

Decision No. W 52/2003

IN THE MATTER of the Historic Places Act 1993

AND

IN THE MATTER of appeals under section 20 of the Act

BETWEEN

TE ARO HERITAGE TRUST

(MIS 0016/2002)

**CAMPAIGN FOR A BETTER CITY
INCORPORATED**

(MIS 0017/2002)

Appellants

AND

**NEW ZEALAND HISTORIC PLACES
TRUST (POUHERE TAONGA)**

Respondent

AND

TRANSIT NEW ZEALAND

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge S E Kenderdine (presiding)

Environment Commissioner J D Rowan

Environment Commissioner J R Mills



HEARING at WELLINGTON on 7-11 October, 14-18 October 2002 and 10-11 February 2003

COUNSEL

J A Hassan/N McIndoe for Transit New Zealand

A Hazelton/F Sutton for Historic Places Trust

T Bennion for Campaign for a Better City Incorporated

W Jeffries/D Foote for Te Aro Heritage Trust

S A B Dosser for Wellington City Council - an interested party



TABLE OF CONTENTS

	Page
<i>Introduction</i>	5
<i>Background</i>	6
<i>Transit’s Work Programme for the Bypass</i>	7
<i>The Authorities Granted by the Historic Places Trust</i>	10
<i>The Intended Appeals</i>	16
<i>Issues for the Court</i>	18
<i>The Case for Transit</i>	18
<i>The Case for the Historic Places Trust</i>	25
<i>The Case for the Campaign for a Better City</i>	26
<i>The Case for the Te Aro Heritage</i>	31
<i>The Case for the Wellington City Council</i>	34
<i>Issues</i>	37
<i>Relevance of the Wellington City Bypass Designation: Estate of P A Moran.</i>	38
<i>Are the Appellants Directly Affected?</i>	39
<i>Matters to be Considered in Appeals.</i>	50



•	S.20(6)(a):	<i>The Historical and Cultural Values of the Site and Other Factors Justifying Protection.</i>	59
•	S.20(6)(b):	<i>The Purpose and Principles of the Act</i>	100
	•	the relevant cultural and historical values, knowledge and disciplines	107
	•	take account of material of cultural heritage value and its least possible alteration or loss.	126
	•	safeguarding the options of present and future generations	130
	•	full research, documentation, and record.	126
	•	the relationship of Maori and their culture and traditions with their Ancestral lands	131
•	S.20(6)(c):	<i>The Existing or Reasonable Future Use of the Site for a Lawful Purpose</i>	137
•	S.20(6)(d):	<i>The Interests of Any Person Directly Affected</i>	140
•	S.20(6):	<i>Appropriate ‘Other Matters’.</i>	143
	•	International Instruments	143
	•	The Distric Plan Heritage Framework	152
		<i>Matters Outside the Appeals.</i>	154
		<i>Summary of Findings</i>	164
		<i>Conclusion</i>	168
<i>Appendices:</i>			
	1	<i>Heritage Buildings Affected by the Bypass</i>	
	2	<i>Buildings within Areas Covered by Authorities Anticipated to be Sold for Removal</i>	
	3	<i>Areas Covered by Archaeological Assessment and Historic Places Trust Authorities</i>	
	4	<i>Historic Town Acres</i>	
	5	<i>Buildings to be Demolished or Sold for Removal</i>	

DECISION

Introduction

[1] The appellants in this case have appealed against three authorities issued to Transit New Zealand (“Transit”) by the Historic Places Trust (Pouhere Taonga) (“the HPT”). The HPT granted the authorities under s.12 of the Historic Places Act 1993 (“HPA”), which allows Transit to destroy, damage, or modify archaeological sites within the designation area (“the site”) for the Wellington Inner City Bypass, (“the bypass project”)¹. Otherwise, under s.10(1), it is an offence to (or cause to) destroy, damage or modify the whole or part of archaeological site knowing or having reasonable cause to suspect it is one. The HPT also imposed conditions under s.15 requiring that an archaeological investigation of some of the site be carried out on its behalf.

[2] The HPT, as do Transit and the Wellington City Council (“WCC”), seeks confirmation of the authorisations. The appellants, on the other hand, seek either the reversal or modification of the decision. Their argument is that the loss of irreplaceable archaeological sites and information for present and future generations, as a result of the bypass proposal, considerably outweighs any gains which might be made for the City as a result of the authorisations.

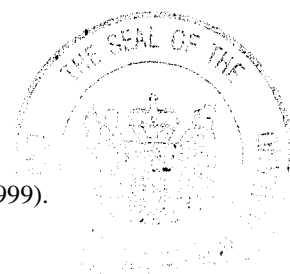
[3] The debate takes place against the background that in archaeological terms:

*The overall Inner City Bypass archaeological project will be one of the largest that has ever been undertaken in New Zealand.*²

[4] We see the fundamental issue for the Court, in this case, as being whether or not the appellants are “directly affected”, so as to have standing to bring these appeals under section 20(1) of the HPA.

¹ See: *Estate of P A Moran v Transit New Zealand* (Environment Court, W55/99, 30 April 1999).

² McGovern-Wilson EIC pages 15-16.



[5] Should we find that neither CBC nor THT are “directly affected”, and therefore have no standing, the only course open to the Court is to strike out the particular appeal.

[6] Early in the Environment Court hearing into this matter a decision was made to hear the evidence of the parties to assist in establishing their standing or otherwise in terms of section 20(1). We adopt a similar strategy in this decision and set out the cases for the parties, before embarking on the discussion of “standing”.

Background

[7] The designation for the bypass was confirmed by the Court in *Estate of P A Moran* and was not appealed by the Campaign for a Better City (“CBC”) or the Te Aro Heritage Trust (“THT”), who are the appellants in this case. The designation was included in the Wellington City Council District Plan in 1999.

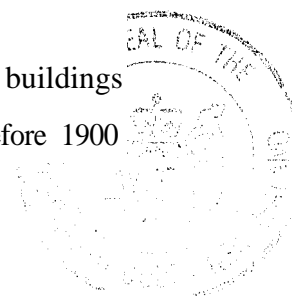
[8] The archaeological site provisions, which are relevant to these appeals, are contained in Part 1 (Protection of Historic Places) - particularly ss.9-20 - which apply to **every archaeological site, whether or not the site is entered on the Register** (s.9(1)). Some sites in issue are not entered on the HPT’s Register of Sites, but come within the definition of “archaeological site” in s.2 HPA, namely:

‘Archaeological site’ means any place in New Zealand that -

- (a) Either -**
 - (i) Was associated with human activity that occurred before 1900; or**
 - (ii) Is the site of the wreck of any vessel where that wreck occurred before 1900; and**
- (b) Is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand.**

[9] In the present case, the sites qualify under this definition because they are associated with human activity that occurred before 1900 and may be able, through investigation by archaeological methods, to provide evidence relating to the history of New Zealand.

[10] The archaeological sites include not only some of the various heritage buildings identified in the *Estate of P A Moran* decision, but others which were constructed before 1900



and are not heritage, but are archaeological sites. As outlined by the Planning Tribunal in *Ngatiwai Trust Board v NZ Historic Places Trust (Pouhere Taonga) (“Ngatiwai (1)”)*³:

The issue in the present appeal is whether or not the applicant is to be authorised to destroy, damage or modify the particular middens identified in his application, and if so, on what terms and conditions. In determining this appeal the Tribunal is to have regard to the heritage values of those particular archaeological sites. The heritage value of other archaeological sites that exist elsewhere on the applicant’s property does not bear on that issue. We hold that the heritage value of those other sites is beyond the proper scope of this appeal, and should not influence our decision on it.

[11] Some buildings to be relocated or demolished under the bypass project, were built during or after 1900 (and therefore do not qualify as archaeological sites) and some non-heritage buildings were built before 1900. The demolition or removal of those buildings which are not “archaeological sites”, are not the subject of the applications for authorisation in this sense and not subject to the appeals. The relevant buildings (heritage and non-heritage) to which the authorities relate are identified in Appendices 1 and 2 to this decision.

Transit’s Work Programme for the Bypass

[12] The following outline of the work to be undertaken by Transit is taken from the evidence of Mr B B Hasell, Regional Manager (Wellington) for Transit:

Buckle Street *(between Tory/Tasman and Taranaki Streets)*

This section of Buckle Street will be moved approximately 8 metres to the north at its intersection with Taranaki Street (to achieve alignment with the reconstructed Arthur Street), and the existing three lanes retained. The section of present carriageway at the southern side will be reconstructed as a planted area. Parking via an access lane will be modified between this planted area and the entrance to the Carillion and former museum.

³ [1996] NZRMA 222, page 232

A cycleway/walkway will be constructed on the northern side of the carriageway. This will extend east to Kent Terrace.

Arthur Street

Arthur Street is to be widened by up to 10 metres on the northern side to provide for two lanes of one way traffic as well as a slip lane and parking on the south side. The slip lane and parking will be separated from the through traffic by a barrier.

A 6m wide cycleway/walkway will also be provided on the north side, beside the widened carriageway, continuing the facility to be constructed in Buckle Street.

Cuba Street to Willis Street (New Road)

This section is a new two lane, one way road, part of which will be constructed over the existing Tonks Avenue. The road will widen to three lanes at Victoria Street and Willis Street intersections.

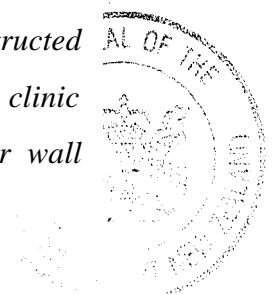
Ground levels are variable in this section and some fill will be required to integrate the new road with existing City streets.

The length of new road in this section totals approximately 270 metres. The footpath (cycleway) crosses to the southern side of the Bypass at Cuba Street.

Willis Street to the Terrace Tunnel

A new on-ramp will be constructed from west of Willis Street to the Terrace Tunnel. This section of road descends into a cutting towards the Terrace Tunnel passing under Vivian Street and Ghuznee Street overbridges. As the road begins to descend into the cut, the bank on both sides will be battered and planted. As the depth of cut increases, retaining walls will be required.

On the western side of the road, a permanent retaining wall will be constructed commencing from a point in line with the centre of the former dental clinic building back to the Terrace Tunnel. On the eastern side, a similar wall



commences at the same location and extends to a point about 20 metres north of the Vivian Street bridge.

For about 70 metres either side of the proposed new Vivian Street bridge, the walls are at their tallest, and will be strutted near the top at approximately 5 metre intervals. At the base of the walls a battered slope will be developed and planted.

As the new on-ramp descends into the cut from Willis Street, retaining walls will be constructed on the alignment of the new road to a height not exceeding 7 metres.

This section of the Bypass is about 430 metres long. The cycleway/walkway continues on the same side as between Cuba and Willis Streets, and is located at the top of the cutting. It terminates at Vivian Street/Buller Street.

Vivian Street west of Willis Street will be accessed by a two lane overbridge to be constructed across the new on-ramp.

Earthworks

The main earthworks consist of excavation and removal of approximately 40,000m³ of material from between the retaining walls. Some of this material will be used to fill up the land between Willis Street and Cuba Street. However, most of this material will be trucked away from the site. The material is not expected to be high quality. It will be for the contractor to arrange for the disposal of the surplus excavated material.

Building demolition and relocation

Prior to the construction of the new road, existing buildings either on the route or affected by the new buildings layout will need to be relocated or demolished.⁴

⁴ Hasell EIC page 12-13.



The Authorities Granted by the Historic Places Trust

[13] The HPA provides for two alternative types of authority application:

- an application specific to a particular archaeological site (s. 11(1)) or
- an application encompassing all archaeological sites or class of archaeological site (s. 12 (referred to as a general authority))

[14] Transit lodged applications for authorities under s.12 HPA with the HPT in November and December 2001 to destroy, damage or modify the archaeological sites.

[15] The word “archaeology” is not defined in the HPA, but its meaning was described at the hearing as follows:

Archaeology is the study of the human past. It is a material-based discipline - the primary source of information comes from physical evidence, both above and below ground. Information gained from these sources may be augmented by historical and other research.⁵

[16] The evidence establishes archaeological sites have intrinsic value on two levels:

- firstly, for their own sake, as monuments or as representative examples of past ways of life and people;
- secondly, they have value for scientific information they can contain: sites are, by definition and implication, physical and tangible; they can be observed and measured.

[17] It is Transit’s evidence through its heritage consultant, Ms M O’Keeffe, that archaeological sites only have a sense of meaning if they are examined in the context of a cultural landscape. Ultimately, these places must be seen as remains of human populations. Sites can be examined by archaeological methodology, that is, by applying a variety of scientific techniques to examine and rationalise the data.

⁵ Transit, Closing Submissions page 2 citing letter from the Trust to Transit dated 14 February 2002. Attachment 2 EIC Ms N Barton.



[18] Ms O’Keeffe identifies that the majority of archaeological sites in New Zealand are subsurface. Therefore their presence or potential significance cannot be verified until investigated or disturbed; she notes that investigation simply to verify a site’s existence is not endorsed by most New Zealand archaeologists.

[19] Ms O’Keeffe explains the concept of buildings as archaeological sites is relatively new in New Zealand. There is a difference between a building as an architectural entity and an archaeological site. Both are premised on physical fabric, but whereas an architect would note the physical material or detail of construction, an archaeologist would attempt to provide a context or meaning for it. For example, an architect would record changes in a building’s form and fabric, such as additions of new rooms, or removal of walls, whereas an archaeologist would not only record those changes but interpret the human activity and social reasons behind them, such as a growing family.

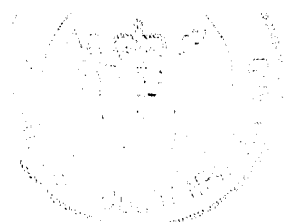
[20] The three applications sought by Transit are general authorities under s.12 in respect of three sections of the land designated by Transit for the bypass project. These are:

- [a] The Western Section, from Ghuznee Street to Kensington Street;
- [b] The Central Section, from Kensington Street to Cuba Street; and
- [c] The Eastern Section, from Cuba Street to Cambridge Terrace.

These three sections are shown on the copy of a map attached as Appendix 3 to this decision. It is taken from the evidence of Transit and entitled “Areas Covered by Archaeological Assessments and Historic Places Authorities”.

[21] The HPT’s powers of determination in respect of the applications are set out in s.14(1):

- (1) **On receipt of an application for an authority to destroy, damage or modify any archaeological site or sites under section 11 or section 12 of this Act, the Trust may, subject to subsection (3) of this section, exercise one or more of the following powers:**
 - (a) **Grant an authority in whole or in part, subject to such conditions as it sees fit:**
 - (b) **Decline to grant an authority in whole or in part:**



- (c) **Exercise all or any of the powers specified in any of section 5, 16, 17, 18, and 21 of this Act.**

[22] The power to impose conditions under s.14(1) is supplemented, in s. 15(1), with the power to impose a condition **requiring that an archaeological investigation of the site be carried out by or on behalf of the Trust, and where the HPT is satisfied on reasonable grounds that an archaeological investigation in that case is likely to provide significant information as to the historical and cultural heritage of New Zealand.**

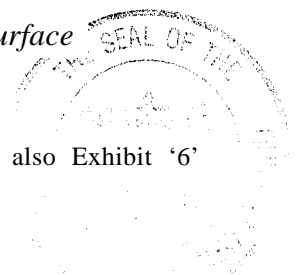
[23] After extending the time period for its consideration of the applications, the HPT notified Transit on 10 May 2002 that it had granted the three authorities sought, subject to various general and specific conditions, including conditions requiring an archaeological investigation of sites by the HPT under s. 15.

[24] Dr McGovern-Wilson, senior archaeologist for the HPT, outlines the scope of the authorities as follows⁶:

[a] Authority No. 2002/99, relating to the Eastern Section:

- (a) *Arthur St and Buckle St had buildings present at least from the 1870s including Drill Hall and barracks. This section is notable for its association with the defence and law and order systems of early Wellington. Only two 19th buildings will be relocated from this section - 289-291 Cuba St. In 1930 during the building of the National Museum the barrel of an Armstrong Gun was buried on the site as it was surplus to requirements and was not able to be sold. In the early 1990s construction work for an extension to the then National Museum uncovered a small rubbish hole containing material dating to around the 1880s. It is highly likely that other similar material survives elsewhere.*
- (b) *Likely archaeological evidence includes standing buildings, foundations of buildings, associated out buildings, subsurface*

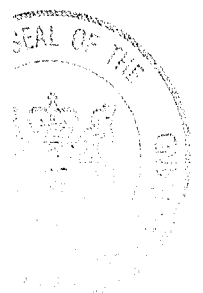
⁶ McGovern-Wilson EIC pages 9-12 summarising O'Keeffe (Project Archaeologist): see also Exhibit '6' produced by the HPT.



features and domestic artefacts. There is also the possibility of the Armstrong gun barrel and Maori sites in this section being encountered.

[b] Authority No. 2002/70, relating to the Central Section:

- (a) *Buildings are present from at least the 1860s possibly the late 1840s. These are mainly domestic houses but also some shop and house combinations and small commercial buildings. There are a number of extant 19th century buildings in this section and their historical and heritage importance has been recognised by their registration by the Trust. Two Historic Areas have also been registered in and around this section. The Cuba St Historic Area is in the path of the Bypass. The other area, Footscray Ave, will not be directly affected.*
- (b) *Much of the history of the central section is focused around the activities of the Tonks family. 270 Cuba St was the home of William Tonks and his family. There is some evidence that this house was built as early as the 1840s and the first reference to the family living here is in 1853. The house is constructed with imported timbers at the back and the Victorian style frontage is likely to have been an addition. Alongside the lane are workers cottages built by the Tonks family to house people working in their factories nearby. The Tonks brick works was located on Webb St, opposite the intersection with Cuba St. At the end of the lane is the home of William's son Henry and his wife Kate who was a successful businesswoman.*
- (c) *The area is notable for its "hen and chickens" character with workers cottages alongside their employers. The number of surviving buildings in their original positions illustrate aspects of the social and economic history of early Wellington and the continuing English tradition of employers providing housing and*



welfare for their workers. Footscray Ave also contains worker's houses, but there is no associated "big house".

