Appearances for the Gore District Council	Ms Kirstyn Lindsay, Southern Planning Solutions Limited, Planning Consultant Mr Keith Hovell, Gore District Council Planning Consultant
Appearances for Submitters:	No submitters appeared at the hearing

Abbreviations

The following abbreviations are used in this decision:

J D Phillips	“the Applicant”
Gore District Council	“the Council”
The Operative Gore District Plan	“the ODP”
Heritage New Zealand Pouhere Taonga	“HNZ”
Southland Regional Policy Statement 2017	“RPS”

The land subject to this application is referred to as “the site”.

The hearing was closed on Friday 6 July 2018 following responses to a Minute issued by the Commission following the hearing at the Council on 5 June.

INTRODUCTION AND BACKGROUND

1. The site is located at 128 Main Street Gore, on the northern corner of Civic Avenue. The legal description of the site is given as Part Sec II, Block VII, Gore Town, with an area of 106m². We understand that the applicant has owned the existing scheduled heritage building since 2002 and that it has been vacant since 2012. The building is a two storey brick structure with an iron veranda which occupies virtually the entire area of its small site.
2. We were advised by the Council that the ODP became operative on 31 July 2006. This particular building was added to the schedule of heritage buildings pursuant to Variation 3 which became operative in November 2007.
3. We understand that demolition of the building was considered around 2012 – 2013 but was not proceeded with at that time, although much of the information provided with the application dates from 2013.
4. The Commission visited the site and the interior of the building on the day of the hearing, and also observed the site in the context of its surrounding area.

THE PROPOSAL

5. The applicant is seeking consent for the demolition of the heritage building on the site, and consent for its replacement by a single storey commercial building (having a facade height of 4.8 m) which would occupy the entire site. Given the very small size of the site, no on-site parking is proposed, but instead a legal arrangement is proposed to provide parking on one or more other properties in the vicinity. The replacement building is proposed to comprise precast concrete, wood feature cladding, vertical aluminium windows and a glass canopy above the entrance.
6. The applicant intends to sell the site ‘with the consent attached’ rather than to develop the property himself.¹ This has been a matter of discussion with the Council on previous occasions, and will be addressed later in this decision.
7. The basis for seeking demolition is described in the application as being:
 - the building is less than 20% NBS and is accordingly an earthquake hazard (being less than 34% NBS);
 - the building is uneconomic to restore to a standard which would comply with modern earthquake codes;
 - the building has proved difficult if not impossible to tenant, particularly the second floor;
 - the internal layout of the building does not lend itself to modern tenancies.
8. At this point we record that the applicant relied on two engineering assessments. The first was undertaken by GM Designs and completed in May 2013. The second was undertaken by

¹ AEE.p16

Stevenson Brown and completed in September 2015.

NOTIFICATION AND SUBMISSIONS

9. The application was publicly notified on 18 March 2018 with submissions closing on 18 April 2018. We were not made aware of any written approvals.
10. Four submissions were received on the application, one is which was late. This late submission was from the Gore District Memorial RSA and received one day following the close of submissions. Section 37 provides that the consent authority may waive the requirement to comply with the time period to make a submission, subject to the following provisions of Section 37A(1) ;

A consent authority or local authority must not extend a time limit or waive compliance with that time limit, a method of service, or the service of a document in accordance with section 37 unless it has taken into account –

- (a) the interest of any person who, in its opinion, may be directly affected by the extension or waiver; and*
- (b) the interests of the community in achieving adequate assessment of the effects of any proposal, policy statement or plan; and*
- (c) its duty under section 21 to avoid unreasonable delay.*

The applicant had no objection to the late receipt of this submission.

11. We note that the submitter can reasonably claim to be an affected party, and did not raise any issues beyond temporary effects associated with restrictions on parking during demolition. The granting of a waiver would not result in unreasonable delay in this case. For these reasons, the Commission accepted this late submission.
12. A submission by Peter Cooper on behalf the P&L Cooper Family Trust supported the application on the grounds that repair of the existing building was uneconomic and also supported the erection of a replacement building without on-site car parking. The submitter also expressed an interest in the property as a potential purchaser.
13. A submission from Environment Southland on the application was neutral with respect to relief, but noted that the site was located within the floodplain of the Mataura River. Accordingly it was recommended that a higher minimum floor level be provided. Separately it was recommended that salvage and re-use of historic fabric into the new building would be appropriate.
14. The RSA submission, lodged by Stephen Brinsdon on behalf of the RSA, requested consultation regarding access to their land during demolition and rebuild. The submission also added that an agreement with the applicant in June 2013 with respect to this matter no longer stood, and further consultation was required.
15. We were advised that none of the submitters wished to be heard.

PRELIMINARY MATTERS

16. Following the hearing, the Commission issued a Minute to the Gore District Council requesting that the *Council* obtain an independent assessment of the costs of strengthening and refurbishing the building subject to the application. This is based on our concerns that the Commission did not have any independent assessment of these costs. Also as part of that Minute we sought that the applicant provide further information with respect to whether it would be possible to use brick salvaged from the existing building as a veneer for the facade of the proposed building, and the possibility of a modified veranda design.
17. A letter was subsequently received from Mr Rex Chapman, counsel for the applicant dated 2 July 2018. This letter contended that the information supplied with the application, while not independent, was credible and reliable and that no further information was required. Although the request for preparing the assessment was made of the Council, we were informed that neither the applicant (nor subsequently the Council), would be prepared to meet the costs of such a report.
18. Mr Chapman pointed out that the Commission could not in fact make an additional request as the provisions of section 92 only allowed for a request for further information prior to the hearing of the application, or if there was no hearing, prior to the decision being made. We are uncertain as to whether Mr Chapman is correct on this matter; the hearing was not formally closed until 6 July. Meanwhile, Mr Chapman also advised that the applicant was not prepared to make any changes to the design of the proposed building with respect to cladding.
19. Mr Chapman also added that there had been no request under section 92 for further information about the cost of strengthening and refurbishing the building. Prior to the hearing there was a request from the reporting officer pursuant to section 92(2) for an independent report assessing the heritage values and historic character contribution of the building². This request was refused [as provided for under section 92A(1)(c)], in a letter from Mr Watt to the Council dated 18 April 2018. However we note that while there was a section 92 request made by the Council prior to the hearing, the nature of the information sought by the reporting officer was different to that sought through the Commission's Minute.
20. Section 92A(3) provides that the consent authority must consider the application under section 104 even if the applicant refuses to provide the information sought. We have no wish to further prolong proceedings, and have gone on to consider this application on the information which is available to us.