(d) *Tonks Ave is described in Ian Bowman's Heritage Inventories as "a unique enclave combining small workers dwellings and generous inner city Edwardian housing with a narrow gateway to the Avenue defined by two storey shops. Its rambling, confined character captures the spirit of the 19th century Wellington."*

(e) *Likely archaeological evidence includes standing buildings, foundations of buildings (as there were several brick works in the vicinity of this area, it is possible that the foundations of early brick buildings destroyed in the 1855 earthquake still survive in situ), associated out buildings, subsurface features and domestic/commercial artefacts.*

[c] Authority No. 2002/98, relating to the Western Section:

(a) *Buildings are present from at least the 1870s. These are mainly Edwardian houses and shops. Subsurface remains of the original Brunswick hotel may survive on the corner of Willis and Ghuznee St.*

(b) *Likely archaeological evidence includes standing buildings, foundations of buildings, associated out buildings, subsurface features and domestic/commercial artefacts. It is most likely that archaeological features will have already been affected by the construction of the motorway off ramp in the 1970s.*



As set out by Transit⁷, the conditions on the authorities are as follows:

General conditions

The general conditions apply to all three authorities. The general conditions require:

- *Preparation of a research strategy (condition 1);*
- *Preparation of a management plan (condition 2);*
- *Work to be carried out in conformity with the cultural heritage protocol and procedures (condition 3);*
- *Preparation of a briefing document for people engaged to work on the Bypass (condition 4);*
- *Adequate fencing and security patrols (condition 5);*
- *Weekly site inspections and a report on compliance with archaeological conditions (condition 6);*
- *The holding of public open days and issuing of media releases (condition 7);*
- *Provision for storage of archaeological finds (condition 8); and*
- *Consultation with tangata whenua and the HPT, should any taonga or Maori artefact, or site of Maori origin be encountered (condition 9).*

These general descriptions need to be kept in mind when the provisions of s.20(6)(a) are examined.

⁷ Transit Outline of Opening Legal Submissions pages 31-32.



Specific Conditions

[25] These were also set out by Transit as follows:

Section 15 investigation

The specific conditions for the Central and Eastern sections require an archaeological investigation pursuant to s. 15 of the HPA on specific town acres. This investigation will include research, investigation and recording of specific buildings prior to their relocation, removal or demolition, identification of subsurface archaeological stratigraphy, features and remains, sampling of representative parts of any historical material encountered, recording, sampling and investigating any artefacts encountered, and the offering of a representative collection of any artefacts and building materials recovered from the project area to an appropriate local or regional museum.

Importantly, the conditions require that this investigation will be carried out by the HPT. This will give the HPT a greater level of control over the investigation than would occur if Transit was entitled to engage its own archaeologist to carry out the work. As the organisation carrying out the work, the Trust will be able to ensure that the investigation is not rushed, is thorough, and is sufficiently well managed.

Monitoring

The specific conditions for all three sections require monitoring of any earthmoving or site clearance that may affect an archaeological site, and reporting to the HPT on the completion of onsite archaeological work.

The Intended Appeals

[26] In May 2002, the THT and CBC lodged intended notices of appeal against the decisions of the HPT to grant the three authorities. We say “intended” because under s 20(1)



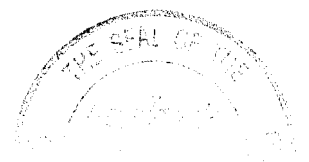
a pre-requisite to the right to appeal is that an appellant must be directly affected by the HPT's decision to grant the authorities. This is an issue we assess later in this decision.

[27] The following grounds for the appeals of both appellants are more or less identical and may be summarised as follows:

the decisions of the HPT:

- do not accord with the purpose and principles of the HPA, including the principle that the identification, protection, preservation and conservation of New Zealand's historical and cultural heritage should involve the least possible alteration or loss of it; and they do not safeguard the options of present and future generations;
- fail to take into account changed circumstances in relation to heritage in the application areas since the Environment Court decision on the appeal against the designation for the bypass in 1999;
- fail to properly consider the distinct heritage values of the separate parts covered by each application;
- fail to accord sufficient weight to international obligations in relation to historical and cultural heritage;
- are inconsistent with the HPT policy;
- placed inordinate and inappropriate weight on the existing designation for the bypass and misunderstand its relevance to the HPT's considerations under the HPA;
- did not consider adequately alternatives to relocation for the heritage buildings the subject of the applications;

[28] CBC's notice of appeal included a further ground of appeal relating to the former Mount Cook Police Station and Tasman Street Wall, but this was notified as withdrawn at a pre-hearing conference.



Issues for the Court

[29] Section 20(4) sets out the Court's powers of determination for the appeals. The Court may confirm or reverse a decision appealed from, or modify the decision in a manner the Court thinks fit. The appeals are heard in the manner prescribed by the RMA and are heard on a *de novo* basis.

[30] Two conflicting alternatives are advocated as to how the Court should determine the issues. Either:

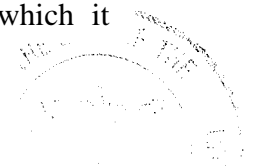
- reverse the HPT's decision and decline the authorities (as advocated by the appellants); or
- confirm the HPT's decision, including the various conditions it imposes (as advocated by the HPT, WCC and Transit).

The Case for Transit

The Work

[31] Transit opened its case with an overview from Mr Hasell in respect of:

- the bypass project;
- Transit's subsequent progress towards the project's implementation, including land holding and design (Transit and the council own all the land involved in the project);
- the heritage protection aspects of the project;
- the land disturbance, building relocation and construction activities which necessitate Transit's applications for the authorities;
- the authorities;
- Transit's consultation with the HPT;
- Transit's consultation with tangata whenua; and
- Transit's consultation with a community advisory group (CAG) which it established after the *Estate of P A Moran* was resolved by the Court;
- urban design improvements;



- construction.

[32] We are reminded that in terms of heritage protection, there are a total of 19 listed buildings in the project area. In accordance with the designation:

- 5 will remain in place;
- 13 will be relocated and restored; and
- 1 will be demolished (Boy's Institute, 30 Arthur Street).

[33] Mr Hasell advises Transit now intends to relocate and reconstruct a further 4 buildings, these being 270 and 274 Cuba Street, and 14 and 21 Kensington Street, which are not listed heritage buildings but have heritage merit. There are a further 25 non-heritage buildings requiring demolition or relocation.

[34] Mr Hasell identifies the new location and treatment of the heritage buildings has been an important part of the design effort between Transit and the council. The opportunity has also been taken to relocate non-heritage buildings onto new street frontages where these buildings have a character that would make relocation appropriate for urban design reasons. The detailed designs were finalised and submitted to the council for certification that they conform to the conditions of the designation. This certification has now been confirmed.

[35] Mr Hasell also drew attention to the fact that substantial archaeological investigation is required prior to the construction of the bypass. He emphasises the importance of beginning the construction as urgently as possible; since designation, water and discharge permits will lapse on 30 April 2004 unless work is started. He advises Transit is unable to obtain funding to undertake the works authorised by the designation or permits until it has obtained authorities under the HPA.

[36] Mr Hasell also put to rest some of the speculation as to what might happen to the buildings if the authorities are declined or funding for the project is not available. Firstly, Transit would need to retain the buildings in order to pursue an alternative project. Secondly, Transit would not be able to fund any heritage work other than maintenance. **Thirdly, if** Transit no longer requires the land for a roading project, it has to be disposed of **in accordance** with the Public Works Act 1981 and that means it is either offered back to the original owner

(or successor) or put in the land bank for Crown settlements with iwi. Transit could not gift the land to a charitable trust such as THT. It would have to be sold at market value. Accordingly, it is very difficult to anticipate what could happen to the heritage buildings should the archaeological authorities be declined.

[37] Mr A J Coulham, resource manager for Opus International Consultants, a roading group based in Wellington which took over from Works Consultancy, gave evidence as head of the design team for the bypass project. He highlighted some of the key designation conditions on the bypass and in a series of detailed appendices, set out the various locations and relocations of various buildings and the bypass routes.

Heritage Values

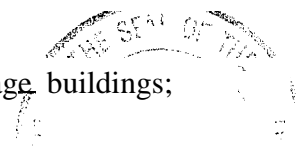
[38] The evidence and cross-examination of Mr I A Bowman, architectural conservator and architect specialising in building heritage, establishes the historical and cultural heritage values affected by the bypass; an analysis of the archaeology authorities; their consistency with the HPA and the ICOMOS Charter; and the present condition of the buildings. He leaves no doubt about:

- the very extent and urgency of the work to be carried out;
- the number of inappropriate repairs which have been carried out on many of the buildings; and
- the extensive damage to some buildings.

[39] Heritage inventories are a means of defining the heritage values of places. Mr Bowman prepared and produced 15 draft heritage inventories for selected heritage and non-heritage buildings that are archaeological sites. The inventories included a history of the area, individual sites of construction, alterations, and a history of the organisations and people associated with the area.

[40] The inventories establish:

- heritage values of spaces and elements of each of the heritage buildings;



- surveys of the buildings to identify the condition of the buildings and determined heritage values of each place;
- policies recommended to retain or enhance those values.

[41] In addition Mr Bowman has made a complete photographic record of the heritage buildings whilst Opus have prepared measured drawings of each of the buildings (complying with conditions 17 and 22 of the designation).

[42] This work, Mr Bowman concludes, is consistent with the purpose of the HPA which requires the promotion, identification, protection, etc of New Zealand's cultural heritage - with particular emphasis on its *identification*.

[43] Mr Bowman identifies that some parts of buildings are to be demolished prior to relocation on the basis that designation (condition 18) allows the demolition of both non-significant heritage elements and elements which are too badly damaged to survive relocation. For example, the stables, salt room and chiller of the butcher shop at 274 Cuba Street are such elements, as is the upstairs verandah of 278 Willis Street (the "Catacombs"), which is vandalised and partially burnt.

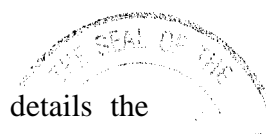
[44] It is Mr Bowman's conclusion that the archaeological authorities granted by the HPT are:

- consistent with good conservation practice;
- follow the ICOMOS NZ Charter; and
- augment and expand the information already gathered from the heritage inventories.

[45] Mr Bowman acknowledges that changes to the work are possible, based on new knowledge gathered during the course of the works.

Consultation Issues

[46] Ms N Barton, resource management planning consultant to Transit, details the extensive consultation undertaken by the designating authority first of all, up to and after the



designation was confirmed by the Court in *Estate of P A Moran*. She notes Kotuku Consultancy (Ms S Forbes) was commissioned by Works Consultancy for Transit to carry out an assessment of archaeological sites affected by the bypass. That report was included in Transit's documentation for the Notice of Requirement for the bypass designation. Ms Barton also refers to continuing consultation with the tangata whenua up to that decision.

[47] Ms Forbes' preliminary overall archaeological assessment was then followed by detailed archaeological assessments in 2001 by Ms O'Keeffe, and which accompanied Transit's applications to the HPT.

[48] A further consultation process under s. 11(2) HPA was then set up in order to take into account the interests of those persons likely to be affected when deciding whether to grant the archaeological authorities. Ms Barton was commissioned to provide further information to the HPT. She advised no additional information on cultural and heritage values in the project area was forthcoming after consultation with environmental groups, with the public generally, and with key stakeholders (such as tenants/owners) in the designation corridor at that time.

[49] In March 2002, the HPT itself sought additional information on who was likely to be affected by the project. Public notices were placed in the newspapers to further seek out persons most likely to be affected. In addition, Transit agreed to reanalysis of the 1145 submissions to the council on RMA issues for the designation project. 15-20% of those submitters raised general concerns of the impact of the bypass on this, one of the older areas of settlement in Wellington. One submitter claimed special knowledge of the area. The follow-up of 4 persons most likely to be directly affected brought no response.

[50] In her resume, Ms Barton concludes that all relevant information was before the HPT when it considered the applications for the authorisations.

Archaeology

[51] Ms O'Keeffe is responsible for the assessments of the archaeological resource along the bypass route and the ways in which it might be investigated, modified, etc. Her assessments made up the applications for the authorisations.



[52] Ms O’Keeffe is in no doubt that the road construction will have a serious and irreversible impact on the archaeological resource. Therefore, the information within the sites, which are to be permanently lost, [should] be extricated in as professional, efficient and timely a manner as possible. Her analysis includes recommendations as to mitigation - including detailed investigation of some of the Town Acres within the designation, archaeological monitoring of the remaining construction work, and the development of protocols to manage relationships and processes and to deal with artefacts. She also identifies a research strategy as being required, together with a management plan. (These were in draft at the time of hearing). The witness also refers to the general and specific conditions identified by the HPT in the authorisations, recording that they go beyond her recommendations and beyond the scale and measures included in most authorities. Ms O’Keeffe commends the HPT’s attention to detail in the authorisations.

[53] We refer in more detail to Ms O’Keeffe’s evidence throughout the decision.

Historical Values

[54] Mr Gary Tonks, great, great grandson of William and Jane Tonks (significant early settlers in Te Aro), heritage consultant and Tonks family historian, also gave evidence for Transit. Mr Tonks details the various significant contributions made by his ancestors to the colonial history of Wellington. He states it is questionable whether any one family contributed as much to the making of the city and the society as they did. The family’s activities included brick-making, a flour mill, a bread-making factory, harbour reclamation works, steam mills, merchant and importer activities, land agents, lessee of Queens Wharf, builders of the Bond Store, gravel works, drapers on Lambton Quay, gold mining, trans-tasman shipping, providing structural timbers for the Government buildings, carrying out works as a Maori interpreter and as a Methodist lay preacher, providing for the poor, etc.

[55] Mr Tonks explains that most family members entrust him to act in the best interest of saving the family history and buildings. He discusses a brief history of his ancestral connection to the land affected by the bypass (at the Webb Street end of Cuba Street), his concerns that the continuing deterioration of the building associated with the Tonks family (270 Cuba Street), and his satisfaction with the authorities granted by the Trust. He agrees that the archaeological investigation works (which are by their nature invasive) should be

carried out in the Central and Eastern sections of the bypass route and is interested to see what they reveal about the Tonks family.

Relocation

[56] Evidence was also given by Mr A W Thornton, consultant engineer to Transit on moving and strengthening and refurbishment of (particularly) the heritage buildings. Numbers 270 and 274 Cuba Street are identified by Mr Thornton as requiring significant repair and he concludes that without such attention and preservation, a number of the buildings have a limited life. He also identifies that many of the buildings can be moved in one piece, the exception being 289/291 Cuba Street - a semi-attached building with a common masonry wall. Overall he considers it is practical to move them all. The witness sets out several moving methods to be utilised for relocating the buildings, the routes they will take, and the structural updating required for the buildings in their new locations.

Peer Review of Archaeological Work

[57] Mr P G Petchey, a consultant archaeologist who has worked on several large-scale roading projects, peer-reviewed Ms O’Keeffe’s archaeological assessments for the HPT, as well as her evidence for the hearing. He set out his findings in respect of both, and also comments on the appropriateness of the conditions set by the HPT on the authorities. He had visited all the sites concerned.

[58] Mr Petchey generally supports Ms O’Keeffe’s assessments, analysing them in some detail. He finds that:

- Ms O’Keeffe’s assessments, while they lack clarity in some areas, do identify the presence of a considerable archaeological resource;
- Ms O’Keeffe’s mitigation recommendations are appropriate and of particular note is her recommendation that a specialist urban archaeologist be appointed for certain aspects of the excavation work;
- the authorities issued by the HPT are some of the best and most thorough he had seen in the New Zealand context: they clearly set out a rigorous programme of archaeological investigation and reporting that is designed to

fully and meaningfully record the archaeological of the affected area: they show a good understanding not only of the archaeological issues, but the practical problems which can occur during urban excavations;

- the HPT's expansion of Ms O'Keeffe's mitigation conditions is to be commended;
- the HPT's decision to carry out archaeological investigations of the important areas in the Central and Eastern sections of the applications is also of particular note.

The Case for the Historic Places Trust

[59] The case for the Trust was put by Dr McGovern-Wilson. He states the following:

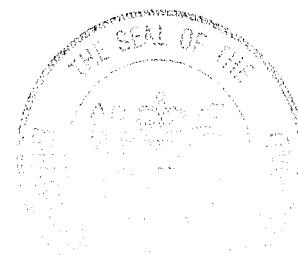
- the archaeological and historical information supplied with the applications is that the designation area is one of high archaeological value (in ground and building) both actually and potentially;
- the fundamental question to be addressed is what is the best outcome for the archaeological heritage both for Wellington and within the wider heritage context;
- better outcomes for heritage can be achieved through granting the applications and carefully managing the project than not;
- the buildings are seriously neglected: at the rate they are deteriorating, their heritage value will be gone;
- the conditions placed on the authorisations are the most extensive and detailed that the HPT has required: they recognise both the importance of the archaeological resource and the extensive nature of the project;
- without a substantial investment of time and money, the future of many of these important buildings is grim;
- the time has come to accept the relocation option as outlined in the *Estate of P A Moran* decision;
- the undertaking of the in-ground investigative work in a comprehensive manner is the best heritage outcome;



- the loss of heritage character along the bypass route through the loss of intervening buildings in the streetscapes is a factor contributing to the HPT's decision;
- the HPT believes the protective outcomes as a result of the authorisations are a better solution for heritage in general;
- the HPT's decision was made not simply because the buildings are in the state they are - it assessed a range of other issues relating to the landscape in general;
- the HPT can list items on the Historic Places Trust Register but it has no power to order a private land owner (Transit or anyone else) to undertake maintenance;
- the HPT does not have sufficient resources to ensure the long term preservation of the buildings;
- there is no indication that if the status quo is maintained, a third party will come to the rescue with a finance package;
- whilst the bypass will affect in-ground archaeological material, a programme of directed archaeological research can offset its loss by providing new information about the way of life in inner city Wellington (1840s-1900s);
- in the sensitive Eastern Section of the route, it may be possible to record any archaeological evidence as it is uncovered and then re-cover it, leaving it *in situ*;
- there is a philosophical debate about such *in situ* techniques - the 'value' of leaving material in the ground as opposed to excavating, recording and assessing it -but this is not a debate for this case.

The Case for CBC

[60] CBC's case proceeded along a number of avenues based on the fact that it is acknowledged by Transit's advisers that the site of the bypass is an area of high archaeological value. Some of CBC's criticisms arose not in evidence-in-chief, but in cross-examination, making it difficult for other parties to respond.

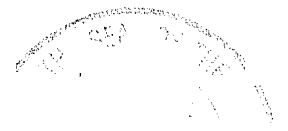


[61] CBC alleges that:

- what is proposed is that within a few months over one summer a large amount of inner city Wellington's archaeology will be modified or destroyed in one operation;
- the authorities will result in the destruction of a key part of the Cuba Historic Area;
- Transit have carried out a deficient archaeological/historical/cultural assessment of the applications for the authorisations by the Trust;
- it is not sufficient to treat this threatened urban archaeological resource by means of s. 14 HPA consent which imposes less preferred mitigation options;
- there is a disturbing lack of information about the current understanding Maori may have about the extent of the archaeological authorities;
- the current archaeological assessments do little to show an accurate overlay between the actual earthworks and areas with high archaeological potential or heritage buildings;
- had the HPT insisted that most sites along the route could be relatively readily located and identified, than s.11 applications would have been required resulting in each site being fully recorded and assessed;
- there is inadequate historical investigation for some sites and buildings; the authorities should be rejected because further conditions cannot be formulated in a situation where there is a substantial information deficit about highly visible pre-1900 buildings on the designation, namely numbers 8, 32, 40 Arthur Street; 270A, 272, 323 Willis Street; and 215 and 219 Vivian Street; in addition, questions remain about 20 and 28 Arthur Street which were built by 1900 and they are therefore on the 'cusp' of being archaeological sites;
- the fact that if the bypass proceeds, the important associations and setting values of the affected structures will be lost to present and future generations;
- there is no presumption in this case in favour of reconstruction and the relocation of heritage settings.
- the HPA should be read in a way which is consistent with New Zealand's international obligations and accordingly sufficient weight should be given to the ICOMOS Charter and UNESCO recommendations on historic and cultural heritage;

- ‘rescue preservation by record’, which is what is to occur here, is criticised by several authorities where the destruction of areas of high archaeological value is concerned;
- the loss of archaeological sites and the loss of information for present and future generations considerably outweighs any gains which may be made by excavating, modifying, recording the sites, and relocating buildings;
- the HPT has limited resources for systematic assessment, a crippling workload for its archaeologists and is administratively and informationally isolated;
- vacant sites exist in a number of areas (Arthur Street and Tonks Avenue) which are located near the surface; their essential elements in terms of previous buildings owners, etc can be quickly identified. These sites are only to be ‘monitored’ under s.17 HPA, ie an archaeologist will observe the bulldozer in action and investigate an archaeological features that are exposed: if a site is found then it should be excavated by standard archaeological methods;
- the primary purpose of the HPA is to promote *the conservation of heritage*: the phrase does not refer to *modification* or *destruction* of sites which are secondary to the purpose;
- there are many sites which are not in the carriageway of the road and for which no reasonable justification for destruction or modification has been given (eg the houses in Tonks Avenue);
- it is ironic that a large volunteer force is expected to assist in the excavation of the archaeological sites, but when the community (through CBC) states it is ready and willing to step in and provide funds and time, its offer is rejected;
- the HPT’s methods for evaluation of the archaeological assessments are deficient.

[62] The issues raised by CBC include leaving the buildings *in situ*. Ms S Forbes, consultant archaeologist to CBC for these hearings, states that the heritage sites include structures, physical evidence, social, historical and cultural values - all of which derive their value from their relationship with each other. She considers that Transit has not paid sufficient attention to the cultural landscapes in which the buildings and the archaeological sites are located. They are not identified sufficiently.



[63] She considers too the relocation of the buildings ignores the values' archaeological context in this case, and that it is professionally and ethically responsible to leave the maximum information undisturbed for future generations. She considers also that the New Tonks Avenue/Precinct area into which the current Tonks Avenue houses are to be located, could not be classified as a heritage precinct, as the new context and the relationship amongst the structures would be artificial.

[64] Another issue raised by CBC is that more work is required to be done in order for a full and proper assessment to be made prior to work commencing. Ms Forbes considers that the research strategy should have been determined prior to the route being finalised, so it could take into account the associative, scientific, social and aesthetic values of the site. This would allow questions about how historical and cultural values should be identified and protected through research questions. Such a method would have resulted in informed decisions about the development, rather than allowing the project to direct the outcome.

[65] Ms Forbes acknowledges that urban archaeology tends to be difficult and complex. She considers in this case opportunities for obtaining good data, which compensates for the loss of heritage through a detailed archaeological investigations, are likely to be marginal in such an urban area.

[66] Mr M Kelly, historian and heritage consultant for CBC, also considers that context is the greatest value that all these buildings possess and the social matrix that is represented by the present layout of streets and houses will be lost if they are relocated. He too asserts that the creation of an artificial precinct of heritage buildings will be undesirable as it would result in a colonial building 'theme park' as can be seen in Howick or Stratford. He states that this is the direct antithesis of the present historic arrangement of streets which holds such attraction for locals and visitors alike.

[67] Mr Kelly considers that a lot could still be done to understand more about the past patterns of settlement and the earliest occupiers of the land. And he considers that a basic pre-requisite before relocation or demolition decisions are taken should be the undertaking of full research and conservation plans, prepared by multi-disciplinary teams, for each of the heritage buildings affected by the bypass. This has not occurred here. In fact, a number of buildings which have archaeological if not heritage status have gone unaccounted for in both the



archaeological assessments and the authorisations. He identifies these with their individual histories.

[68] International evidence against removal of buildings is also a focus for the CBC and THT witnesses. In this context, Mr Kelly states that it is an established principle of heritage conservation, which is reflected in the ICOMOS Charter, that moving built heritage is not desirable in any circumstances unless it is a last resort. He asserts that there is an overwhelming body of evidence that establishes the primacy of the original site over any alternative, and informed us that English Heritage (a body akin to the HPT) regards relocation as akin to demolition and has no policy for it.

[69] Dr I Barber, lecturer in archaeology at Otago University, states that internationally the practice of *preservation by record* is generally recommended where there is no reasonable option for preservation of heritage values in place. He states that the UNESCO Recommendation makes it clear that responsible authorities are expected to act so as to preserve cultural heritage in an original setting wherever possible, particularly in urban situations where group historical associations are affected. Since the adoption of this 1968 Recommendation international heritage experts have continued to identify salvage, reconstruction and reassembly approaches as intrusive and inferior mitigation options in many, especially urban, situations. Dr Barber also points to the internationally influential *Burra* Charter (Article 9) which also strongly promotes the preservation of heritage connections *in situ* where the evidence of setting and association might be threatened.

[70] Dr Barber considers too that it is difficult to determine the point at which an archaeological resource in its setting is too important to be preserved - merely by record or salvage. In such cases, the information gathering and assessment processes recommended by UNESCO are critical. This would involve a comprehensive comparative assessment process involving local and national agencies, consideration of project variations, and a presumption against the reconstruction and destruction of a heritage setting.

[71] With regard to the costs and time involved for archaeological excavations, Dr H D Bader, urban landscape archaeologist for CBC, observes that excavations properly carried out are expensive and time consuming. The proper way to execute a comprehensive area excavation, such as this, is with time to plan and undertake the excavation, allowing a



sufficient lag for any earthworks. He considers the authorisations do not allow for this. He states that the current archaeological assessments do little to show an accurate overlay between the actual earthworks and areas with a high archaeological potential or heritage buildings. Therefore, it is uncertain which buildings are moved or being destroyed as a necessity to make room for the road or only for the convenience of the development. He considers that on this basis of the current state of the archaeological evidence, the bypass should not proceed. Another thrust of Dr Bader's evidence is that any archaeological consideration has occurred at the end of the lengthy planning process for the bypass - and therefore was a reactive consequence.

[72] Dr Bader further maintains there is not enough analytical evidence to identify or recognise hypothetical sites and considers that a GIS (Geographic Information Systems) examination would have assisted in a much more holistic approach to the applications. He considers further the separation of the bypass into three sections and the HPT's proposed conditions are in contradiction to modern archaeological approach, which favours the archaeological landscape in a holistic manner rather than the traditional approach focussing on single properties.

[73] Dr Bader also considers the time allowed for archaeological excavation is not adequate. He considers too that the authority conditions are completely inadequate as they only require the excavation and analysis of any archaeological remains encountered during earthworks. He concludes that ongoing assessment of the archaeological potential for the different areas of the bypass is largely left open to Transit.

The Case for THT

[74] THT's stance is very similar to CBC's with a more direct focus on the particular buildings.

[75] Mr J Moore, developer, builder and restorer of historic houses, particularly in Thorndon, states that the modern heritage practice is to officially designate historic preservation districts - this is widely followed overseas, particularly in the US. He asserts that one of the most significant international urban trends of recent years has been cities'



renaissance of their downtown areas through the restoration and the reuse of heritage buildings. And this is what should be considered here.

[76] Mr Moore considers too that well restored historic buildings, such as Te Aro could produce along the bypass route, will find a ready market for buyers. The growing popularity of inner city property, and inner city living (which has increased exponentially year by year since the 1960s), has added to this. If the bypass does not proceed, he considers that there will be extensive demand from investors, developers, home owners and small business people for these properties, especially as there is only a small number of heritage buildings available for restoration in Te Aro.

[77] After outlining his extensive experience in Thorndon, Mr Moore's evidence also traversed issues such as the importance of keep historic buildings *in situ*, and the costs and the difficulties of moving heritage buildings. He is very critical of relocation as a measure of the protection of historical and cultural values labelling the relative values of the new Tonks buildings with the term 'Tonks Avenue to Tonks McHeritage'. He also states that whilst the bypass route is short in duration, it will do incredible damage to many historic properties and the City's urban fabric. Although many of the properties appear dilapidated, all are able, on his inspection, to be renovated and restored. Mr Moore further outlines ways in which the affected areas may be saved, restored and protected if the bypass does not proceed.

[78] Mr D Cockburn, conservation architect, discusses the urban form of Te Aro identifies that it is rectilinear in plan. He asserts that the curving bypass will permanently and completely change the urban form of the Tonks Avenue area, as well as producing along its route numerous triangles and narrow strips of waste land foreign to the Te Aro area. He contends that if the bypass proceeds, a choice needs to be made to either:

- position the new buildings in line with the bypass; or
- fit the bypass into the rectilinear pattern of Te Aro.

[79] He contends that the latter approach would be more appropriate for the heritage, history and archaeology of Te Aro and the City. He further contends that buildings are perceived as enclosing their street spaces, and it is as important to conserve the streetspaces

and other adjoining open spaces between as it is to conserve each building. Mr Cockburn too gives detailed evidence on heritage and cultural values of the area.

[80] Mr P Martin Hill, architect and buildings archaeologist, outlines at some length the work to be done before commencement of relocation. His evidence was tabled without objection. The witness was seriously ill at the time. We note it here, as it gives useful background as to what is required in terms of the building's archaeology before they are relocated. Mr Hill records that some years ago he went through all of the buildings in Tonks Avenue, with the exception of 13 Tonks.

[81] He identifies that to commence a survey before buildings are relocated, it is necessary to form a base of photographs, drawings (including drainage and cadastral) as a basis for the survey of each house, including sections and elevations of the walls and ceilings of each room. The resulting records will show everything needed to rebuild the house. Wallpaper is also mentioned as a good chronological record of family life and other events in the household. This needs to be removed and dated layer by layer, wall by wall, room by room, for this to be appreciated.

[82] And then there is the extent of ground archaeology. There can be problems in determining the extent and position of probes, but fundamentally, the whole surface needs to be examined to a depth of 800 centimetres. This includes areas where bottles, cast iron or other metal and children's toys have been buried; the foundations of outbuildings; early toilets, etc. It includes areas where partly burned objects might be; past excavations; artefacts under the dwelling floors, which involves raking up between joists. There is also the building construction itself and the research required on that issue - the type of timber joints and nails used, the spacing of studs and sizes, the use of reused materials, the methods of securing partitions, studs, types of timbers used, labels, notes, stampings and other markings, construction methods, etc.

[83] All the invasive archaeological work needs to be carried out before any buildings are moved to avoid the loss of heritage items. The process should produce a complete **record of** the heritage of the area and explain much about the social background.



[84] Mr Hill concludes that invasive archaeology, if carried out completely and thoroughly, will give the best available heritage story for this area. But in the end the process has significant drawbacks. It will damage the cottages and cause the destruction of the gardens. Mr Hill considers that the [Tonks Avenue] cottages should not be moved and that, instead, all efforts should be made to preserve the area. His experience with the Thorndon Trust and the Colonial Cottage Museum, Mr Hill asserts, shows that it is possible for this to be successfully accomplished by dedicated groups working in co-operation with the community, the city council, property owners and developers.

[85] Evidence was also given by Ms Dafanie Goldsmith from Auckland, a descendant of the Tonks family. She supports leaving the heritage area of Tonks Avenue/Cuba Street intact. We refer more specifically to her concerns elsewhere.

The Wellington City Council

[86] The WCC is described in the evidence as Transit's partner in the bypass project and records its support for Transit's proposal for heritage conservation of the buildings in *Estate of P A Moran*. Its case in these appeals relates only to the protection of the buildings.

[87] The WCC owns three buildings in the project area, namely 11, 12 and 13 Tonks Avenue. It has committed funds of \$980,000 to support heritage in the area of the bypass and for particular enhancements over and above that required for the designation. A further \$440,000 is budgeted for urban design works and additional landscape enhancement for the area.

[88] The WCC's case is predicated on the basis that the bypass project will meet key council objectives in terms of both conserving the city's built heritage and initiating urban renewal in the Te Aro area. For this reason, it supports both Transit and the HPT in their approach to this case.

[89] The WCC's immediate focus is four of the factors the Court is required to have regard in s.20(6) HPA - namely the historical and cultural heritage values of the site justifying 'protection' of the site; the purpose and principles of the Act; the extent to which



protection prevents or restricts the lawful use of the site; and finally, any matters the Court thinks appropriate in the circumstances of the case, eg mitigation.

[90] The WCC suggests substantial reliance should be placed on the Court's findings in *Estate of P A Moran* when making an overall assessment of the proposal under s.20(6), while focusing more closely [in this case] on archaeology values. It acknowledges the building and sites subject to the designation have high heritage values, but the question is whether those values translate into a justification for their [absolute] protection.

[91] Evidence in favour of Transit's mitigation measures by way of relocation for the buildings is provided by Ms J Black, Manager of Urban Development, who, as leader of the WCC's Urban Design Unit from 1993-1996, was involved in the development of the city's urban design strategy at that time. Of particular relevance for this case is her experience with the development of the Cuba Street Precinct and its incorporation into the district plan

[92] Ms Black has also been intermittently involved in the bypass project over a long period of time. With respect to that work, Ms Black explains that the council has a number of key objectives - supporting the bypass project for the wider advantages it brings to the City, urban renewal (particularly of the southern Te Aro area); heritage conservation; and ensuring good urban design outcomes. The latter is of particular importance as so many of the buildings concerned, are in very poor condition, and will deteriorate further without urgent attention and funding.

[93] Ms Black makes particular reference to the extensive design conditions placed on the designation. She considers that these and additional proposals encouraged by the council will promote the identification and conservation of the historical and cultural heritage of New Zealand by maintaining the streetscape and historical associations with the area's past. Such proposals include:

- the relocation of 12 Tonks Avenue being considered by the Mayor of the City and her council after representations from Mr Gary Tonks;
- appropriate heritage and urban design layouts, plant species selection, pedestrian accessway locations, the design of open spaces and the exact location and orientation of buildings;

- use of brick headers (in some cases with Tonks bricks) in the New Tonks Avenue to provide more of an enhanced setting for the heritage buildings on relocation;
- standard design amenity lighting changed to a colonial style to complement the heritage nature of the area;
- the heritage setting for 13 Tonks Avenue [its formal garden] is being recreated in its new setting;
- a ‘private garden’ is being retained on the site of the old at 13 Tonks Avenue;
- bricks from demolished buildings and re-use of available materials from relocated and demolished buildings is to be utilised in refurbishment of the buildings and landscaping of their new settings to provide appropriate historical links and associations;
- discussions with Transit have resulted in the area between New Tonks Avenue and Kensington Street being considered as an appropriate context for heritage: they have resulted in Transit agreeing to locate numbers 14 and 21 Kensington Street and 270 Cuba Street and the provision of a building platform for a fifth building in the area: the objectives are to create a street in keeping with the Te Aro area, an appropriate setting for the relocated buildings and a strong desire to create an edge to the bypass;
- Transit have agreed to a district plan design guide being produced to guide further development along the bypass route.