STATUTORY MATTERS

21. The site is zoned Commercial under the ODP, and is identified as being within the 'Central Area', described in Chapter 4 Part 15 as the 'Gore Townscape Precinct'. This area contains additional rules (as set out below) with respect to buildings within the commercial core of the town. The building is a scheduled heritage structure (identifier H13) under Chapter 2 of the ODP. Although difficult to discern on the planning map, the site is at the extreme southern end of the Central Area. The relevant planning map in the ODP is Map 7A.

² section 42A report, paragraph 44

22. We were advised that the building is not listed as a protected heritage item by HNZ, and this was not in dispute.
23. Land use consent is required in terms of the following provisions of the ODP;
- Chapter 2, Rule 2.5.9 – the demolition of a scheduled heritage structure is a discretionary activity.
- Chapter 4, Rule 4.15.1(1) – buildings are subject to the following provisions within the Townscape Central Area:
- Within that part of the Commercial Zone at Gore shown on the District Plan Maps as “Central Area”:*
- (a) Other than to provide recesses associated with the entrance of persons, buildings shall provide continuous fronts to the street.*
 - (b) Buildings shall provide a veranda to the edge of the footpath, together with under veranda lighting.*
 - (c) Buildings shall be constructed to the front boundary of the site.*
 - (d) The facade of the building shall have a minimum height of 8 m along the street frontage.*
 - (e) Areas utilised for the outdoor storage or placing of goods or waste shall be screened from public view.*
- Chapter 5, Rule 5.9.4 and Table 5.4 – consent is required as a restricted discretionary activity as no on-site car parking is proposed.
24. The applicant and the Ms Lindsay were in agreement as to the applicable non-compliances and the legal status of the activity.
25. On this basis, we are required to assess the application as a discretionary activity.

LEGAL SUBMISSIONS AND EVIDENCE

26. Mr Chapman presented brief legal submissions on behalf of the applicant. He responded to Ms Lindsay’s report and the key matters raised in her recommendation that the application be declined. He stated that the application was a discretionary activity and that accordingly the application was entitled to be treated on its own merits. He submitted that the purpose of the Act would be better served by the application being granted.
27. He noted that the building had remained unused for nearly 8 years, that movement in the brickwork was clearly evident, and that the two engineering assessments undertaken of the building had clearly established that it was earthquake prone. He added that the alternative to demolition was to ‘do nothing’ as strengthening and refurbishment was not economically viable. He said the applicant had demonstrated a commitment to conserving heritage with his properties elsewhere in the District.
28. Mr Watt presented a statement of evidence on behalf of the applicant. He began by explaining that subject to the demolition of the current building, a concept plan was proposed “.....for a

*small commercial building which could be readily adapted to a variety of tenancies*³.

29. It was apparent that simplicity, combined with an element of variety in terms of textures and materials, had been adopted in order to “adequately present the building”⁴, but at the same time achieve an economic return.
30. Mr Watt then sought to address a range of matters raised in the officer’s report. He reiterated that there was evidence of significant cracking in the brickwork as shown in photographs attached to his evidence, and which he said was apparent in the wooden floors upstairs. He also argued that ‘differences’ between statements in the engineering assessments were not unusual, and that there was clear agreement in both of the engineering reports that in terms of earthquake assessment, the building was 20% or less of the standard required under the NBS.
31. Stating that the building had been vacant for some time, he advised that the building had been marketed by Mr Lloyd Anderson of Harcourt’s, who advised that the building could not be tenanted because it was a known earthquake risk, that there was little or no demand for first-floor commercial rental space in the commercial area of Gore, and the available spaces were well below an acceptable standard.
32. He added that heritage fittings, fixtures, and materials would be removed for recycling where practicable, but doubted whether the condition of this material was such as to justify this. He added that as there was the possibility of pre-1900 historic heritage on the site, an archaeological investigation would need to be the subject of an appropriate condition of consent.
33. With respect to the proposed new building, based on Mr Anderson’s advice he added that it would be reasonable to expect an annual rental income of \$25,000, and that the new build would cost approximately \$264,000 – which he contended showed that the proposed new building would have reasonable prospects of being commercially viable.
34. He said that demolition of the building had been considered in 2013, and following consultation with the Council an application had been prepared, but was not proceeded with at that time. He said that circumstances had now changed and that a concept had been prepared which was commercially viable. He also made reference to a consent that had been granted for the redevelopment of the former Methodist Church site in Gore, which was also an heritage building. Finally, he noted that timeframes had now been introduced by central government to address issues with earthquake prone buildings.
35. In terms of consultation, he said there had been discussion with the New Zealand Historic Places Trust in 2013 and we understood that its successor (Heritage New Zealand Pouhere Taonga) were ‘aware’ of the current application. He added that there had been consultation with the adjoining RSA in 2013, but we were unaware of any further development since that time. He said the other neighbour (Telecom – now Spark) had been served a copy of the application.
36. An issue raised with the application concerned potential flood risk. He stated that current flood

³ Evidence W. Watt, paragraph 4.2

⁴ Ibid. paragraph 4.3

protection works in Gore were designed to protect against floods with a return period of 50 to 60 years, but that for a bigger event it would be impractical to require a floor level of 1.0 – 1.5 m above ground level. He proposed that a minimum floor level of 300 to 600 mm above ground level would be appropriate based on advice he had received from Mr Gavin Gilder, Senior Policy Planner at Environment Southland.