[94] Ms Black supports Mr Bowman’s approach to relocating the heritage buildings. She emphasises support too for keeping buildings associated with the Tonks family as a group in New Tonks, those grouped on the corner of Abel Smith Street and Willis Street, as well as keeping together buildings of a similar scale in Kensington Street and elsewhere. Ms Black further explains that large individual buildings with a strong street presence (such as the “Catacombs”, “Woodside” (Avonside), and 319 Willis Street) have been carefully relocated from their immediate settings to proximate, prominent positions on local streets affected by the bypass, or on the edge of the bypass itself. Ms Black observes this enables the bypass to be set within the existing context, with buildings up to its edges rather than the more traditional wide landscaped edges commonly found on State Highway projects. The witness notes that this practice, in the past, has resulted in large areas of the city’s heritage, identity and orientation being lost.

[95] The witness stresses that the relocation of buildings within the context of an altered environment is fully endorsed by the council's current heritage and urban design policies and she observes - *The physical and social history of the area will be evident through retention of its buildings in the creation of appropriate settings. A strong sense of identification with this part of the city will still be possible.* In Ms Black's opinion, the final result will be *an attractive city street that retains continuity with the area's origins and that can be enjoyed and understood by people moving through the area and along the road.*

[96] Evidence was given by Mr S G Lamb, a resource management officer in the WCC's City Development Unit, who was responsible for the overall co-ordination of the various units of the council (urban design, heritage, traffic) that have an interest in the final design of the bypass. Mr Lamb, in response to questions from the Court, also set out costing issues for 12 Tonks Avenue, the site of which is owned by Transit and is surplus to the roading requirements.

[97] Mr Lamb notes that the council completed its key role under the designation when it certified the final designation, although it will remain involved through monitoring issues. Specifically on the interface between heritage and archaeological issues, the WCC's Heritage Policy advisor will co-ordinate with the HPT to maintain a watching brief over the delivery of the designation and authority conditions.

Issues

[98] The following are the issues as defined by the Court arising from the way the hearing proceeded, and against those matters set out in joint memorandum by the parties. Many of the original issues became irrelevant as it became clear several of the 'threshold' provisions of HPA controlled the jurisdiction of the Court. Those we consider relevant are:

- the relevance of the designation in the district plan to the consideration of the archaeological authorities;
- whether the appellants are "directly affected" so as to have standing to bring appeals under s.20(1) HPA;
- assessment on the merits: s.20(6) issues, including the purpose and principles;

- other matters;
 - international instruments;
 - district plan provisions;
- recommendations on matters outside the appeals.

The Relevance of the Designation in the District Plan to the Consideration of the Authorities

[99] Counsel for HPT invited us to take judicial notice of the Court's findings in the *Estate of P A Moran* as the Judge and one Commissioner who sat on that case are sitting on this. There was no objection to that submission.

[100] We consider it is necessary to take note of the Court's findings and conditions in that case, for they are a basis for some of the issues alive in this. The following are designation conditions of particular relevance⁸:

condition 17 - the 12 buildings on schedule 2 shall be relocated as shown on fig 3;

condition 23A - Transit shall not demolish the buildings - and shall maintain them in good repair after relocation (including 5 yearly inspections);

condition 23B - the buildings shall not be relocated except back to their original sites;

conditions 20 - buildings on schedule 3 shall not be demolished or removed;

conditions 23C - Transit shall use its best endeavours to secure covenants/ encumbrances on the titles to give effect to conditions 20, 23A and 23B, and will not take active steps to sell the buildings without first ensuring that an appropriate covenants registered;



⁸ WCC Submissions pages 12-13.

condition 21 -provides that ‘at the option of Transit’ all other buildings within the boundaries of the designation may be demolished or removed.

[101] It is also necessary to have regard to the designation decision in terms of at least one aspect of our evaluation under s.20(6)(c) HPA - the extent to which protection of the (in absolute terms) site prevents or restricts reasonable use of the site.

Are the Appellants “Directly Affected”?

[102] Under the RMA, the making of a submission in regard to HPT’s decisions granting heritage orders gives the automatic right to appeal, s.192(c). But that situation changes when the HPT grants authorities to an applicant to destroy or modify a site under the HPA. Here the right to appeal is limited.

[103] Section 20(1) of the Act states that:

Any person who is directly affected by any declaration, decision, condition, or review of any decision made or imposed by the Trust under-

...

(c) Paragraph (a) or paragraph (b) of section 14(1) of this Act (which relates to the Trust’s powers in respect of an authority application); or

(d) Section 15 of this Act (which relates to the Trust’s power to grant an authority subject to the condition that an archaeological investigation be carried out); ...

may appeal against that declaration, decision, condition, or review to the Environment Court.

[104] CBC is an incorporated society under the Incorporated Societies Act 1908, and THT is a charitable trust formed in 1994 and incorporated under the Charitable Trusts Act 1957. Transit considers that CBC and THT under s.20(1) are not “*directly affected*” by HPT’s decision to grant the authorities and therefore do not have standing to bring these appeals..

The CBC Case

[105] CBC submits that it is directly affected as a legal person and that it represents persons who are legally affected. In support it filed numerous affidavits from persons who are members of CBC and, either implicitly or directly, state they support its appeal. Those

deponents with links to the area include some who live in the Transit properties as tenants, or the area generally; some who work or were born in some of the properties such as the “Catacombs” (which was once a hospital); one who is of Te Atiawa ki Taranaki descent and works in the community gardens between Kensington and Victoria Streets in the path of the bypass; and so on.

[106] The issue is whether such links may be considered sufficiently different from those had by the public generally to award CBC and the people it represents the standing of being “directly affected” by the authorisations.

CBC as a Person “Directly Affected”

[107] CBC acknowledges that there is no case law specifically addressing the issue of incorporated bodies being directly affected under the Act, and that the term has to be interpreted in light of the statutory framework.

[108] CBC submits that if it were to own land in the area, it would be a body “directly affected”, but in lieu of that aspect it submits that its constitution nevertheless states that it is explicitly concerned with the inner city area affected by these applications. CBC’s function is *to promote environmentally sustainable ways of living in Wellington...* In addition, its goals include:

- (i) *promoting the sustainable management of natural and physical resources, particularly in regard to built environments*
- (ii) *protecting and restoring the environment including its physical systems and cultural heritage*
- (iii) *endowing Wellington with the attributes of a living city*
- (iv) *promoting sustainable communities by creating urban villages.*

[109] CBC points out that it has been active over many years in expressing concern about the heritage values of the areas affected by the applications, including being the main appellant in the hearing which resulted in the decision *Estate of P A Moran*. CBC maintains that the *Moran* hearing illustrates the dedication CBC has to fulfilling the objectives in its

constitution, and indicates as a result it is a party which is directly affected by the Trust's decisions on the applications.

[110] CBC notes that the group has over 400 members, and the affidavit of Alan Whiting, for the Campaign, indicates that CBC has spent funds and expended volunteer time on heritage sites in the area. CBC notes also that it has organised guided tours to promote the area's history, and that it has been closely involved in liaison over the project - as an example it was invited to join the Community Advisory Group. CBC identifies further that it has offered to assist Transit in maintenance and restoration of the heritage buildings in the area.

CBC Representing Persons who are "Directly Affected"

[111] CBC submits that the High Court *Ngatiwai* decision⁹ ("*Ngatiwai (2)*") establishes that corporate or incorporate bodies may act as nominal appellants for groups of persons directly affected. An appellant will have to prove there is an adequate mandate or authority, and whether those who have given that mandate or authority are truly directly affected in the particular circumstances of the case.

[112] CBC provides excerpts from *Ngatiwai (2)* that it considers are relevant to its claim to being "directly affected". These are from the *Australian Conservation Foundation* case¹⁰, and state that any special interest a person has in the preservation of a particular environment must be more than a mere intellectual or emotional interest, and:

*- a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests...and perhaps to his social and political interests . . . The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, . . .*¹¹



⁹ *Ngatiwai Trust Board v New Zealand Historic Places Trust (Pouhere Taonga)* [1998] NZRMA 1 (HC).

¹⁰ *Australian Conservation Foundation Incorporated v Commonwealth of Australia and others* 28 ALR 257.

¹¹ *Ibid* at p 284.

[113] CBC considers that *Ngatiwai (2)* in fact suggests some emotional connection to the site might suffice. It considers that a broad and unquibbling approach to the issue is necessary for Greig J gives the example thus:

*If the plan was to destroy the tomb and the grave of one's grandparents, to raise their grave sites and scatter their bones, the children and the grandchildren would, in ordinary parlance, be entitled to consider themselves as directly affected.*¹²

[114] CBC also refers to s. 11(2)(d) HPA which states that when an applicant applies for an authority it must supply a statement as to whether consultation with *tangata whenua* and any other person likely to be affected has or has not taken place. CBC considers that this provision ought to inform the definition of persons "directly affected". An example given is that from Ms Barton's evidence:

Persons likely to be affected would be those who have some form of direct link to the site. This could include a current and long standing occupant (owner/tenant), or one with an historic link through family connections to a former owner/occupant. It may also include a person who is a current and long standing occupant (owner/tenant) of an adjoining property.

[115] Mr J Moran, for example, is one who swore an affidavit. He is the beneficial owner of a third share in the property at 276/278 Cuba Street. He spent his childhood there. He states that because of his interest in - and long connection with - the land, he considers himself to be directly affected by the authorities to modify and destroy the area. Another is Ms P V P Hanify who grew up in Tonks Avenue and spent her formative years in the Arthur and Cuba Street neighbourhoods. She identifies neighbourhood personalities, shops and workshops in the area, which cast fresh light on some of the sites the Court visited - and clearly demonstrates her affection for the area.

[116] CBC further submits that the HPA contemplates that those persons who have had a close association with archaeological sites (ie. buildings) are in a way a part of the overall heritage resource associated with the site since they can provide valuable information about a

¹² *Ngatiwai Trust Board v Historic Places Trust* [1998] NZRMA 1, p 9-10.

site and about its identification, recording and preservation. CBC considers that the affidavit evidence of the 15 people which it has collected address these issues.

[117] Finally, CBC submits that a lack of [a direct] proprietary interest is not fatal when a party is claiming to be directly affected. There may be a direct effect where no private right is interfered with, *but the plaintiff in respect of his public right, suffers special damage peculiar to himself from the interference with the public right*¹³. A strong emotional attachment may suffice, such as that portrayed in the evidence of Mr Gary Tonks, for example, (whose ancestors established in Tonks Avenue/ Cuba Street) and the others who swore the affidavits.

The Case for THT

[118] THT submits that its organisation was specifically set up to protect the heritage affected by Transit’s roading proposals, and its objectives are very clear. THT identifies that some of its members are directly affected, either by owning property or being a tenant to the land covered by the authorities, or by having a strong philosophic and emotional commitment to heritage issues in Te Aro. In support of this issue, THT relies on the affidavits of Mr Keith Jefferies, barrister and solicitor and co-counsel in this case, and Ms Karen McIntyre, a member of THT.

Issues

[119] The following are the three issues we identified:

- What is meant by “directly affected” under the Act? *Ngatiwai* (2) states that such words apply to the circumstances of the case¹⁴.
- Are CBC and THT “directly affected” by the decision of the Trust?
- Alternatively, are CBC and THT acting as “nominal appellants” for groups of persons directly affected?

¹³ *Boyce v Paddington Borough Council* [1903] 1 Ch 109, page 114.

¹⁴ [1998] NZRMA 1.

Consideration

The Meaning of “Directly Affected”

[120] The right to appeal under the HPA is limited to those persons who are directly affected by the Trust’s decision to grant authorities to destroy or modify archaeological sites.

[121] Transit considers the ruling in *Ngatiwai* (2) that an incorporated society can represent directly affected persons is relevant only to Maori groups, and by claiming otherwise CBC is extending the decision of the High Court. Transit submits that the High Court states that “tangata whenua” ought to be able to choose a representative, but did not suggest that groups other than tangata whenua should be able to do so.

[122] We do not read the High Court’s decision as restrictively as Transit. That case is about a Maori Trust’s right to appeal under the HPA, and Mr Justice Grieg carefully analysed the facts before him. If he meant to limit his findings as exclusively applying to Maori groups only, one would expect him to expressly say so. But when analysing evidence of the recognition of the collective nature of Maori society, he concludes thus:

*I readily accept all of that **and that particularly in relation to Maori groups** it is both convenient and appropriate that there should be mandated or authorised representation by which the views and claims of **a particular group** may be channelled into a single voice speaking for all. (emphasis added).¹⁵*

[123] This statement, although directed at Maori interests, does not maintain that only Maori groups have the right acknowledged. What the decision does do, is place considerable emphasis on the factual matrix surrounding any one case. One of the most relevant issues therefore to be taken from *Ngatiwai* (2) is the emphasis in Justice Greig’s additional statement that *what is to be emphasised is that such words* [“directly affected”] *apply to the particular circumstances of the case.*

[124] To establish whether CBC or THT are directly affected under the HPA, the circumstances of their involvement and those they speak for need to be carefully

¹⁵ *Supra* 12, page 7.



particularised. How directly affected the appellants prove they are, indicates whether they can be declared directly affected by the Trust's decisions made about the area.

Are CBC and THT "Directly Affected"?

[125] Transit refers the Court also to *Australian Conservation Foundation* case¹⁶ which rules that the fact a body is incorporated with particular objectives does not strengthen its claims to standing. Transit considers, and the Court agrees, that the mere fact a person has concern about an issue does not qualify that person as affected, as was held in that case.

[126] As to CBC's goals and functions as recorded in its constitution, they apply generally to the Wellington area. They do not refer specifically to the bypass project nor do they refer or expressly relate to the archaeology of the Wellington central area.

[127] And as to the CBC's involvement as appellant in *Estate of PA Moran*, CBC did not call any expert archaeological evidence in support of that very broad ranging appeal.

[128] Transit considers that the only evidence of CBC involving itself in any archaeological issue under the HPA, is its making of a submission, in response to the public notice, on the authority applications made by Transit. There is proof CBC submitted in response to the public notice, on the authority applications, the subject of the appeals. Ms Pollack acknowledged she was unaware of whether any practising archaeologist had been consulted about the submission.

[129] Transit also submits that none of the actions specified by CBC - spending funds, volunteering time, organising tours and being involved in liaison issues with Transit - sufficiently differentiate CBC from others in the community with such active interests. Instead, these actions highlight how CBC chooses to assist its members. Transit considers that the fact CBC liases with Transit (and vice versa) shows an interest but that does not prove that CBC is directly affected.

[130] Offers of assistance in the maintenance and restoration of the heritage buildings in the area is also not evidence that CBC is directly affected by the Trust's decisions. Evidence

¹⁶ *Supra* 10.

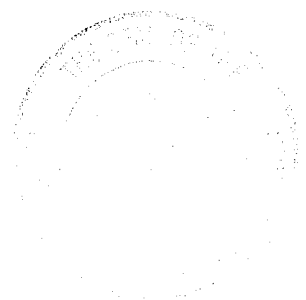


relied on in Mr Hasell's response to a question in cross-examination from counsel for CBC may have little weight as the matter was not addressed in the evidence in chief for CBC. Nor did CBC put Mr Hasell's answers to any relevant CBC witness. There is no evidence from Ms Pollack, secretary for CBC, either, as to any relevant CBC resolutions on the maintenance and restoration of the buildings. There were, it seems, general discussions between CBC and Transit about the maintenance regime for the historic buildings and CBC's desire to assist if it was appropriate, but that is all. Nor has CBC undertaken any maintenance or restoration of any of the archaeological sites in issue (although we note this assistance was offered and refused).

[131] Transit also considers that the purported actions undertaken by CBC that are illustrated in Mr Whiting's affidavit do not demonstrate that CBC is directly affected by the Trust's decisions. Transit considers that Mr Whiting's comments indicate that CBC, by *working on behalf of its members and assisting members to maintain their intimate links with the grant areas*, show how, as an organisation, CBC is not of itself "directly affected".

[132] THT argues that it is an organisation directly affected by reason of its aims, objectives and its histories. The affidavit of Mr Jefferies sets out the THT's aims, discusses how the organisation came about, and concludes that as THT has an 8 year involvement with heritage issues affected by the bypass, it is therefore directly affected in any decision relating to these matters.

[133] But involvement in heritage issues does not constitute an organisation as being directly affected. The fact that an organisation has the aims outlined by Mr Jefferies does not constitute evidence that it is directly affected for they are general in application. They do not reveal how THT could be said to be more directly affected by the decision on the authorities, any more than any member of the public who has feelings or interests in the natural, cultural and physical heritage of the Te Aro area in Wellington City.



[134] Therefore, after an assessment of counsels' submissions and the various affidavits filed and relevant case law in *Ngatiwai (2)*, therefore we do not consider that CBC and THT have standing to bring these appeals for the following reasons:

- the present appellants have not shown as incorporated bodies, independent of their members, they are directly affected;
- their interests are very broad ranging;
- the phrase “directly affected” is at once narrow and specific: the TCPA cases generally referred to by CBC do not provide authority for reading down or out the word “directly” from s.20 HPA;
- the HPA 1980, repealed by the current Act in 1993, also gave a right to appeal a decision by the Trust, to anyone “directly affected” (s.48): the subsequent Amendment Act replaced s.48 with s.20, but did not alter the requirements of a party requiring it to;
- by comparison the Town and Country Planning legislation did not narrow affected parties to being “directly” affected, and included rights for representation in s.157: and the HPA does not have an equivalent s.274 RMA which refers to representations from “any person having an interest in the proceedings greater than the public generally”.

CBC and THT representing those “directly affected”

[135] The affidavits filed by the appellants' members demonstrate their strong affection for the area in question, an extensive knowledge of many who lived there, and an undoubted commitment to preserving what remains of what was a strong, vibrant and interesting inner city community. The deponents presented a human face to the issues we are assessing. We appreciate the considerable care which went into the preparation of their affidavits.