37. He disagreed with the view of the Ms Lindsay with respect to the significance of the building in the context of it not being listed by HNZ. It was the opinion of Mr Watt that a building of that nature was “.....deemed to have heritage value but only within its local context”⁵.
38. He also asserted that the proposed building was appropriate in its form and scale, bearing in mind that would be a small structure on a small site. He said there was sufficient fenestration and variety of cladding to provide a degree of interest, the interior of the building could be viewed through windows facing the footpath, and that there would be an element of shelter associated with the canopy at the front of the building. He questioned the need for a veranda along the building frontage in this case given his observation of low pedestrian volumes, low traffic volumes on Civic Avenue, and the very short frontage. In his view, a new building would generate activity and therefore contribute positively to the town centre.
39. He also disagreed with the Ms Lindsay with respect to the character of the streetscape in the vicinity, noting that the adjoining 1956 Post Office building had a character reflecting its function at the time it was built, and that the proposed new building at 128 Main Street and its neighbour reflected a principle of ‘form following function’. He contended that the character and appearance of the two buildings were distinctly contrasting, and that there was little heritage character remaining in the vicinity of the subject property.
40. A further point of contention between Mr Watt and the Ms Lindsay concerned the financial implications of retention. He stated that upon advice from Mr Peter Cooper, of Jones Cooper Builders Ltd Gore, the cost of upgrading the building including consenting, design, strengthening, new ground floor fittings, updated services and with provision for contingency, would amount to approximately \$485,000. He said that based on these costs, a rental of \$450-\$500 a square metre would be required which was far in excess of the market rate in Gore. He said the ‘do nothing option’ would result in the building simply being left as it was and secured from vandalism as this would be cheaper than restoration.
41. In terms of the draft conditions attached to the officers report (assuming consent was granted) he was in agreement with all conditions, except a proposed condition requiring that the demolition of the existing building only be permitted once building consent for the new building had been issued. His reasons for opposing that were:

*“Unless the Council itself is prepared to purchase the property and carry out the redevelopment itself, there can never be a guarantee. This is simply because redevelopment takes time and economic conditions can change over time. It could easily take six months or more from the granting of consent to the approval of building consent for the new building. In my opinion such a condition would be both unreasonable and unenforceable”.*⁶

⁵ Evidence of W. Watt, p6.

⁶ Ibid. paragraph 5.8.2

42. Ms Kay-Smith is the property and office manager of Southern State Properties, which is owned by the applicant, Mr Jack Phillips. By way of background she explained that the applicant had originally owned 131 properties in Southland, many of them in the District. She said that many of his properties were old, and he had put considerable effort into upgrading a number of the residential and commercial buildings that he owned.
43. She stated that the applicant had already expended \$45,000 on professional fees for a building that had a rateable value of only \$1000. She said the building could not be either sold or rented in its current state.

The Officers Report

44. Ms Kirstyn Lindsay set out her explanation of the statutory background to the proposal, and expressed the view that in this case it was appropriate to apply the provisions of Part 2 of the RMA, given that the ODP was an older first-generation document, and citing comments made by the Court in the *Davidson* case⁷. In particular, she questioned whether the ODP continued to give effect to the higher order Southland Regional Policy Statement. We will return to this matter later.
45. She considered that the two engineering reports from GM Designs Ltd and Stevenson Brown Limited were in conflict, on the basis that the latter stated that there were no obvious cracks in the building and no obvious signs of foundation settlement, which she stated was inconsistent with the claims made in the applicant's AEE. She further stated that the information contained in the AEE failed to provide any detailed costings to justify costs of the strengthening work that would be required. She added that the applicant had refused a request under section 92(2) of the RMA to commission an independent report assessing the heritage values and historic character of the building⁸.
46. She was also critical of the AEE on the basis that the assessment did not go into the reasons why the building was deemed worthy of scheduling, being particularly critical of the building being described as a "*relic of a previous townscape*"⁹. With respect to it not being listed by HNZ, she stated it was "*..... nonsensical to consider that, because an item does not pass the tests for national significance, its heritage value to the local community is not significant and may be disregarded*"¹⁰. She claimed this would render the heritage schedule in the ODP redundant and in the case of Gore District, would result in 26 of the 32 scheduled items being deemed not worthy of protection.
47. She also asserted that the application failed to take into account the contribution that the existing building made to townscape (being at the southern edge of the 'Central Area') and a lack of evidence that only a single storey building would be viable. She considered there was a significant risk that if consent were granted the site could remain vacant for a prolonged period of time or even indefinitely. For this reason, she considered there needed to be a condition

⁷ RJ Davidson Family Trust versus Marlborough District Council[2016]Env 81, paragraph 262

⁸ s 42A report, paragraph 44

⁹ AEE, paragraph 24

¹⁰ s 42A report, paragraph 53

linking demolition to the granting of a building permit for a new building.

48. Her concluding remarks were that:

"In my opinion, without fully addressing and extinguishing the spectre of demolition by neglect, the granting of this consent could create a highly undesirable precedent, and one that the Commissioners may wish to be mindful of".¹¹

ASSESSMENT

49. The relevant provisions of section 104 of the Act to this application are as follows:

104 Consideration of applications

- (1) *When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to -*
- (a) *any actual and potential effects on the environment of allowing the activity; and*
 - (b) *any relevant provisions of –*
 - ...
 - (v) *a regional policy statement or proposed regional policy statement;*
 - (vi) *a plan or proposed plan; and*
 - (c) *any other matter the consent authority considers relevant and reasonably necessary to determine the application.*
- (2) *When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.*
- (3) *A consent authority must not, -*
- (a) *when considering an application, have regard to –*
 - (i) *trade competition or the effects of trade competition; or*
 - (ii) *any effect on a person who has given written approval to the application.*

50. We have approached the consideration of this application on the following basis:

- The heritage significance of the building
- The effect of the loss of the building on the commercial centre of Gore;
- Whether the building requires upgrading to be fit for purpose;
- Whether upgrading the building is reasonably practicable;
- Whether demolition is contrary to the objectives and policies of the plan;
- Any other relevant matters.

The heritage significance of the building

51. Ms Lindsay advised us that there were 32 listed buildings under the ODP, and 26 of these are not listed by HNZ. The activity status of demolition (fully discretionary) under Rule 2.5.9 (2) is the same for all 32 buildings.

¹¹ Ibid. paragraph 111

52. It is common in district plans for works involving heritage buildings (demolition, alterations, maintenance, and relocation) to specify a different activity status according to the nature of the work involved and the relative significance of the building. Logically this should be coordinated with the listing system of HNZ, but there is no requirement for this to be done. HNZ has a two level listing system based on the relative significance of the buildings (or heritage features) concerned. Only a district plan listing, in the absence of a heritage order, can impose a statutory requirement is to obtain consent for demolition, or other works affecting heritage items.
53. Some district plans specify that the demolition of buildings having the highest significance be a noncomplying activity. In the case of listings under the ODP, the activity status for the demolition of all heritage buildings is a discretionary activity, which means that the case for demolition will need to be based on the facts and circumstances of each individual application. Demolition does not face the more demanding test required of a noncomplying activity.
54. A choice of words by the applicant in part of the AEE that the subject building was a “relic of a previous townscape” was unfortunate in that it implied (deliberately or otherwise) that the value of old commercial buildings in general could be discounted, prompting a spirited response from Ms Lindsay. We accept that the building is one of only a small number of surviving old commercial buildings in Gore, and does have local significance for this reason. For clarity, we wish to make it clear that the demolition of heritage buildings having local significance under the ODP should not be taken as a formality.
55. We reiterate that the demolition of this building is a discretionary activity, which means that demolition may be appropriate depending on the circumstances and merits of the case concerned. The building has not been formally recognised through a listing by HNZ, who however have a broad ambit to be involved in heritage issues, not merely those associated with buildings that they have chosen to list. However they have not elected to be a party to the current application.
56. We also note that although the application was publicly notified, no other parties have submitted in opposition to the demolition of the building.
57. Accordingly we accept the contention of Mr Watt to the extent that the building has local significance, and in *relative* terms does not rank as being among the higher echelons of heritage buildings.
58. We noted earlier that Ms Lindsay had expressed concern about the precedent that may be created by a grant of consent for demolition. Mr Watt explained in the AEE that a factor in seeking consent was the “..... *consent granted for the redevelopment of the former Methodist Church on the corner of Irk St and Fairfield St (which) gave the applicant some confidence to proceed*”¹².
59. We consider that both Ms Lindsay and Mr Watt have both erred to a certain extent with respect to precedent¹³, albeit to support very different points of view. Firstly, it is problematic to apply

¹² AEE, page 19

¹³ Section 42A report, paragraphs 108 and 109

an issue of precedent to discretionary activity applications. However more importantly, the circumstances which may apply to any particular application for the demolition of a heritage building are highly unlikely to be replicated in a subsequent application or applications. The construction, location, character, age, earthquake resistance, economic viability and numerous other factors will inevitably vary from one heritage building to another.

60. It may be tempting for some to argue that a previous consent for demolition of the heritage building provides a precedent for granting another application, and undoubtedly some will put forward an argument on this basis. However we consider that little weight can be placed on a precedent argument with respect to historic heritage. We also consider it is simply not tenable to argue that consents should be granted solely on the basis that a building is old and needs upgrading.
61. Ms Lindsay appears to imply that declining consent will somehow act as an incentive to compel building owners to undertake the maintenance of heritage buildings. In the absence of a viable economic use, only minimal, if any, maintenance is likely to occur. In this case, the work requires goes well beyond what would typically be regarded as 'maintenance' in heritage terms – it requires structural strengthening for an irregular shaped building on a very small site, as well as refurbishment. Such works would be major in scale and very intrusive.

The effect of the loss of the building on the commercial centre of Gore

62. Earlier under the heading of 'Preliminary Matters' we noted that the Council had issued a request for further information under section 92(2) of the Act. Ms Lindsay stated in her report that the application was "*..... silent on the reasons why the building was deemed worthy of scheduling in 2006*"¹⁴. We were somewhat perplexed by this comment, and found ourselves in agreement with the submissions of Mr Chapman¹⁵ on this matter. The reasons for a the listing of a heritage item either are, or should, be specified in the District Plan, and are not a matter to be addressed through a resource consent application. They are matters which are relevant to a plan review or plan change.
63. We consider that the section 92(2) request may have asked the wrong question, which would have been better directed at seeking confirmation of the costs involved in strengthening and refurbishment, a factor which is crucial to the current application.
64. We then went on to consider the heritage significance of this building in the context of its surrounds, and in particular the Central Area comprising commercial centre of Gore. In her report, Ms Lindsay observed that:

"The building at that location could be viewed as a historic remnant, bookending the heritage structures associated with the Main Street. The building can also be seen as contributing to the heritage narrative by continuing comparable or evolving patterns, elements and architectural styles and provide a context to other scheduled heritage buildings. The changing environment surrounding the subject site could also mean that the building's historic value has increased rather than decreased".

¹⁴ Section 42A report, paragraph 46

¹⁵ Submissions of R Chapman, paragraph 14

65. She has identified an important element that can be served by heritage buildings, especially on corner sites such as this one. Heritage buildings can provide a significant historic narrative, especially as part of a group of such buildings.
66. In this case however, the subject building is at the extreme southern end of the Central Area, and to a significant extent it is visually overpowered by the height and scale of the very utilitarian former Post Office building to its immediate north. Rather than acting as a bookend, the building at 128 Main Street has effectively been corralled away from the commercial area to the north by this large intervening and unsympathetic structure.
67. The replacement building is proposed as a small single storey commercial building. It can best be described as 'functional'. Its visual anonymity would likely be such that while it certainly would not inspire, it would probably not cause offence either.
68. Subject to consent for the demolition of the existing building, a complying building could be erected on the site provided that it had contiguous street frontage with adjacent buildings, was built up to the site boundary, had a veranda, was between 8m and 12m high and provided an appropriate number of carparks¹⁶.
69. Given the extremely small size of the site, we are satisfied that realistically, any building on the site would be unlikely to provide on-site car parking, and indeed such car parking would create open space which in urban design terms would be a poor outcome, and there was no evidence to suggest that parking was at a premium in this location. Obviously a two storey building (existing or proposed) will generate a higher car parking demand, but again not to the point where on-site car parking would be necessary, let alone practicable. We consider the lack of on-site car parking, which is characteristic of the site as it presently stands, is appropriate in this case given the site constraints.
70. There are no design controls for buildings in the Central Area, so a larger but still utilitarian building, could still be built on the site even if it were two stories in height. Such a utilitarian building could be easily designed to be compliant with the rules of the ODP. We note Mr Watt's observation and experience with respect to Invercargill (a much larger centre) that it is difficult to successfully develop second-floor commercial space in Gore, an issue that is likely to be exacerbated in this case by the location of the site on the southern extremity of the Central Area. We accept the evidence from Harcourt's that there is little market for second-floor commercial activities in Gore. We also accept Mr Watt's opinion with respect to pedestrian movement in this location, and that a continuous veranda is not necessary. There is no veranda apparent on the Post Office building frontage, or beyond to the south, and there was no evidence that delays to pedestrian movements across Civic Avenue would be a significant inconvenience for the public given that the street does not generate frequent vehicle movements.
71. Given the surrounds of the area and its location on State Highway 1 through Gore, we have doubts that this location would be conducive to a combined commercial and residential development of two storeys. It would be possible to install a decorative facade to a height of 8