[136] Transit submits that the circumstances in the 1987 Planning Tribunal case *Zwartz v Wellington City Council*¹⁷ are more analogous to CBC and THT's situation than other cases it cites (namely *Hadley v Opotiki Council*)¹⁸ in terms of who may be “affected”. Transit

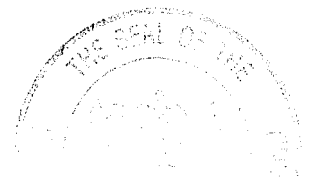
¹⁷ (1987) 12 NZTPA 187. In *Zwartz* a developer had applied for a resource consent to erect a large office close to a park where the appellant was accustomed to have lunch and take walks. The appellant claimed that the development would detrimentally affect the amenities of the park that he had enjoyed for so long.

¹⁸ [1973] 4 NZTPA 443, 453.

considers that much of the affidavit evidence produced by CBC in support of its claim to be “directly affected” in this case is akin to the sorts of interests claimed by Mr Zwartz, namely lunching in the park, being a walker and tramper, and a concerned ratepayer, pedestrian and driver. The Court in *Zwartz* held that the test in relation to the words in s.2(3) “any...person affected” under the Town and Country Planning Act 1977 was that propounded by Cooke J in *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd*¹⁹ - whether there was *likely to be an effect on him significantly greater than, or different from, the effect on the public generally*.

[137] We conclude that CBC is not the nominal appellant for persons directly affected, nor is THT. CBC’s argument relies on its interpretation of *Ngatiwai (2)*, where the High Court decision overturned the ruling of the Planning Tribunal that an incorporated body cannot represent people who are directly affected. In *Ngatiwai (2)*, the Court allowed an incorporated body, duly mandated, to legitimately appeal as a representative. As submitted by Transit, fundamental to the reasoning in *Ngatiwai (2)* however, was the High Court’s acceptance that it is common practice for Maori Trust Boards in that case to be recognised as a conduit for iwi whose especial place is specifically recognised in the HPA under s.4. CBC and THT do not have the same statutory mandate.

[138] As to THT, Mr Jefferies deposes that he has been a trustee of that organisation since its inception but there is no evidence to what, if any, effect the granting of the Trust authorities would have on the trustees. THT’s evidence largely relies on claims that various of its members are directly affected. Mr Jefferies attests that THT has approximately 30 members who mostly reside in the inner city and who feel strongly about heritage issues. A number of those members live and work close to the route of the bypass. Mr Jefferies comments on his understanding of the feelings of many members (though in evidential terms this is hearsay) and he himself does not attest to having such feelings or being directly affected. Ms McIntyre attests to being a member of THT. She deposes that she lives in Aro Valley, has a personal attachment to the area, has helped in organising Te Aro Heritage Tours for the Cuba Street Carnival and believes herself as a consequence to be directly affected.



¹⁹ [1974] 1 NZLR 295.

[139] Strong feelings for and personal attachments to an area do not constitute 'directly affected' however; neither does the fact that THT members live and work close to the route of the proposed bypass; nor does an interest in organising heritage tours of the area. Members of the public in fact may also have similar feelings about the issues relating to heritage and archaeology, live and work close to the bypass route, and promote heritage tours of the area. They too are not 'directly affected'.

[140] Neither does the evidence suggest that various individuals within the organisations are directly affected.

[141] None of the witnesses purport to have any proprietary interest in the land; in all cases the nature of the effect described in the affidavits is a largely emotional attachment of one kind or another. For example, Mr Moran's building; the property in question is owned by the estate of Peter Aloysius Moran which was not represented in Court. And personal funds spent voluntarily on one of the tenanted buildings (the Catacombs) demonstrates significant interest in its upkeep but is not a proprietary interest in the sense of being directly affected.

[142] And the fact that someone was born years ago in what is now the Catacombs (as were many others), or gardens an empty lot in the path of the bypass, does not prove they are directly affected. Nor does the fact someone gives volunteer time to heritage sites in the area, or is closely involved in liaison with Transit on issues arising, or being invited to join the Community Advisory Council, enough to sufficiently differentiate CBC from the public at large.

[143] We conclude that if, for example, CBC represented a group of property owners in the path of the designation, or if it represented a group of descendants with ancestors in a cemetery in the area, or if it represented Te Atiawa's concerns for koiwi known to be buried in the area, then the question of standing might be very different.

[144] We accept that Justice Grieg in *Ngatiwai (2)* suggests (obiter) that a very close proximate emotional attachment could be seen as sufficient for deeming a person directly affected. However, the CBC and THT claims fall below the Justice Grieg's hypothetical example.

Conclusion

[145] We consider those “directly affected” by a decision of the HPT could include:

- any person with a proprietary interest in the land;
- the applicant for the authority the subject of the appeal;
- tangata whenua who are linked to the site through their ancestry²⁰; and
- other persons without a proprietary interest in the land such as children and grandchildren being directly affected by a proposal to dig up a grandparent’s grave²¹ : whether any such person was “directly affected” would be determined on the evidence.

Determination

[146] Neither CBC nor THT or its members are persons directly affected by the Trust’s authorisations. Therefore they have no standing under s.20(1) to bring these appeals and they are required, as a matter of law, to be struck out.

[147] Despite our findings on these matters, in case we are wrong, we propose to examine the provisions of s.20(6) on their merits.

Matters to be Considered in Determining Appeals: s.20(6)

[148] Section 20(6) HPT sets out the matters which the Environment Court must consider when determining the appeals. It provides as follows:

- (6) **In determining an appeal under this section in respect of a decision made under paragraph (a) or paragraph (b) of section 14(1) of this Act, the Environment Court shall have regard to any matter it considers appropriate, including (but not limited to) -**

²⁰ *Ngatiwai Trust Board v Historic Places Trust* [1998] NZRMA 1, page 10. Contrast with the Planning Tribunal’s decision in *Ngatiwai v Historic Places Trust (Pouhere Taonga)* [1996] NZRMA 222, page 234, which states: “Possibly tangata whenua with an interest in any remains of their ancestors that might be uncovered in the course of the proposed works” which was seen as too narrow by the High Court.

²¹ “We do not accept the applicant’s submission that for a person to be directly affected by a Historic Places Trust decision he or she needs to have a legal interest in the land where the archaeological site is found. We

- (a) **The historical and cultural heritage value of the site and any other factors justifying the protection of the site;**
- (b) **The purpose and principles of this Act;**
- (c) **The extent to which protection of the site prevents or restricts the existing or reasonable future use of the site for any lawful purpose;**
- (d) **The interests of any person directly affected by the decision of the Trust;**
- (e) **A statutory acknowledgement that relates to the site or sites concerned.**²²

As HPT point out no one provision takes precedence over the other. In this exercise, all are to be weighed carefully.

Historical and Cultural Heritage Values of the Site and Any Other Factors Justifying its Protection: s.20(6)(a)

Introduction

[149] CBC suggests that the values of the archaeological resource in the areas covered by the authorities are so high that no amount of re-assembly or rescue archaeology can compensate for this loss.

[150] CBC and THT also allege that the HPT's decisions fail to properly consider the distinct heritage values of the separate parts of the site covered by each application both buildings and subsurface archaeology. They produced a list of pre 1900 buildings and sites which they allege have not been considered by either Transit or the HPT, which we refer to later. The list relates to buildings in Arthur Street, Vivian Street, Willis Street and Oak Avenue. They also consider the authorisations do not respect the very high historical and cultural values along the bypass route.

²² Transit notes and we agree:

- (a) Section 20(6) does not expressly apply to the HPT in its determination of authority applications/under s. 14. Section 4 purpose and principles would, however, apply - see below.
- (b) In this case s.20(6)(e) is not relevant as there is no statutory acknowledgement relating to the site of the project.

Issues Arising

[151] The questions posed by s.20(6)(a) of the HPA are:

- The state of heritage and archaeological work in Wellington
 - What are the historical and cultural heritage values of the area subject to the applications?
 - Do those values justify protection of the site?
 - What does protection mean?
- *The state of heritage and archaeological work in Wellington*

[152] Ms Forbes observes that archaeological research in Wellington has been very limited with the exception of work carried out on early military occupational and the history of the City. This does not mean that the information is not available. Pre 1840 history is seriously under-represented in the archaeological record although much is known. Ms O’Keeffe shares this view of pre 1840 sites.

[153] Compared with the recorded sites in areas well known by tangata whenua, however, there are serious gaps in the national published records of post 1840 urban and industrial settlement in Wellington. Ms O’Keeffe notes that only two archaeological sites are recorded in the Wellington inner city area, (Te Aro Pa and the Nairn Street cottage). Since the authority applications were written, a further archaeological site has been investigated in 213-215 Taranaki Street (Mt Cook Boys’ School Latrines).

[154] It is stated examples of inner city heritage are significantly rare in the urban context which heightens their archaeological/heritage value. It is considered too that the state of heritage preservation in Wellington is not representative. In the 1970s a great many important buildings were torn down with a selective preservation of others.

[155] Ms Forbes considers the built heritage, the archaeological sites and the associated value of the area of the bypass are significant on a regional and possibly national level, particularly some rare groupings of historic buildings. Upper Cuba Street, Footscray and

Tonks Avenue are particularly important examples of historic, residential and commercial buildings.

[156] Dr Barber considers that the removal of some of the last *in situ* 19th century industrial and residential associations in urban Wellington, is a matter of considerable concern for a city that has sustained substantial loss or inappropriate treatment of its built heritage throughout the latter part of the twentieth century. He states that Wellington has a poor reputation for preserving heritage and archaeological sites and that it is not well placed for the treatment of its built heritage resource.

[157] Mr Bowman however, discusses the more recent growing understanding in the community of heritage issues. He identifies that the WCC is one of the most forward in considering heritage, listing buildings, and writing heritage rules for the controls of modification to heritage buildings.

[158] There is little doubt that what could occur as a result of these authorisations, will be of very great significance to the City of Wellington - both to the state (knowledge and protection) of its heritage buildings, as well as the contributions to be made to the knowledge of its archaeological sites.

[159] With these matters in mind, we turn to an evaluation of what is in issue in these appeals.

- **The historical and cultural values of the area and their protection** (*their archaeological value in terms of New Zealand's heritage and societal origins, and history, the relative values of the site*)

[160] The New Zealand Company ships arrived in Wellington in 1840. Mein Smith's plan for the city was laid out the same year. The city was divided into 1100 one acre blocks for sale with 10% of these to be reserved for Maori. The city layout and road alignment of this plan is largely in use today.

[161] Under s.2 HPA:

historic area means an area of land that-

- (a) Contains an inter-related group of historic places; and

- (b) **Forms part of the historical and cultural heritage of New Zealand; and**
- (c) **Lies within the territorial limits of New Zealand:**

historic place-

(a) Means -

- (i) **Any land (including an archaeological site); or**
- (ii) **Any building or structure (including part of a building or structure); or**
- (iii) **Any combination of land and a building or structure,-**
that forms part of the historical and cultural heritage of New Zealand and lies
within the territorial limits of New Zealand; and

- (b) **Includes anything that is in or fixed to such land:**

[162] No mention is made in the HPA of what is meant by the word ‘values’ and what they consist of, but we take it they have aspects of all of the above definitions. Mr Bowman states he prepared draft heritage inventories for the various heritage - non-heritage buildings that are archaeological sites, on the basis of the work undertaken in *the Cultural Significance* section of *The Conservation Plan: A Guide to the Preparation of Conservation Plans for Places of European Cultural Significance*²³. He bases his criteria for the identification of places of heritage value on those identified in the district plan, namely:

Cultural Values: emotional, historical, design, technological

Use Values: economic, functional, educational, social, political

Contextual Values: measure of value, level of authenticity

[163] Ms O’Keeffe based her value assessments of the archaeological sites against ten criteria²⁴. When characterising the context (class) of a place, she looked at *currency, rarity, diversity* and *representativity*. When comparing the place relative to other similar places, the criteria used were *survival/condition, diversity, group value* and *potential*. She also makes her assessment in terms of relationships with other heritage landscape items, namely amenity value (potential of the archaeological values of a site as a visual, educational or recreational resource) and conservation value (potential of archaeological values to enhance the value of a site by integrating archaeological values with other values)²⁵.



²³ J S Kerr (National Trust of Australia 1990).

²⁴ Department of Conservation Walton A, 1999.

²⁵ Dr McGovern-Wilson for HPT considered these criteria as a meaningful mechanism by which consultants like Ms O’Keeffe can make assessments and present information to the HPT on that basis.

[164] Basing her assessments on these provisions, she concludes:

- there is potential for many archaeological deposits and features;
- the sites and features are likely to yield a great deal of valuable information of high significance about the settlement of inner city Wellington in the colonial period;
- this information would be of great significance, as very few buildings or sites from this period survive, and very few archaeological excavations of sites from this period have been undertaken in Wellington.

[165] Ms O’Keeffe notes that while the archaeological values of the study area are high, they are not unique within New Zealand in terms of their origin, use, or features of historical potential. She balances the high archaeological values of the site (the bypass route) against the potential for further knowledge about a significant period of Wellington’s history. She concludes that:

- avoidance of impact is not possible on potential subsurface archaeological sites;
- the potential sites are not so significant as to prevent their modification or destruction by the planned roading work;
- given the high values of the site, it is imperative that archaeological investigation takes place prior to any construction work.

[166] In Transit’s and the HPT’s opinion, however, the values of the site are not so high (both surface and subsurface) as to warrant declining the applications. The values are not seen as unique. And in terms of the nature of the values (modified or unmodified, already vulnerable, etc), Transit point that a particular characteristic of the values in this case, is that they include above-ground buildings (including those recognised as having heritage value). The buildings are presently exposed to the elements, and other risks, rather than being sheltered as any subsurface archaeology may be. Both Dr McGovern-Wilson for the HPT, and Mr Bowman for Transit, express strong concern about the ongoing deterioration of the buildings if relocation and protection is not undertaken urgently.

[167] The appellants consider that from an archaeological perspective, the buildings and sites should remain as they are. Thirty-eight properties are to be demolished or relocated for a section of road about 700 metres long. They also stress that the introduction of the long

curved street will do untold damage to the Te Aro heritage and its historical associations. The effect will be seen in the empty wastelands and odd-shaped blocks of land created by the introduction of Victoria Street creating SLOAPs (Spaces Left Over After Planning). Such spaces become waste land and because they are not narrow in pattern, they are difficult to use efficiently.

[168] The appellants also consider that only parts of some of the buildings can be readily moved, with chimneys and some internal partitions and masonry walls unable to be moved at all in an intact form. These aspects alone, it is considered, are to have serious implications for the protection and preservation of the buildings. Were they to be left on their original sites, they could be restored and the maximum of heritage fabric preserved.

[169] The appellants are very critical of Transit's emphasis on the necessity of the *identification and recording* of New Zealand's historical and cultural heritage, rather than its *protection, preservation and conservation*. In fact, Mr Cockburn for THT goes so far as to state that the poor state of the buildings and the loss of their heritage context due to their relocation is so great, that he would prefer they are recorded and demolished, rather than further degraded by relocation into inauthentic streets and relationships.

[170] The appellants consider also, that if the authorities are declined, CBC and THT and trusts which might be set up (such as the Thorndon Trust (as an example)) will step into the vacuum left by Transit. In the result, southern Te Aro's heritage could be restored in much the same way as Thorndon was in the 1980's, resulting in a lively and charming mix of residential/commercially used buildings, enlivened with interesting new buildings.

[171] All parties to the proceedings indeed the high - very high historical and cultural heritage values of the site, so we begin our evaluation from this premise. The values exist in the cultural landscapes and the combinations of land (Town Acres), colonial buildings and structures. They exist in the rectilinear road pattern of Te Aro which dates back 160 years to European settlement. They exist in the scale of the streets and small lanes along the bypass route, which stem from 1840. The values exist on the associative and cultural and social values of the people of the day. They encompass the people who worked and lived in the areas identified.

[172] We next assess the particular historical and cultural values of the three sections for which the authorities have been issued to determine the significance of the values in issue, the

nature of the values in issue and values in relation to subsurface and/or buildings archaeology. The appellants allege that Transit and the HPT have failed to properly consider the distinct heritage values of the separate parts covered by the application.

[173] And finally, we assess the buildings archaeology value - their value as archaeological sites. Such assessments are well developed overseas. It is Dr McGovern-Wilson's intention to bring New Zealand practice, which has lagged behind the rest of the world until now on this issue, into line with overseas' standards on this issue. The practice requires full an detailed analysis by a specialist buildings archaeologist for buildings targetted for relocation.

[174] Map 7 taken from the *Inner City Bypass Historic Places Authorities: Reference Plans and Photos*, put in evidence by Mr Coulam, showing the Historic Town Acres to be investigated and/or monitored. It is attached to this decision marked Appendix 4. Photo Map 2b, attached as Appendix 5, shows the buildings to be demolished or sold for removal or part relocation/part demolition.

The Eastern Section

Buckle Street, Arthur Street and Upper Cuba Street

Buckle Street

Historical and Cultural Value

[175] The designation footprint covers half of Town Acres 226 and 233. Ms Forbes observes tangata whenua history and archaeological studies are slender in the assessment work done so far. Partly this is because the post 1840 archival record is so rich for this part of the city, and partly because there have been few comprehensive studies into this period of land use.

[176] Ms Forbes set out the Maori Occupational/Archaeological Sequences of the area. When the European settlers arrived they found the relatively flat land (Thorndon and Te Aro) inhabited by Maori. In 1844 the Te Aro iwi signed a deed bringing some kainga and gardens into the New Zealand Company land selected for the colonists. Maori were displaced, Te Aro pa being purchased in the 1870s by the Crown. What became Buckle and Taranaki Streets

were taken for defence purposes. Ms Forbes identifies that in the region of this study area cultivation areas are known to have been at Huriwhenua (60-80 acres near the Te Aro kainga) and at Hauwai. Both were associated with Ngai Tara but may have existed earlier as some of the landscape features associated with these sites are named by Ngati Mamoe.