¹⁶ AEE, paragraph 26

m (instead of the 4.8 m proposed), but such an approach would be contrived and unlikely to serve a useful purpose. Were this site located between two adjoining 8m (or higher buildings) on each side, then the one storey facade height currently proposed would have a significant adverse visual effect. As it is, even the two storey height of the current building is in relative terms dwarfed by the height and bulk of the adjoining former Post Office building.

Whether the building requires upgrading to be fit for purpose

72. Notwithstanding some debate between Mr Watt and Ms Lindsay about inconsistencies between two structural assessments¹⁷ undertaken of the building, we are in absolutely no doubt that major seismic strengthening would be required in order for the building to be utilised for any purpose – commercial, residential or other activities.
73. We accept that the building falls well below the minimum standard required for safe occupancy under the requirements of the New Zealand Building Act 2004 and the Gore District Council Earthquake Prone Buildings Policy. This requires that a building of less than 34% New Building Standard is regarded as earthquake prone. The two reports indicate that the building is at or below 20% NBS. We also accept that without such strengthening, tenancing the building will be almost impossible, as well is being unacceptable in the interests of occupier safety. Typically, upgrading to a minimum standard of at least 67% NBS would be expected for commercial buildings.
74. We also note that this particular building (and potentially others) were listed in the District Plan as far back as 2006 prior to more recent and stringent building codes coming into effect.

Whether upgrading the building is reasonably practicable

75. It was this issue that caused us some concern. The applicant relied on the evidence contained in the two structural reports described in the footnote (17) below, and a written statement appended to Mr Watt's evidence as Appendix 1. This was prepared by Mr Peter Cooper of Jones and Cooper Limited, a building firm based in Gore. Mr Cooper is a submitter in support of the application and advised that he could be a potential purchaser of the property should consent to the current application be granted¹⁸.
76. Support for the application was also provided by Mr Lloyd Anderson of Harcourts Real Estate, to the effect that there was no market for second storey commercial space in Gore.
77. Apart from the planning evidence of Mr Watt, none of the parties whose opinions were relied on for the applicant, were available to attend the hearing. This meant we were unable to test these opinions or evidence by way of questioning. We would like to emphasise at this point that in no way are we criticising the credibility or knowledge of the persons that Mr Watt relied on in preparing the AEE and evidence. We also acknowledge that Mr Watt is a qualified planner and has extensive and lengthy experience, which we respect.

¹⁷ Stevenson Brown Limited (Peter Stevenson), Ref 15066, 17 September 2015; GM Designs Limited (Michael Sheridan), Ref J 4726, 22 November 2013 (Rev 1)

¹⁸ Email from Peter Cooper, 26 March 2018

78. However it is normal, and we believe accepted, practice at a hearing that parties whose evidence is relied on should be available to answer questions. It is also important that parties be independent, which is difficult when the evidence relied on with respect to building costs is from a submitter in support.
79. Nevertheless, and given the refusal of either the applicant or the Council to accept the cost of independent advice, we had no alternative but to assess the application on the information available.
80. The budget put forward by Mr Cooper¹⁹ was as follows:
- Consents and design – \$30,000
 - Strengthening the building – \$250,000
 - New ground floor, first floor, windows, drains and electrical fittings, and internal linings –\$175,000
 - Contingency – \$30,000
81. His summary then goes on to say:
- “Therefore approx 485k for 100m² lettable area. Assuming zero residual value for the building as is, you would need rental around \$450-\$500/m², 3 times the market rate in Gore, this would not be a viable investment”²⁰.*
82. Mr Watt stated that a quantity surveyor had estimated that the new building would cost \$264,218²¹.
83. We have concluded that:
- There is no reason to doubt the cost estimates for the new building.
 - There is at least strong anecdotal evidence that it is difficult to establish viable second-floor commercial activities in Gore, and for that matter in Invercargill which is considerably larger (having regard to the evidence and experience of Mr Watt).
 - The cost estimates for strengthening and refurbishing the existing building are accepted to the on the basis that they would have to be inaccurate by a very wide margin indeed, to undermine the applicant’s contention that such works to the building would be uneconomic.
 - The relatively remote nature of the site relative to the central area of Gore is a further factor.
 - Although we were not able to ask questions of the Mr Cooper, we accept that he is an experienced builder in Gore, including some experience with heritage buildings, and although his evidence cannot be independently assessed, we accepted as ‘credible’. We are not willing to conclude that it is in any way misleading.

¹⁹ Appendix 1 to the brief of evidence of W Watt.

²⁰ Ibid.

²¹ Evidence of W Watt, page 12

84. We also note that there was no independent evidence prepared by the Council itself, and while the applicant's evidence was questioned, no evidence was called in opposition to it.
85. Finally, we are conscious of the fact that there are no submissions in opposition to the application, and in particular by HPT or other parties, who might have been expected to call contrary evidence.

Positive effects

86. The proposed activity has a greater likelihood of ensuring that the site is redeveloped for an active commercial use, by generating economic and 'people' activity associated with the site. It will enable the owner of the site to recognise a return on the property.

Conclusions on effects

87. We have somewhat reluctantly come to the conclusion that if consent were refused, the potential adverse effects would be greater than a grant of consent. The reason for this is that it is highly likely that the building would continue to physically deteriorate – the very problem of 'demolition by neglect' referred to by Ms Lindsay. We were left in little doubt that declining consent would not result in the applicant upgrading his building, but instead would result in the adoption of the 'do nothing' option. There is no practicable means to compel a building owner to restore a heritage building.
88. In some instances there is money or other incentives available from a Council to effectively 'bridge the gap' to achieve economic development – examples include the Public Trust Building in Christchurch as just one example. However we are not aware of any funding being available to assist this owner or other owners of heritage buildings in Gore District.

Objectives and Policies ¶

89. The relevant plan provisions in this case include the Operative District Plan, and any relevant provisions of the operative Southland Regional Policy Statement 2017.

The Gore District Plan

90. *Chapter 2 – Matters of National Importance*

Objective 2.5.3 – Recognise and protect the heritage values of buildings, sites, structures and archaeological sites.

Policy 2.5.4(2) – Avoid adverse effects of land use activities on heritage sites.

Policy 2.5.3(4) – Avoid changes to heritage structures that adversely affect values of significance.

Policy 2.5.4 (6) – in considering any application seeking changes to, or demolition of, any registered heritage structure listed in Table 5.1 have regard to:

- (i) the structural integrity of the building, as assessed by a suitably qualified and*

- experienced professional engineer;*
 - (ii) *any risk that is posed to other property and the safety of people within or near to the structure; and*
 - (iii) *where demolition is sought the financial implications of other options.*
91. We consider that the proposed demolition is contrary to Objective 2.5.3 and Policies 2.5.4 (2) – (4). Two of these policies use the word “avoid”, which if applied in conjunction with a higher order planning instrument at national or regional level, would have potentially fatal implications for this application. We will return to this in our discussion below with respect to the Regional Policy Statement. This is particularly important in this case, because the regional planning instrument substantially postdates the earlier Gore District Plan.
92. Policy 2.5.4(6) has the effect of qualifying Policies 2.5.4(2) – (4). In this case we are satisfied that in terms of subclause 2.5.4(6)(i) the evidence clearly establishes that the building has been subject to two reports as to its structural integrity, and in its current form is unsafe for use in terms of subclause (ii). Although not fully tested by independent evidence, the uncontested evidence that is available, has sufficient credibility to establish that strengthening and restoration is unlikely to be financially viable.
93. *Chapter 3 – Land Use Activities – A Framework*
- Objective 3.3(9) – Maintain and enhance the built character and other characteristics of the Gore commercial area.*
- Policy 3.4 (13) – Within the Gore commercial area protect:*
- (a) *the character of the existing buildings in the Central Commercial Area*
 - (b) *the streetscape of the Central Commercial Area*
 - (c) *the form and function of the locality*
 - (d) *the safety and amenity of pedestrians.*
94. The application of this objective and relevant policies is in some respects challenging with respect to an application of this nature. We concede that the proposed building has little in the way of the character and charm exhibited by the existing building. However approval of this application will at least potentially maintain ongoing economic activity on the site, and in a modest way, the vitality of the Gore commercial area to a greater extent than would occur if the current building were to remain abandoned. For reasons we explained earlier, given this outlying location we do not consider there would be any significant effect on the safety and amenity of pedestrians.
95. We conclude that the application does not generally achieve this objective and the relevant accompanying policy suite, but is not *contrary* to them, particularly given the location of the site. It is not simply that the site is at the southern extremity of the commercial area of Gore, but also the fact that it is physically separated and isolated by the large former Post Office building. Were the building located between the Post Office building and the centre of the commercial area, our conclusions may well have been different.
96. This site (and much of the central area of Gore) has historically been subject to substantial

inundation from the Mataura River, and we understand that apart from physical flood protection works, the Council sets minimum floor levels based as necessary on advice from Environment Southland. Objective 4A.3(2) and Policy 4A.4(2) are relevant to this issue. Subclause (b) to the policy makes reference to stipulating elevated floor levels within buildings, and this can be done by the Council at the time of issuing a building consent. There was agreement at the hearing that a grant of consent would not be contrary to these provisions relating to management of flood hazards.

97. Given the location and very small size of the application site, no concerns were raised by any of the parties with respect to parking provision and access, and it was agreed that there was no conflict with objectives and policies on transport.

Southland Regional Policy Statement (“the RPS”)

98. The RPS became operative in 2017. Accordingly it substantially postdates the District Plan and is the ‘superior document’ at an objective and policy level, a distinction which becomes particularly important if the older District plan does not give effect to this more recent document. We consider that the relevant provisions of the RPS are as follows:

99. *Objective HH 1 – Historic heritage values are identified and protected from inappropriate subdivision, use and development.*

Policy HH 2 – Avoid, mitigate and where appropriate remedy adverse effects on historic heritage values from inappropriate subdivision, use and development. On a case-by-case basis take into account factors such as the significance of heritage values, financial cost and technical feasibility when making decisions relating to the protection of historic heritage.

100. Reference was made earlier to the word “avoid” in two of the policies of the PDP relating to historic heritage. We are somewhat taken aback by the provisions of the RPS with respect to heritage. It would appear that the provisions of the RPS are actually more *liberal* on balance, than those of the existing district plan.

101. Policy HH 2 opens with the words “*avoid, mitigate and where appropriate remedy.....*” which do not provide particularly strong guidance, although in this application there is no avoidance, and the only mitigation is the construction of a smaller new building which will provide a degree of economic and social activity, in the context of a site that may otherwise remain derelict and idle. However more importantly, it talks about consideration on a “*...case-by-case basis....*”, the significance of heritage values, and “*..... financial cost and technical feasibility when making decisions relating to the protection of historic heritage*”.

102. We have been faced with the situation where the evidence that has been put before us on matters relating to structural matters and costs of restoration has been largely unchallenged, and on balance seems sufficiently credible to justify a conclusion that the retention of the building is unlikely to be viable, raising the spectre that the site would otherwise remain derelict for a potentially very long period of time. This is a significant adverse effect in itself. Reference to considering each proposal on a case-by-case basis sits comfortably with the discretionary activity status of demolition under the ODP.

103. The RPS also raises the issue of sustainable use of heritage resources;

Objective HH 2 – the built heritage of Southland is appropriately recognised and where possible utilised in a sustainable manner.

Policy HH 6 – Adaptive reuse. Encourage the adaptive reuse and maintenance of built historic heritage.