[177] Buckle Street is also significant for its long period of military use. Buckle Street (along with Arthur Street) had buildings present from the 1870s including a drill hall and barracks. It is named after John Buckle, a New Zealand Company Director. The section is notable for its associations with defence and law and order systems of early Wellington.

Buildings Archaeology Value

[178] The National War Memorial and Carillon; the National Museum and Art Gallery buildings; and the Mount Cook Police Station are either Category I or Category II HPT listed buildings in the area, but they are not affected.

Subsurface Archaeology

[179] According to the archaeologists, this is one of the areas significant to tangata whenua therefore and there is the possibility of pre-European Maori sites. Te Aro is one area that is known to have had a lengthy occupation history prior to colonial settlement.

[180] Ms Forbes also identifies that despite the continuous occupation by tangata whenua, surface features have not survived in the Wellington soils, though it must be stressed that once any earthworks are undertaken, archaeological evidence should be expected. Pa and other occupation sites are difficult to trace without excavation and traditional records. The soils in the southern part of the North Island are very stony and surface features are quickly lost.

Arthur Street

Historical and Cultural Value

[181] With regard to Arthur Street's heritage values, Mr Kelly for CBC carried out historical research to identify the historical records of some of the street's oldest buildings in the street as part of the Te Aro Heritage Trail, which he assessed for the council.

[182] He states that the old houses of Arthur Street, among others, are reminders of cultural heritage landscapes for which little is really known. The earliest owners and occupiers of the land of the 19th Century patterns of settlement are only vaguely understood and CBC considers that much more should be done to recover that information.

[183] Arthur Street is named after the son of William Tonks who arrived in Wellington in 1842. The street is part of Town Acres 101, 103, 105 and 107. William Tonks Jnr, a brick maker in nearby Webb Street, bought these four sections in 1864 from the Hon Algemon Tollemache, an English landowner in the area, who had purchased sections from the New Zealand Company. The Tonks family were intimately associated with Te Aro and Cuba Street and Tonks Avenue in particular. The Rates Books show William Tonks informally subdivided some or all of the land laid out Arthur Street, and built numerous houses here. It appears that Arthur Street was completed in 1865 or 1866.

[184] Tonks possibly built number 8 Arthur Street in 1868, but around 1873 it was bought by Robert McCallum, a printer and painter. The supporting physical evidence even suggests the building dates from the 1860s. Mr Kelly also establishes the same Tonks linkage and dates of buildings (relatively) for numbers 32 and 40 Arthur Street.

[185] Number 32, a slim single storey cottage with a lean-to, is associated with a William Luke, an engineer. Mr Kelly estimates the house could have been built about 1875. It has corrugated iron cladding, the use of which was made compulsory in inner city Wellington in 1878. The house stayed in the Luke family for the next 50 years. Number 40 Arthur Street was occupied in 1873 by Thomas Lachlan Campbell, a labourer. It is a simple double storey dwelling, possibly built between the 1860s-1870s.

[186] The Boys Institute building, built in 1906 for education purposes, is a heritage building but not an archaeological site. It has historical significance because of its early educational value. Transit considers that because the Boys Institute is masonry in construction, it will be too expensive to relocate.

Buildings Archaeology Value

[187] Numbers 8, 32 and 40 Arthur Street are identified as having considerable rarity value both for their age in the area and as surviving Te Aro workers cottages. They are the first and only remaining houses to occupy their sites in the street since European settlement began.

[188] Mr Bowman disputes CBC's approach to the Arthur Street and sets out in his rebuttal evidence the degree of historical and conservation research that has been carried out on the Arthur Street buildings (including work undertaken by Ms J Gatley for the HPT). He identifies that as far back as the initial Ian Wards' report on the area, it was decided that the houses on the north of Arthur Street did not warrant retention. And any control over the only heritage listed house, number 8, was removed as part of the district plan hearings process²⁶. Mr Bowman states *the other houses were not recommended for listing by the public or myself who was engaged by the WCC at the time to advise on which buildings should be listed*.

[189] Thus, it has been considered earlier that the buildings did not individually have sufficient heritage values to warrant listing for protection. Unlike Tonks or Footscray Avenues, there was no coherent group to which they contributed. It was also considered there are many similar houses elsewhere in Wellington, such as in Thorndon and Aro Street, which have greater heritage value because of their greater age, and/or because they are part of a coherent group.

[190] The heritage values of Arthur Street are now seriously diminished because the coherence of the buildings is highly modified. This fact was confirmed on our site visit. Because of their location too, the houses cannot remain as they are in the path of the bypass.

[191] Ms Forbes confirmed in her 1995 Kotuku Report for Works Consultancy that the coherence of the buildings and their historical values in Arthur Street were seriously modified. She also considers in the checklist attached to her evidence for the hearing that the removal of numbers 8, 30 and 40 Arthur Street will not seriously detract from the heritage value of the street. The fact that 8 Arthur Street was removed from the district plan list of heritage buildings appears to confirm that the community appears not to have warranted its protection as important at the time of the district plan references²⁷.

[192] We have no specific evidence on the state of numbers 32 and 40 Arthur Street so we do not know the degree of modification or otherwise that might have occurred with them. We know from our site visit to 8 Arthur Street that some original features remain in that building.

²⁶ Ian Wards, who was the Government Historian at the time, led the Wellington Regional Committee: of the NZHPT 1988. Mr Bowman also identifies five other investigations that have taken place since that period.

²⁷ It is noted that in Ms Forbes' 1995 report to Works Consultancy Services she records 8 Arthur Street as being built in 1902, and notes it is a heritage building, but not an archaeological site (page 15). Similarly, Mr Bowman records that 8 Arthur Street was built in 1902, in his bypass report in 1995 (page 11).

[193] In Exhibit 1 put in evidence by Mr Hasell *Summary of Directly Affected Buildings Along Wellington Inner City Bypass Route* number 8 Arthur Street is classified as having potential use in the Character Area, which indicates that more recently its status has been upgraded to that possibility. We discuss 8 Arthur Street and the other related (“Tonks”) buildings at the end of this decision.

[194] The HPA only allows the HPT to consider buildings which are pre 1900. But Transit’s assessment did not specifically cover numbers 8, 32 and 40 Arthur Street. Nevertheless, Dr McGovern-Wilson identified they fall within whatever conditions that the HPT consider should relate to buildings archaeology. The work will be undertaken in conformity with the research strategy and therefore allows the HPT to manage the work in that way.

Upper Cuba Street

Historical and Cultural Value

Cuba Street is named after a colonial ship which arrived in 1840. Mr Bowman describes the history of the area in his heritage inventories thus:

The Te Aro area

The Te Aro area was one of the earliest European settled areas in Wellington soon after 1840. The area quickly became the city’s commercial centre but with a variety of other uses including military, governmental and residential. The large blocks of the original town plan were unworkable without additional lanes accessing the centres of the blocks and avenues such as Tonks and Footscray resulted. The Tonks family started the Tonks brickworks at the top end of Cuba Street but industries became common much later in the nineteenth century and into the twentieth century. Manufacturing concerns such as Hannah’s boot factory and Byrant’s match factory became employers of the local residents.

The Te Aro area shared a common characteristic of New Zealand towns of the late nineteenth and early twentieth centuries area where the rich and poor living close together. The upper Willis Street and Abel Smith area were

popular for the wealthy with substantial homes, while the upper Cuba Street area was populated by shop owners and workers for nearby factories. The further development of the Cuba Street area was encouraged by the advent of the tram in 1904.

[195] The early development of the Cuba Street area is strongly linked to the settlement of Tonks Grove (now Avenue). It is the second historic precinct in the area, Footscray being the first.

Buildings Archaeology Value

[196] Only the 289/291 Cuba Street buildings fall within the Eastern Section Authority. They are Category II buildings on the HPT's Register. Such places are recorded as places of historical or cultural heritage value. The architect was Thomas Turnbull, a Scotsman who arrived in 1871 and who was a pioneer in the design of buildings to withstand earthquakes.

[197] The buildings reflect the pattern of verandahed two-storied Edwardian shops with residences above which defines the overall character of Cuba Street. They were built for James McKay in 1900 and whose tenants included a fishmonger, grocer, butcher and dressmaker.

[198] Mr Bowman states in his heritage inventory that the basic Italianite style of the building and largely authentic state of the buildings enhances the streetscape and makes a valuable contribution to the built heritage of the Street. He records that the buildings have high levels of authenticity of materials, design, craftsmanship and setting, so retention of this resource is highly desirable. The buildings are to be investigated, recorded and analysed prior to their relocation.

[199] Their values therefore lie in their architecture as much as their connection with the retail character of the area, which the buildings have retained for nearly a century.

[200] The buildings stand in the path of the proposed by-pass. Protection of these buildings therefore does not include leaving them *in situ* if the by-pass is built. They are being moved across the road and will replace the relocated 270 Cuba Street.

[201] Mr Bowman states that these houses are deformed and lean away from each other. There is rot at the base of the buildings, and water staining and rot between the two houses. They are therefore vulnerable to further decay. At 289 Cuba Street, on the upper floor, the corridor east wall has been removed, probably within the last fifteen years. There is no ceiling lining and most of the fabric in the western room has been removed. Flashings are missing or rusting. Corrugated steel north cladding is extensively rusted. The flooring in number 291 is not level and moves considerably when walked upon.

[202] Mr Moore has had extensive experience restoring and renovating old and heritage buildings, particularly in Thorndon, considers the removal process will cause the loss of most of the heritage values, and all that will remain of each building is one external wall, the intermediate floor, and the roof. He suggests that the relocation of these two semi-detached buildings would be complicated by the brick “party wall” that is to be demolished prior to the transportation of the buildings. Mr Thornton, for Transit, suggests relocating the buildings separately and repositioned adjacently without the legal complications of a party wall. These issues should be resolved inter parties if possible.

[203] CBC had a discussion with Dr McGovern-Wilson about the issue of relocation, whether it conforms with the provisions of s.2 HPA, and whether the buildings would retain their status as historic places when moved. Dr McGovern-Wilson was quite specific in his response (and the only witness to give direct evidence on the subject). He acknowledges that relocating buildings does affect the context in which they have a relationship with the land. But under s.2(a)(ii) HPA he observes the building or the structure *in and of itself* can be a historic place within the definition. He is of the opinion that the section does not state that the land forms a part of the historical and cultural heritage, so in his opinion shifting a historic building and reaffixing it to the land falls within the definition of historic place.

[204] We have already noted the definition of historic place as including any building or structure (including part of a building or structure) that forms part of the historical and cultural heritage of New Zealand (s.2(a)(ii)). It may include anything that is in or fixed to such land (s.2(b)) but it does not exclude a historic building or structure that is not affixed to the land. We conclude Dr McGovern-Wilson is correct in his interpretation.

[205] The high cultural and heritage value of these buildings will be modified by their relocation but they will be conserved and relocated as close as possible to the site of their

original one - which must be a relevant consideration under s.2(a)(ii) and (iii). We concluded that relocation was a good conservation practice given the bypass route.

Subsurface Archaeology

[206] Ms O’Keeffe considers the excavation of Eastern Section will locate foundations of buildings (and associated outbuildings), domestic artefacts, and possible Maori sites associated with settlement of the area. She concludes these sites will provide important and currently rare information as to Maori settlement and resource exploitation of the central city area. There is a possibility the Armstrong gun barrel may be located.

[207] Dr McGovern-Wilson states that it may be possible to record any archaeological evidence as it is uncovered and then re-cover it, which is a good option as it allows for the preservation of material *in situ*.

Eastern Section’s Authority - Specific Conditions

[208] The HPT has required that a s.15 archaeological investigation be carried out in the designated parts of Cuba and Arthur Streets, because of the nature of the buildings (present at least from the 1870s) and associated features. These include former Town Acres 101, 102, 103, 105, 107. Section 17 investigations shall be made on Town Acres 226 and 233.

[209] Research into various mediums will be undertaken to provide information about Arthur Street and Upper Cuba Street and its inhabitants in the period from 1840 - 1900. The archaeological buildings and heritage buildings will be investigated, recorded and analysed prior to their removal from their site, and the information about their construction, alteration and use will be documented.

[210] The subsurface archaeology shall be identified, recorded and analysed with accepted archaeological practice to document and recover information about the use and development of the area. A representative collection of artefacts and building materials recovered from the project area shall be offered to the appropriate museum for use as a comparative collection.

[211] Ms O’Keeffe was asked about her recommendation to use a general s. 17 investigation on the former Town Acres 226 and 233, instead of the site specific s.15 investigation. She records that the subsurface cuts will be so shallow, almost certainly within

the current cut surface for road construction, that it is very unlikely to impact on the archaeological layer which will remain untouched. With a cut not very deep monitoring is more appropriate than a full s 15 investigation.

[212] Ms O’Keeffe further identifies that if sites were revealed during the monitoring (potential Maori sites and military buildings) they would be investigated properly and appropriately with sufficient time allowed for the work.

[213] We conclude that the conditions are conservative and reflect the significant value of the potential archaeological resource. Transit had recommended s.17 monitoring for the entire Eastern Section, but the HPT considered specific site monitoring for Arthur St and Cuba Street would be more appropriate. This appears an entirely prudent choice given the sensitivity of the area.

[214] Dr McGovern-Wilson also put to rest some of the concerns around the word ‘monitoring’ which is a method to be used in the area by Transit’s archaeologist. This is what he says in allaying the perceived concerns of CBC that a s.15 site specific authorisation should have been issued by the HPT instead of a s.17 general one for former town acres 226 and 233. Discussing the issue of monitoring in the Western Section, he says this:

Well, I think you obviously don’t clearly understand the nature of the phrase monitoring. Perhaps I should clarify to the court here that monitoring is a phrase that we [the HPT] use and you will see it used around the conditions in the authorities relating to the observation of earthworks and so on as it occurs. So that one can then observe if archaeological material comes up. If archaeological material is recovered you then have the ability to undertake explicit archaeological practices in relation to recording, analysis, identification, excavation etc. And so monitoring, which is a term that seems to be tossed around, is a completely abbreviated or accepted archaeological practice, and it doesn’t mean you simply stand there and watch a bulldozer moving backwards and forwards. ... it is simply a process that is different to a detailed s15 work process [and] requires a similar input of archaeological expertise if and when it is required.

The Central Section

Historical and Cultural Value

[215] It is Mr Bowman's evidence that the Central Section was settled soon after 1840 and there has been industrial, commercial and residential use from this time. The Tonks family were the significant early settler family who both lived and traded in this area for more than 150 years. The family businesses had a significant impact on the successful early economic and building development of Wellington and the Upper Cuba Street area in particular. They owned much of the upper Cuba Street area. Kate Tonks was an especially significant member of the family who had property in Wellington and Karori, and later owned and developed much of Tonks Avenue.

[216] The character of the Upper Cuba Street area is defined by the original town plan and developers such as the Tonks family. The large blocks of the original town plan were unworkable without additional lanes accessing the centres of the blocks. Small lanes such as Tonks Grove (now Avenue) and Footscray resulted.

[217] Buildings in this area now comprise of small-scale single and double storied commercial and residential buildings. The commercial properties are mostly two-storied, and constructed to the side and front boundaries with living accommodation on the first floor. Housing is a combination of small workers cottages and residences to house the more affluent. The workers cottages housed workers' in local industries such as the Tonks' brickworks, the later Hannah's Boot factory and the Bryant's Match factory.

[218] Most buildings date from the late Victorian and Edwardian periods, although some of the workers' housing in Tonks Avenue was constructed in the 1870's.

[219] It is Mr Bowman's evidence that all identified heritage buildings reflect and contribute to the character of this area as well as having significance for their age, association with the Tonks family, and/or architectural design. Mr Moore also reflects that the Upper Cuba Street/Tonks Avenue area is particularly unusual in that its heritage value is not related to the individual buildings but to the collective as a whole.

[220] Mr Bowman describes Tonks Avenue as having a unique enclave, combining small workers dwellings and generous inner city Edwardian housing, with a narrow gateway to the

Avenue defined by two-storied shops - *Its rambling confined character captures the spirit of 19th Century Wellington* ... Tonks Avenue, originally Tonks Grove, is named after the Tonks family. CBC considers that in terms of any ‘other factors’ justifying protection of the site in terms of s.20(6)(a), it should be noted a number of the buildings in the Tonks Avenue area are already in a historic area. There is also considerable potential for adjacent areas to be included in an historic area by variation under s.31(6) HPA. Tonks Avenue is in fact surrounded by the Footscray Historic Area and the Cuba Street Historic Area.

[221] With reference to the Tonks Avenue buildings, CBC identify there is no criteria in the HPA which considers the word ‘uniqueness’, which is a word the Court identified with the Tonks Avenue ‘hen and chickens’ buildings’ (workers-mistress) relationships in the *Estate of PA Moran*. Rather, the HPA identifies, among other matters:

- The “*importance of identifying rare types of historic places*” (s.23(2)(j) underlining added).
- The extent to which the place “*forms part of a wider historical and cultural complex or historical and cultural landscape*” can also be important (s.23(2)(k)).
- The community association with, or public esteem for, the place (s.23(2)(e)).

[222] In questioning by the Court about the rarity value of Tonks Avenue, Mr Bowman indicates he was aware of workers cottages in Tateville (Wellington) associated with large houses, so in that context the Tonks buildings’ arrangements are not rare. He also points out that originally, 5-7 Tonks Avenue (which started as a track) were the buildings in place. Other houses eventually joined the lane and it grew. Other houses were removed and so like the rest of the city the area changed - *which is what history is about*. He went on to state that *the idea of “hen and chicken” is to do with size and also to do with ownership - its physical and historical*. In terms of Tonks Avenue he states *the term is curious because in terms of ownership and age the idea of hen and chickens doesn’t really follow. The chickens come first and not all of the buildings were owned by Kate Tonks who built number 13 which is the ‘hen’ that was built*. Number 13 Tonks Avenue was built in 1906.