104. We are satisfied that in the case of virtually all heritage buildings, it is essential that the buildings perform a useful function – not simply be empty historic monuments. We would certainly support the re-use of this building (perhaps commercial on the ground floor and residential upstairs) were the strengthening and restoration of the building practical in economic terms. Having regard to the balance of probabilities we are forced to reluctantly conclude that demolition is appropriate in this case.
105. We have proposed through an advice note support for the salvage of any reusable materials. Whether this is practical or not will become clearer through the demolition process.
106. We do not consider that a grant of consent would be contrary to the objectives and policies of the RPS.

Other matters

107. Ms Lindsay advised that the application site is shown on the Gore Inundation Maps is being within the Mataura River Flood Plain. It is expected that the site and the surrounding area could be inundated in the event of a stopbank breach or overtopping. Environment Southland have noted that there is an enhanced risk of inundation given the potential implications of climate change.
108. She also notes that appropriate minimum floor levels can be set at the time of building consent. The applicant has proposed that any wiring within the new building be located above the height of any inundation. We agree with her proposal that an advice note be included with the conditions of consent.
109. Ms Lindsay expressed concern during the hearing that should consent be granted for demolition, there was a significant risk that the construction of a new building on the site may not eventuate, leaving the site vacant for an indeterminate period of time. To address this, she proposed a condition requiring that a building consent for the new building be approved prior to consent being issued.
110. We agree that there is a risk that the site could remain vacant for a prolonged period, and it is an issue that has arisen previously with the demolition of heritage buildings elsewhere. These concerns have as their basis that the preferred outcome is the retention of a heritage building, the less preferred outcome its replacement with a new building, and the least preferred outcome is that a heritage building is demolished and not replaced at all.
111. In opposing the proposed condition, Mr Watt cited uncertainties such as the results of any necessary archaeological investigation, the need to secure tenancies and changes in

circumstances. He contended that all of these factors raise prospective delays that would make the condition unreasonable and impractical.

112. While we have considerable sympathy with the basis for Ms Lindsay's proposed condition, it would not of itself ensure that a new building was erected on site, in which case the only penalty on the applicant would be some additional costs in obtaining the building consent. Because such a condition would be largely symbolic and not effective (and may potentially deter a potential investor), we are unable to support the imposition of such a condition.
113. A submission from Steven Brinsdon on behalf of the Gore District Memorial RSA sought consultation from the applicant regarding access to RSA land during any demolition and rebuild. It noted that an agreement with the applicant to enable access to the submitters land in June 2013 no longer stood, and expressed concern that the car parking conditions of this submitters consent could be breached. The submission was otherwise neutral.
114. Ultimately we consider that the RSA can readily control the situation as its consent would be required as landowner for any access to its land by the applicant for demolition or construction purposes. It is a matter of consultation between the applicant and the RSA.

Part 2 Resource Management Act

115. Ms Lindsay discusses the implications of the *King Salmon* case and more particularly the subsequent *Davidson*²² decision in her report, noting that case law reveals it may not be necessary to make reference to Part 2 when determining an application for resource consent, on the basis that an operative District Plan can be taken to give effect to higher order statutory documents. She notes however that the new Southland Regional Policy Statement has become operative only recently and long after the Gore District Plan became operative. We agree with her observations on this matter, and even if only for want of caution, consider that it is appropriate in this case to consider Part 2 matters.
116. The assessment of an application under Section 104 of the Act is subject to the provisions of Part 2, comprising sections 5 to section 8. Section 5 states:
- 5 Purpose*
- (1) *The purpose of this Act is to promote the sustainable management of natural and physical resources.*
- (2) *In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –*
- (a) *sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) *safeguarding the life – supporting capacity of air, water, soil, and ecosystems; and*
- (c) *avoiding, remedying, or mitigating any adverse effects of activities on the environment.*
117. Section 6 of the Act requires that decision-makers recognise and provide for the matters

²² *RJ Davidson Family Trust versus Marlborough District Council [2016] EnvC81*

contained therein. The relevant matter of application under section 6 is:

(f) *the protection of historic heritage from inappropriate subdivision, use and development.*

118. Section 7 contains three subclauses which are relevant to this application. These are:

(b) *the efficient use and development of natural and physical resources:*

(c) *the maintenance and enhancement of amenity values:*

(f) *the maintenance and enhancement of the quality of the environment.*

119. In contrast to the context of the *King Salmon* case, we note that the RPS provisions on heritage are virtually an invitation to undertake a 'balancing exercise', as a consequence of the wording of Policy HH 2. This approach is replicated under Policy 2.5.4(6) of the ODP. Both Policies HH 1 and HH 2, as well as section 6 (f) of the Act make reference to "inappropriate" subdivision, use and development. Our conclusions may well have been different had the objective and policy framework at the regional and district level been more prescriptive.

120. We consider that while there is a weighting towards the retention of historic heritage under the Act, under the RPS and under the ODP, it is not anticipated that heritage buildings must be retained in all cases. This is reinforced by the discretionary activity status for the demolition of heritage buildings under the ODP. We do not consider that the objectives and policies of the ODP on heritage are inconsistent with the provisions of the RPS.

121. Historic buildings are a physical resource and their retention can confer social, cultural and economic benefits, provided that any protected buildings are safe and are capable of reasonable use. In this case we have concluded that it is highly unlikely that any building owner (in the absence of financial assistance from the Council or another party) would strengthen and refurbish the existing building at 128 Main Street to make it safe and capable of productive use. Although the issue is finely balanced, we consider that the purpose of the Act would be better achieved by the replacement of this building with a new building, with the associated benefits of activities undertaken in association with it.

122. Having regard to section 6 (f) of the Act, we have concluded that on balance, the demolition of this building and its potential replacement with a new structure would not constitute *inappropriate* use and development.

123. With respect to section 7(c) the maintenance and enhancement of amenity values and section 7(f), the maintenance and enhancement of the quality of the environment, we consider that having regard to the surrounding environment of the site, that the proposed building would maintain the quality of the environment, albeit that it would not *enhance* it to the same degree if strengthening and restoration were a realistic outcome. We consider that a grant of consent would be consistent with section 7(b) and would promote the efficient use and development of natural and physical resources.

Section 104/104D RMA

124. In applying the provisions of section 104 of the RMA, we conclude that having regard to matters

relevant to the strengthening and restoration of the building, and likelihood that it would remain in an increasingly derelict state, a grant of consent would not have effects that would be more than minor.