[223] Nevertheless, Mr Bowman continues, Tonks Avenue has heritage values by virtue of the age of the buildings, the urban design of the area, and its association with the development

of the lane. He is clear however, that it does not disclose *a rare* combination of buildings. We note *rare* is defined as *seldom found or occurring*²⁸.

[224] Mr Petchey discusses the word *unique* identifying it is a term often too loosely used. He identified that the HPT, when ascribing significance to sites or places, assess a series of levels where a site may be considered regionally, nationally or potentially internationally significant. A *unique site* has to be determined at a national level by the nature of the definition - *there is only one of*: Mr Petchey is happy to state Tonks Avenue has very high values both in potential archaeology and streetscape/townscape values. He acknowledges that none of his examples were built by a woman (although only 13 Tonks Avenue and 274 Cuba Street were directly identified as being built by Kate Tonks). Mr Petchey too considers there were better examples of where both capital and labour are located in the same place (citing *Ben Har* in Otago and *Willowbank* in Dunedin). In terms of Tonks Avenue's industrial and residential context, Mr Petchey concludes it is incomplete.

[225] Mr Bowman's more detailed analysis of the hen and chickens aspects of Tonks Avenue than hitherto, effectively puts to rest its rarity value in our view. The Kate Tonks building (13 Tonks) was not effectively in place at the same time as 1, 3 and 5 Tonks Avenue and in terms of ownership and age the hen and chickens links do not follow. Nor in archaeological terms (which is not how it was presented to the Court in the *Estate of P A Moran*) is the site 'unique'. It is not the only one of its kind.

[226] Nevertheless in the area of the bypass, we accept that Cuba Street, and Tonks Avenue in particular, have very high archaeological, societal, heritage, historical and streetscape values.

Buildings Archaeology

274 Cuba Street

[227] 274 Cuba Street is in the direct path of the bypass. It is to be relocated to define the new gateway to New Tonks Avenue. It is a Category II building in Edwardian Free Classical Style registered by the HPT. The style of the building is typical of the period although little of the original remains. It was designed by Mr R R MacGregor, who designed a number of

²⁸ The Concise Oxford Dictionary 7th Edition, 1982

notable Wellington buildings. The building was built for Kate Tonks in 1902 and rented out. A later design for a butcher included a stables and a salting area at the rear of the property and some of those structures remain. It is one of the defining ‘gateway’ buildings to Tonks Avenue and has an associated value in its relationship with the Tonks family.

[228] Mr Bowman identifies that the building demonstrates the architectural response to the typical social pattern of the period which existed in the period where residential space was above retail. It also contributes to the Edwardian streetscape of the area, the building’s residential scale contributing to the unusual character of the area.

[229] Mr Bowman considers however its level of authenticity is low in design, materials and setting. It has exterior modifications, particularly to the front gable, a new verandah and interior modifications. Nevertheless in his view, it is significant locally and warrants the highest level of conservation. The brick outbuildings are considered not possible to retain.



274 Cuba Street

270 Cuba Street

[230] We were advised by Mr Hasell that 270 Cuba Street was added to Transit’s lists of buildings to be reconstructed and moved after discussions with the community; particularly after discussion and consideration of the [new] material provided by Mr Gary Tonks, whose ancestors had owned the property.

[231] 270 Cuba Street’s new location is to be a “Tonks Precinct” associated with the New Tonks Avenue and it will be located between the 13 Tonks Avenue (the Kate Tonks dwelling

- Wharenui) and 21 Kensington Street buildings. The 14 Kensington Street and 12 Tonks Avenue buildings are to be located adjacent.

[232] The main issue of relevance for the building's retention and relocation is its links with the Tonks family as one of the family's earliest homes (possibly built on Town Acre 99 around 1860-1862), when the site was purchased by William Tonks from the Hon Algernon Tollemach.

[233] Mr Tonks states in his evidence-in-chief that the family's early home of 270 Cuba Street should be properly recognised as a significant heritage home. Mr Tonks is content the [Tonks] building is to stay in the upper Cuba Street area, and that Tonks Avenue will be re-created as New Tonks.

[234] Mr Bowman sets out the cultural values of what remains of the house as follows:

Emotional: All heritage buildings affected by the bypass have been the focus of considerable political action by opponents of the bypass and many tenants of these houses have been involved in the anti-bypass campaign. The vociferous opposition to the bypass recognises the emotional attachment many people feel for the individual buildings and the area as a whole. It has been suggested that this house is one of the oldest in Wellington, however the age is disputed. Even so the house is old in European terms with consequent emotional value of continuity in a changing world.

Historical: The house was owned by the original Tonks who were significant business people in the early settlement of Wellington. The house is believed to have been constructed in the 1860's.

Design: The house design and construction are consistent with the period as a Victorian 'L' plan box cottage.

Technology: the construction of the house uses technology of the times including mortise and tenon joints, and machine sawn weatherboards.

Measure: 270 Cuba Street is an early house, few of which survive in Wellington.

Level of Authenticity: 270 Cuba Street has very little authenticity of materials, craftsmanship, and some authenticity of setting and design.

Statement of Significance: 270 is intimately involved with the Tonks family, being the family home of the first generation of the highly entrepreneurial and influential early family.

[235] No party challenged Mr Bowman's evidence on these values.

[236] During the hearing, there was a great deal of discussion about the age and significance of 270 Cuba Street. A photocopy from Mr Bowman's Heritage Inventory²⁹, shows an 1869 photo of an earlier dwelling with Jane and Williams Tonks outside. Exhibit 4 from Mr Bowman also shows a photo of 270 Cuba Street as it was in 1966, from Mr Gary Tonks. It is stated *that it is known to be in existence by 1862 and Jane and William being in the house at that time. The house was owned by the Tonks family until 1950 and it is therefore associated with the significant early settler family.*



Jane and William Tonks outside their home at 270 Cuba Street Wellington, ca 1869.
Tonks Family records. ATL F-26842-1/2-

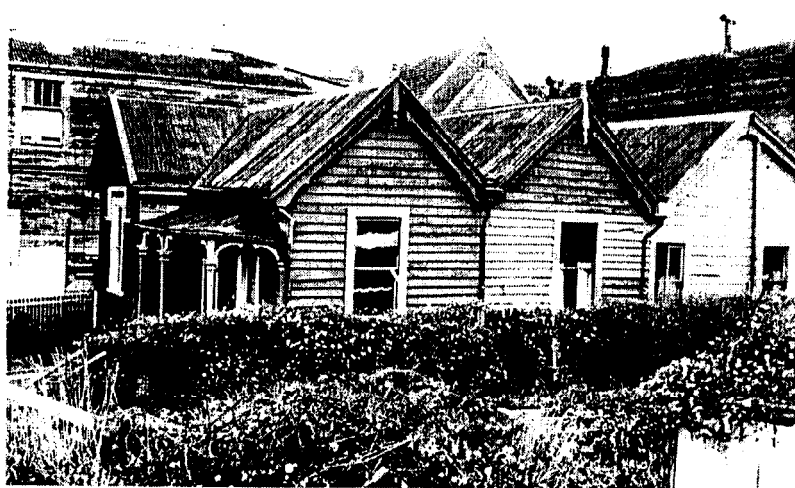
[237] Mr Bowman considers the building to have no heritage value, and he doubts that 270 Cuba Street is the same building in the 1966 photo as shown in the photo from the 1860s. With specific reference to Exhibit 4, the building Mr Gary Tonks and Transit now support as an original Tonks building, Mr Bowman points out that there is no bay window, the veranda is a completely different design and the roof slope is very much greater than it would have been in 1869 when the first house was photographed. The valance in the 1869 photo is also

²⁹ Agreed Bundle of Documents Volume 2 page 163.

specific to the 1860s and is quite large and would have been done by hand whereas the more recent decoration seen in Exhibit 4 is done by machine. Mr Petchey, for Transit, also doubts whether it was the same building as seen in the 1869 photo and suggests that it could instead be a building that was relocated on to the site.

[238] Mr Kelly, for CBC, also produced overheads of plans (Exhibit 14) which he states shows a Tonks family home to be at 276 Cuba Street, where in fact the Moran (*Estate of PA Moran*) building now stands. This evidence appears to be consistent with Mr Bowman's statements that the buildings shown in the two photos are not the same.

[239] Transit points out that Mr Bowman had no opportunity to comment on Mr Kelly's observations, because Mr Kelly had not included his opinion regarding 270 Cuba Street in his pre-exchanged evidence. Rather, Mr Kelly's views were given in response to questioning by counsel for CBC. Transit also point out that Mr Tonks also had no opportunity to comment on Mr Kelly's evidence concerning 270 Cuba Street because it was not in the pre-exchanged briefs, and not put to Mr Tonks in questioning. Thus, he too had no opportunity to comment on assertions relevant to his family history.



270 Cuba Street, Gary Tonks, 1966

[240] Transit submits that the evidence concerning the age and identity of the house at 270 Cuba Street provides an example of the ever-changing nature of history. It is also an example of how archaeological investigation is a means of assisting history, the testing of theory through examination of the physical record. Mr Petchey, for example, states in cross-examination, it may be that *the only way to actually answer these questions regarding the building's prominence are (sic) to apply archaeological techniques to the site . . .* It is

submitted that rather than destroying history, the archaeological investigations will act at a litmus test of history, furthering our knowledge and clarifying the issue currently in dispute.

[241] Mr Moore considers that the reconstruction of 270 Cuba Street will be extremely expensive. And he also considers that the new position for this property in the New Tonks Avenue is totally inappropriate as it would no longer have any historic relationship with the other Tonks properties. It would be hidden away behind 13 Tonks Avenue and in its new location have an uneasy relationship diagonally to the bypass route.

[242] In Mr Moore's opinion, given the state of the building, it would be much more appropriate and cost effective to leave it *in situ* and allow a re-creation of the building's street-facing garden. *Long term, this house could be seen as a visitor/interpretation centre for the Tonks heritage precinct, possibly combined with a café or other use which would allow public access*, he states.

[243] The evidence of Mr Cockburn identifies that street space is the important context for most urban buildings. He considers such buildings, deprived of their ability to define their familiar street spaces, lose an essential part of their heritage. This relates back to the appellants' desire to leave all houses *in situ* but this is not possible in this case.

[244] A number of questions arise out of the evidence on 270 Cuba Street, namely why were the differences between the 1869 house and the later dwelling not established before? And does it matter in terms of what has transpired between Mr Tonks, the community and Transit? For Jane and William Tonks clearly lived on the site and 270 Cuba Street is an early Wellington house - if by no means the earliest.

[245] Mr Coulman's evidence for Transit demonstrates that it is necessary to remove or demolish the building at 270 Cuba Street in order to comply with the requirement in condition 17 of the designation for the Bypass, to relocate 1, 3 and 5 Tonks Avenue onto the area of land 270 currently occupies. The evidence of Ms Black for the council is that it is not possible to "squash up" these buildings to allow 270 Cuba Street to somehow be rotated to accommodate the Tonks Avenue dwellings and to be kept in the same place at the same time. But 270 Cuba Street is not just affected by moving the Tonks Avenue houses. Numbers 289-291 Cuba will also dislodge it in any event and this is demonstrated with regard to Appendix 5.

[246] Our site visit to 270 Cuba Street indicated a building badly burnt in the 1980s and a mostly gutted shell with few of its original features remaining. We note the evidence disclosed only 10% of the original building materials are left. The nature of its value in terms of its building archaeology is seriously modified.

[247] Given the building's severe state of deterioration, we have reservations about whether it should be rebuilt and relocated at all. When we put the question to Mr Bowman about whether the house was worth saving if it is not the original Tonks house (Mr Tonks said the family lived there prior to 1862), he replied in the negative.

[248] The only alternative to not relocating 270 Cuba is demolition, which is an undesirable result for Mr Tonks and others who believe in the building's heritage value. Also, it is Transit's prerogative under condition 23B of the designation to relocate non-heritage buildings or not.

Tonks Avenue

1 and 3 Tonks Avenue

[249] The avenue in which the buildings are located was originally known as Tonks Grove and was first referenced in 1890. The buildings are situated on Town Acres 99 and 97, first purchased by William Tonks in 1853 and 1860.

[250] The buildings are registered Category II buildings by the HPT and are listed in the district plan as heritage buildings. It is suggested they may have been built around 1884. The buildings are small workers Victorian cottages with minimal detail other than Classical front windows suggesting an Italianite style. They have a high level of authenticity. 1 and 3 Tonks are seen as significant locally, warranting the highest level of conservation in Mr Bowman's view. Both buildings have interior joinery which is impact damaged.



1 Tonks Avenue



3 Tonks Avenue

5 Tonks Avenue

[251] The building is listed in the district plan as a heritage building. It may have been constructed by 1875. The land on which it is built was owned by William Tonks. It is a Victorian Georgian double gable box cottage and is the largest of the three Tonks cottages. It has moderate to high levels of exterior authenticity, although the interior has been modified more significantly.

[252] Mr Bowman identifies there are areas of borer and rot on the exterior and interior. The exterior corrugated steel cladding to the walls is extensively rusted at the base, while the floors are largely resting on the ground. It is anticipated that most of the floor and sub floor framing has rotted. Interior joinery is damaged.



5 Tonks Street

[253] Mr Bowman identifies the exterior timber work has extensively crazed and peeling paint, while the entire base is likely to be rotten. The front entrance porch is rotted, while the

metal cladding, flashings and stormwater disposal system are rusting. There are missing interior linings, rot in the kitchen ceiling and rotten piles and sub floor framing.

12 Tonks Avenue

[254] This house was designed in 1905 for Kate Tonks by the architect J M Dawson. It is one of the few two-storied houses in the Edwardian Queen Anne style. As half of a terrace house, it reflects the demands for land in the early Edwardian period for the inner city. Mr Bowman indicates in some of its aspects it reflects 13 Tonks with its flying gables, faceted bay and corbels. The grouping, relationship and scale of the buildings in Tonks Avenue are seen by Mr Bowman as locally significant townscape elements.

[255] 12 Tonks is largely intact except through the removal of the corridor wall to the dining and kitchen spaces on the ground floor. The exterior has changed little other than with considerable deterioration.

[256] 12 Tonks Avenue is in the path of the bypass and will be relocated to the New Tonks Precinct. That project was very commendably finalised by the WCC during the course of the hearing.



12 Tonks Avenue



13 Tonks Avenue

[257] Named originally as *Whareniui*³⁰ this two-storied house was built for Kate Tonks in 1906 by J M Dawson, the architect. Kate Tonks was left to bring up five children after her husband Edward died in 1884. The building is designed in the Edwardian Queen Anne style, has a concrete basement and two brick chimneys.

[258] Mr Bowman identifies that recent repair work by the WCC has remedied much of the deterioration visible in 2000. The remaining areas of deterioration relate to:

- [a] the basement wall which is cracked in areas on the north elevation with rusting steel reinforcing visible;
- [b] vegetation is growing close to the west elevation, which increases the moisture level in that area enhancing the possibility of rot at the base of the wall. The east first floor balustrading appears to have deteriorated with several balusters dislodged.



13 Tonks Avenue

[259] Mr Bowman observes however, the adaptation from house to theatre was carried out with little respect for the original spaces or fabric. Floors, walls and ceiling linings have been removed without reinstating any finishes so that current Building Act requirements will be difficult to meet. Wiring appears haphazard.

[260] Leaks are evident in the first floor rooms with extensive water staining and extensive rot especially in the northeast room. The southeast room has rusting pressed metal ceilings.

³⁰ Known locally as "Stagecraft".

The ceiling and walls of the small kitchen on the west side of the building have evidence of rot.

Evaluation

[261] In our consideration of the Tonks Avenue houses, we noted Mr Bowman, for Transit, considers that 3, 5 and 7 Tonks Avenue could be left undisturbed, but believes this will lead to a greater loss of heritage values than relocating the buildings as proposed. He confirms the rambling and picturesque nature of the present Tonks Avenue. He considers the confined character of the old Tonks Avenue is one of its current unique features but observes some of the structures are very badly deteriorated and will only survive if relocated.

[262] Ms O’Keeffe considers the Tonks buildings on their site have archaeological interest and will clearly yield archaeological information, but as a cluster of houses she, like Messrs Bowman and Petchey considers that they do not have great rarity value in the national sense. She also states:

As I hv previously indicated, we do know a lot about the contxt of Tonks Avenue in historical terms, the family, their social status, occupations and so forth, but it remains to be seen how much of that context that social and historical context is reflected in the archaeological record, both in the built structures and the below ground archaeology. And, as I have already indicated, I speculate tht one possibility is tht the Tonks family properties, being the buildings and sites, may yield little in the way of archaeologically significant information that expands on tht context and essentially tells us anything that we don’t already know. The archaeological material may confirm some of tht context, which is always useful, but it may well be another site tht yields far more interesting and significant archaeological material and answers the important research questions to which we currently don’t have answers.

[263] All expert archaeological, historical and architectural advisers to CBC and THT were however against the relocation of numbers 3, 5, 7 and 13 Tonks Avenue. Ms Forbes considers that the relocation of these houses into a precinct will not preserve the heritage value of the place. The archaeological evidence under and around the buildings will be destroyed. The relocation will preserve the buildings, but will do so only by creating a new

artificial city landscape using old buildings. Dr Barber considers that relocation would be a loss of heritage and archaeology that could not adequately be mitigated. He identifies building foundations, sheds, yards and gardens are a very significant part of the archaeology of the area. All these will be left behind if the buildings are moved.