125. We also consider that application, while not consistent with a number of policies with respect to heritage, is not contrary to the objectives and policies of the RPS or the ODP as a whole having regard to RPS policy HH2 and ODP policy 2.5.4(6) respectively.

Permitted baseline

126. With respect to historic heritage, we consider that the application can draw little support by comparison with the effects of any permitted activities, and has little application to this proposal. The only qualification to this is that the zone provides for commercial buildings up to 2 – 3 stories in height without any required standards as to urban design. Otherwise the rules of the zone are such that the application can draw little any support from the rules framework.

Trade competition

127. This is not a relevant consideration for this application.

Precedent effects

128. We address the issue of potential precedent earlier in this decision, and for the reasons set out earlier, we do not consider a grant of consent would give rise to a precedent or undermine confidence in the administration of the District Plan.

CONCLUDING COMMENTS

129. We are aware that the District Plan has been operative for 12 years, and as a result of some matters which have arisen as a consequence of this hearing, we make the following observations.
130. It would be helpful if there was a more detailed basis for listing of heritage buildings in the ODP, based on ICOMOS criteria, together with a greater congruence with Heritage New Zealand listings and the differentiation of those buildings having greater heritage significance, with consideration being given to whether noncomplying activity status would be more appropriate. Such an assessment of heritage buildings needs to take account of the implications of potential earthquake strengthening.
131. Secondly, we note that there are no design criteria set through rules for building facades within the central commercial area adjoining the Main Street in Gore.

DECISION

Pursuant to Sections 34A, 104, 104B and 108 of the Resource Management Act 1991, consent is hereby granted to application LU2018/357 subject to the conditions as specified below:

Conditions

1. The demolition of Scheduled Building H13 approved by this consent, must not commence until evidence of site access and off-site storage areas agreements, necessary to undertake the demolition and new build works for the duration of the works, has been submitted in writing to the Chief Executive.
2. Once demolition has commenced, the consent holder must erect the approved building within two years.
3. All demolition and development works must comply with the Gore District Council Subdivision and Land Development Bylaw 2011.
4. Prior to any works commencing on the site a Site Management Plan (SMP) must be prepared and submitted to the Chief Executive for approval prior to any works commencing on the site. All contractors must be made aware of the SMP Plan and its procedures, and all works undertaken on the site must be in accordance with the SMP.

The SMP:

- (a) shall address the management of dust, noise, traffic and sediment effects within the site arising from any demolition and construction.
 - (b) must not conflict with the Gore District Council Subdivision and Land Development Bylaw 2011.
 - (c) must be held on site at all times when work is occurring and must be produced for a Gore District Council Officer upon request.
5. Prior to any works commencing on the site a Traffic Management Plan (TMP) must be prepared and submitted to the Chief Executive for approval prior to any works commencing on the site. All contractors must be made aware of the TMP plan and its procedures. The TMP must:
 - (a) address any road closures or road management and traffic movements to and from the site.
 - (b) must require that no material is tracked on to the roading asset and any damage to the roading asset is repaired at the consent holder's expense.
 - (c) must not conflict with the Gore District Council Subdivision and Land Development Bylaw 2011.
 - (d) must be held on site at all times work is occurring and must be produced for a Gore District Council Officer upon request.
 6. Construction noise must comply with the time noise limits imposed by the New Zealand Standard NZS 6803: 1999 below:

<i>Time of Week</i>	<i>Time Period</i>	<i>Leq (dBA)</i>	<i>Lmax (dBA)</i>
<i>Weekdays</i>	0730 – 1800	75	90

	1800 – 2000	70	85
	2000 – 0630	45	75
<i>Saturdays</i>	0730 – 1800	75	90
	1800 – 2000	45	75
	2000 – 0630	45	75
<i>Sundays and public holidays</i>	0730 – 1800	55	85
	1800 – 2000	45	75
	2000 – 0630	45	75

7. Prior to the occupation of the building, the consent holder must lease four car parks within a 500 m radius from 128 Main Street for the use of occupiers of the building. Proof of the lease must be provided to the Chief Executive in writing prior to the occupation of the building.

8. If the consent holder:

(a) discovers koiwi tangata (human skeletal remains), waahi taoka (resources of importance), waahi tapu (places or features of special significance) or other Maori artefact material, the consent holder must without delay:

- (i) notify the Consent Authority, Tangata Whenua and Heritage New Zealand, and in the case of skeletal remains, the New Zealand Police.
- (ii) stop work within the immediate vicinity of the discovery to allow a site inspection by Heritage New Zealand and the appropriate runanga and their advisers, who must determine whether the discovery is likely to be extensive, if a thorough site investigation is required, and whether an Archaeological Authority is required.

Any koiwi tangata discovered must be handled and removed by tribal elders responsible for the tikanga (custom) appropriate to its removal or preservation.

Site work must recommence following consultation with the Consent Authority, Heritage New Zealand, tangata whenua, and in the case of skeletal remains the New Zealand Police, provided that any relevant statutory permissions have been obtained.

(b) discovers any feature or archaeological material that predates 1900, or heritage material, or disturbs a previously unidentified archaeological or heritage site, the consent holder must without delay:

- (i) stop work within the immediate vicinity of the discovery or disturbance; and
- (ii) advise the Consent Authority, Heritage New Zealand, and in the case of Maori features or materials, the tangata whenua, and if required, must make an application for an Archaeological Authority pursuant to the Historic Places Act 1993; and
- (iii) arrange for a suitably qualified archaeologist to undertake a survey of the site.

Site work may only recommence following consultation with the Consent Authority.

Note : The Gore District Council Subdivision and Land Development Bylaw 2011 is currently under review for updating. All references to the bylaw in this decision shall be taken as applying to any

successive bylaw relating to the same matters.

Advice Notes:

1. Minimum floor levels should take into account increased flood risk arising from climate change.
2. Adaptive reuse and salvage of historic fabric should be undertaken where possible.
3. An Archaeological Authority under the Heritage New Zealand Pouhere Taonga Act 2014 may be required for this work. The consent holder is advised to discuss the proposal with Heritage New Zealand.
4. The consent holder is advised that this consent does not confer any right to pass over or occupy any other person's land without that person's express permission.



Robert Charles Nixon
Chair, Hearings Commission
13 July 2018