[264] Ms Forbes advised that she had been contacted by Opus for Transit to carry out an assessment of archaeological sites affected by Stage II of the Inner City Bypass in 1995. The brief was constrained by the contractor to physical [buildings] archaeological values (and evidence) alone. Her findings were not presented to the Hearing Commissioners on the designation nor to the Environment Court on appeal. Ms Forbes states that when she completed her draft assessment, all her comments on collective heritage values, maintenance, access issues to sites (to avoid heritage “zoos”) and the integrity of heritage areas or precincts, were removed by the Opus team. In the event, what was eventually discussed by the Environment Court in *Estate of P A Moran* was limited to architectural and aesthetic landscape values alone. There was no discussion of possible or likely impacts on archaeological evidence with respect to the proposed demolition and removal of the buildings.

[265] Mr Moore for THT considers that the shuffling about of buildings would be a bit like putting Ascot Street [Thorndon] Cottages on a back of a truck, dumping them on one side of Bowen Street and claiming to have thereby saved heritage - *as a developer with strong commitment to and experience of heritage restoration, I am appalled that such a travesty should have been contemplated* he states ... And of the New Tonks Avenue, he states:

This would be a poor replica of the original Tonks Avenue. Its entry will not be framed by historic “gateway” buildings. It will not be two sided, but open on the north side to a carpark and will have the feel of a modern ersatz colonial motel. It will be removed from the historic Cuba and Arthur Street intersection and will have no historic, archaeological or social appeal or authenticity. It will also be directly adjacent to a bypass with a notable absence of the quiet, secluded ambience of the real Tonks Avenue. By comparison the original Tonks Avenue, once restored, would be a special and charming place, a peaceful oasis in a bustling city.

[266] Mr Kellaway, for CBC, has been professionally involved in heritage advocacy and heritage management for 18 years. He also gave evidence in the *Estate of P A Moran* case. He considers that Tonks Avenue is a unique precinct with high heritage and potentially high

economic value. New Tonks Avenue, by comparison, is a “*stage-set version of the original lacking improvisation, spontaneity and the reality of the original site . . . it has all the hallmarks of a theme park.*” He makes the point that the community is extremely sensitive to what is real. New Tonks has *artificial value and there is little interest in what is false or mock*. In Mr Kellaway’s view, the ad hoc development proposed will spoil the considerable heritage potential of the area.

[267] Mr Kellaway points out that relocation of the Tonks building will also involve:

- the loss of the brick building between 3 to 5 Tonks Avenue;
- the loss of such small rambling out buildings which evolve organically over time;
- changing the sense of space;
- the loss of key townscape values.

[268] Mr Kelly, too as an historian, considers that leaving the buildings as they are is infinitely better than putting them into a ‘pre-fabricated zone’.

[269] And as noted earlier, evidence was also given by Dafanie Goldsmith of Auckland for THT, who like Mr Gary Tonks, is also a direct descendant of William and Jane Tonks who arrived with their family in Wellington in 1842 aboard the *Birman*. Mrs Goldsmith opposes the proposed modification and destruction of the Tonks Avenue archaeological site and those sites on Upper Cuba Street associated with the Tonks family. She considers it is imperative that Wellington does not follow Auckland’s lead in allowing development to demolish the very soul of the City. In her approach, she was not far removed from Mr Gary Tonks.

[270] The issue of the virtual destruction of Tonks Avenue was one which concerned the Court in the *Estate of P A Moran*. The Court noted that hen and chickens dwellings *in that area* [of Te Aro] were unique. It was not assessing them on a local (Wellington) regional or national scale under the HPA. In the *Estate of P A Moran*, a decision to relocate the houses was made on the basis of the wider provisions of the RMA, namely preservation and protection of the built heritage (above archaeological considerations), and considerations of and emphasis on urban design issues and landscape.

[271] Dr Bader interestingly said this:

Tonks Avenue is not any more a working class environment as it was. It is now in a different social context with values different to the original which created it. So I would say that the context of the old ones is not completely destroyed by taking them away but we are creating an addition to that context on the basis of our values today.

[272] It emerged from cross-examination of Mr Hasell that relocated 5 Tonks Avenue is closer to the final bypass carriageway than it is in its existing location. It is Ms Black's evidence for the council that one of the main objectives of the design of the area beside the road, is to create a strong built edge to the bypass. It is important for the WCC that the New Tonks Avenue is accommodated well within the urban environment with buildings up to the street edge where appropriate, but this is not the context of the old Tonks Avenue which was a quiet lane. New Tonks Avenue is also significantly wider than the original avenue. Thus the historical street landscape of the Tonks Avenue houses will be changed.

[273] Ms Forbes explains that Opus had indicated to her that the options of retaining 1, 3 and 5 Tonks in their current position versus relocating them were still under evaluation at the time she was engaged in 1995. It is submitted by Transit that relocation was the outcome of that evaluation. The relocation of 1, 3 and 5 Tonks to the new precinct was part of the Court's decision in *Estate of P A Moran*, a *de novo* hearing under the RMA.

[274] As counsel for Transit submits, leaving numbers 1, 3 and 5 Tonks Avenue to stay where they are, would be a much cheaper option for Transit, but it would be contrary to condition 17 of the designation, which requires 1, 3 and 5 Tonks to be moved.

[275] Given Dr McGovern-Wilson's interpretation of "*historic place*" under s.2 HPA and the fact that the area of the New Tonks Avenue is so proximate to the historic Footscray Precinct which is within the designation area, then Transit must be given credit for its attitude to the Tonks Avenue houses. Relocation is confirmed as an acceptable option to demolition in the New Zealand version of the ICOMOS Charter. And Dr Bader puts the original values of the houses in a more contemporary frame which should make the issue of their relocation less emotive. The WCC should be anything but criticised for providing an acceptable relocation site as close to the original as possible.

[276] The real issue is whether anything in these proceedings which indicates the houses to be relocated may stay where they are. And Transit's submissions suggest there are not.

Subsurface Archaeology

[277] Intensive investigation and analysis will be carried out in this section, as this is where more significant deposits are envisaged to remain. Ms O'Keeffe states that it is highly probable pre-contact Maori lived in this area to utilise nearby swamp and cultivation areas, or occupied the nearby pa located on Mt Cook.

[278] This area was included in the European plan of Wellington City, which was laid down in 1840. The sections were occupied from the 1870s, if not before.

[279] In Exhibit 15³¹ however, the archaeologists agree that Tonks Avenue would not necessarily have the sites that would be the focus of subsurface investigation because of the houses that stand on them. The research instead should focus on the potential uncovering of Maori artefacts.

Central Section's Authority - Specific Conditions

[280] The HPT propose under the Specific Conditions on the authority that a s. 15 archaeological investigation take place on designated parts of former Town Acres 97 and 99 (Tonks Avenue and Cuba Street) and it is to be carried out by the HPT. Mr Petchey observes that the specific condition for a "HPT - directed excavation" in these areas [including Arthur Street] also shows a consideration of the high archaeological values the areas have - *it is unusual for the Trust to undertake this type of work itself it being more usual for independent consultants to be engaged by the authority holder*. The buildings at 1, 3, 5, 6, 13 Tonks Avenue; and those at 270, 272, and 274 Cuba Street, are all to be investigated, recorded and analysed prior to their relocation.

[281] Following the archaeological investigation of Town Acres 97 and 99 under s. 15, any earthmoving or site clearance that may affect an archaeological site is to be monitored by an approved person(s) in accordance with s.17. Site clearance of former town acres 93,94, 95, 96, 98 and 100 shall too be monitored by an approved person(s) under s.17.

³¹ *Archaeological Discussion to Assist the Court*: Bader, Forbes, McGovern-Wilson, O'Keeffe.

[282] The appellants have not raised some specific arguments in relation to the Central Section. They allege that the values of the sites in that region are so high that the buildings should not be relocated. An especial focus appears to be the Tonks Avenue houses and 270 Cuba Street, which are not on the carriageway of the designation but will be displaced nonetheless. And some concern was expressed about the works around the Footscray Cottages.

[283] Dr McGovern-Wilson points out the Central Section Authority only allows Transit to do such works as are required for constructing the road and associated works such as the cycleways, the footpaths and the relocation of the buildings. Any work around the Footscray Cottages would be undertaken under condition 12(b) of the Central Section Authority. This requires all site clearance and earthworks in the remaining Town Acres of the Central Section to be monitored with requirements for archaeological investigations if required, recording, measuring, etc.

[284] We agree with the HPT and Transit that the area, in particular Tonks Avenue, has very significant values but is not “rare”. The s.15 investigation set down by the HPT indicates the high values the Trust consider the area has, and we concur with this assessment.

[285] The issue of Tonks Avenue and its buildings will be referred to again in the course of this decision under the heading *Recommendations on Matters Outside These Appeals*.

The Western Section

[286] The Western Section of the bypass is largely between Ghuznee Street and Kensington Street.

[287] Transit intends to relocate five houses in the Willis Street area. The buildings are all directly in the path of the by-pass. All five are listed in the council’s heritage inventory in the district plan and three were constructed before 1900.

Abel Smith Street

[288] Abel Smith Street was named after a Director of the New Zealand Company. It was a favourite residential area and the corner of Abel Smith and Willis Streets area is a third historic precinct affected by the bypass.

Willis Street

Historical and Cultural Values

[289] Willis Street is named after Mr Willis of Willis and Company, the firm for whom the first Mayor of Wellington, George Hunter, worked. Mayor Hunter lived in Willis Street. It is Mr Bowman's evidence that in the early era of European settlement in Wellington, the northern half of Willis Street became a significant commercial area, while the southern half was developed from the 1850's as a residential area. From this early period, residences were mainly for the wealthy. The street was well known, even from the 1840's, as a location for many doctors' surgeries and residences. Consequently many of the houses in Willis Street were large, with at least one, (278 Willis Street, now known as "Catacombs"), converted for use as a hospital.

[290] The character of the street has partially been retained with the original modest commercial buildings being replaced by tall office blocks but with many of the large original homes from the 1880's converted to new uses. Changes in the residential area have mostly seen the addition of small-scale commercial buildings on corners, such as 286 Willis Street, built largely as speculative developments. These are shops with living accommodation above and were built from the Edwardian and inter-war periods.

Buildings Archaeology Values

[291] Mr Kelly considers that the block on the western side of Willis Street, between Abel Smith and Vivian Streets, encompasses one of the most interesting and diverse areas of heritage in Wellington. He points out the residential parts of this stretch of Willis Street are not only characterised by the grand but also by the modest and small workers' cottages which are located near larger houses in the same fashion they do in parts of Thorndon. There are small lanes that give access to less accessible properties. Youngs Avenue, for example, is named for Andrew Young, who operated a coaching business and built or owned some of the buildings that still stand in the vicinity of the Abel Smith and Willis Street corner.

[292] Several houses in the street (including number 278), are approximately 120 years old, while the buildings on the corner of Willis and Able Smith Streets are said to be good examples of early 20th century speculative retail/accommodation development. Two out of the six heritage buildings in this area are large houses originally owned by well known

doctors of the period and used by them for their practices, reflecting a unique [professional] character to the street. Mr Kelly identifies that it is remarkable that so many private hospitals and practitioners' residences and surgeries were gathered in one place.

[293] Mr Kelly states:

Not only is this area full of interesting historic buildings, some of which have never been formally recognised, but it also combines an authenticity and character unmatched elsewhere in Te Aro. Today only these neighbourhoods and the odd significant building elsewhere represent Te Aro's historic past. In addition to the loss of the pre-1900 buildings, later heritage buildings, hitherto unrecognised, such as the Equity Boot Co. factory (1910) in Oak Park Lane will also be lost to demolition.

We consider the historical and cultural values of the area to be high.

278 Willis Street - "Catacombs"

[294] The building is listed in the district plan as a heritage building. Research suggests that this building was constructed in 1873 for Andrew Young, the Victorian merchant mentioned above. It was then sold to Francis Levy, the wife of a prominent clothing manufacturer. Her son substantially added to the house in 1921, when he converted the house into the Willis Street Obstetric Hospital. Dr Levy was a foundation member of the New Zealand Obstretical and Gynaological Society. The building became known as the 'Catacombs' when a social service organisation took it over in the 1970s. It is of simple design and in Mr Bowman's opinion has interesting Italianite detailing. It is now one of the few remaining large buildings in the area with its garden largely intact. It contributes greatly to the streetscape in this location.



278 Willis Street

[295] The upper floor of the building is divided into two flats. There is evidence of a leaking roof and rot. Paint is peeling from most of timber work. The interior is generally sound though the rear flat was recently vandalised.

282 and 284 Willis Street

[296] These buildings are listed in the WCC's district plan as heritage buildings. They were built in 1901, as ground floor shops and first floor accommodation to the designs of Francis Penty, an architect practising in Wellington from 1887 onwards. The design of the buildings follows the common Italianite style of inner city commercial/residential buildings of the Edwardian period. The houses are in a largely authentic state and their location enhances the streetscape. Along with 286 Willis Street, Mr Bowman considers the buildings make a valuable contribution to the built heritage of Upper Willis Street.



282 Willis Street



284 Willis Street

[297] At 284 Willis Street, generally the exterior paintwork of the building is peeling and there is rot at the base of the building. Flashings are rusting or missing. There is a significant gap between the main part of the building and the narrower two-storey section, suggesting some movement. The interior has areas of rot, and there are inappropriate repairs. There is generally minor impact damage and coating damage on the interior.

[298] At 282 Willis Street, the building is on a lean to the south and the interior first floor slopes significantly to the south. The roof has been replaced in the last few years and is in good condition. Most of the north wall is constructed against a brick party wall and its condition cannot be assessed, however the lean-to is visible and there is extensive rot in cladding and framing. Paint is peeling off most of the weatherboards. The flooring to the rear rooms appears to be resting on the ground and areas move when walked on. The original south entrance door is rotten and has been twisted.

286 Willis Street - "Bar Bodega"

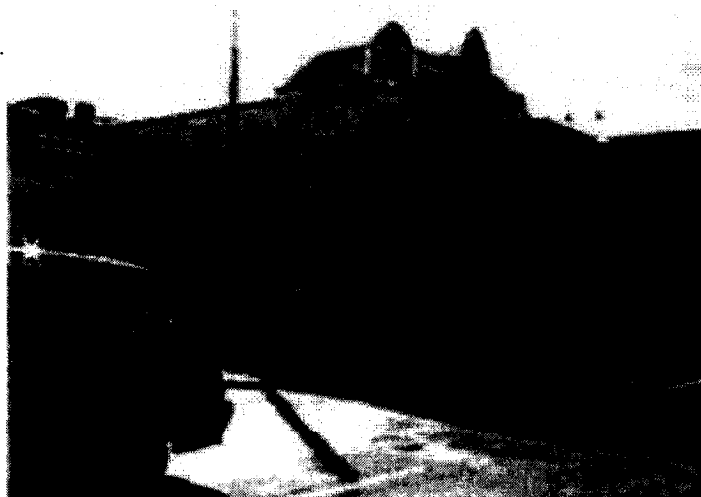
[299] The shop and residence at 286 Willis Street was also constructed in 1891/93³² for Andrew Young, the coaching proprietor. The architect is believed to be that who also designed 282-284 Willis Street - Francis Penty. 286 Willis Street is two-storeys and wraps around a corner, providing a transition between Abel Smith and Willis Streets. It was originally a chemist's shop and in 1937 became a butchery. Its chamfered³³ design was a popular and successful means of architecturally addressing a corner. Unfortunately this building will not be relocated to another corner site.

[300] The building, like 282-284, retains high levels of authenticity of materials, design, craftsmanship and setting.

[301] There appears little deterioration on the exterior walls whilst the main visible deterioration includes cracked tiles. The main roofing appears to have been replaced. There is interior deterioration in the form of water staining from leaks.

³² Mr Bowman states 1893, Mr Kelly 1891.

³³ Defined in the Oxford English Dictionary as "channelled, fluted, furrowed, grooved".



286 Willis Street

319 Willis Street

[302] This large two-storey house in Italianite style was designed by Thomas Turnbull³⁴ as a private residence and constructed in 1896. It was modified in 1928 to accommodate a waiting room, laboratory and clinic, and for the best part of eighty years the building has been the location of various GPs and medical specialists.

[303] The heritage inventory states that the exterior form and most of the stylistic elements have been retained at 319 Willis Street. However, due to renovations and extensions the house has lost some design, craftsmanship and materials authenticity. The house retains authenticity of setting, and will lose this when relocated.

[304] Generally the building is in good condition. Damaged weatherboards and some rotten baseboards are visible. Paint is peeling from the weatherboards and rust is visible on the cast iron pipes.

³⁴ Turnbull was the architect who designed 289/291 Cuba Street. Amongst his most important buildings were the Willis Street churches of St Peter (1879) and St John (1885), as well as Antrim House, Wellington (1905).



319 Willis Street

Oak Park Avenue

[305] Formerly Oak Park Lane, Oak Park Avenue, like many other lanes in Te Aro, began as a right of way in the 19th century. It was most probably established by or for the Equity Boot Company and remains a little known but interesting relic of an earlier era. ‘Woodside’³⁵, a large Victorian house, is located on the corner of Vivian Street and Oak Park Lane and is known as 215 Vivian Street.

[306] Mr Kelly maintains that little evidence has been provided about the buildings in Oak Park Avenue that will be affected by the bypass.

[307] He provides a detailed assessment of 1 Oak Park Avenue, which is the former Equity Boot Company factory. The land this building occupies was part of Section 114, Town of Wellington and the first title granted under the Land Transfer Act was to Mr T K MacDonald, land agent, auctioneer and politician in 1884. The Equity Boot Productive Society, a boot and shoe manufacturing business, purchased the land at the rear of the block in 1910, and operated from there for 27 years.

[308] Mr Kelly considers that 1 Oak Park Avenue is one of Wellington’s best remaining industrial buildings of the early 20th century. He considers that it makes a fine contribution to an interesting neighbourhood of buildings. He states that there are relatively few 19th and early 20th century industrial buildings of this size left in Wellington, with perhaps the most

³⁵ This building has also been called “Avonside” in Ms Forbes’ and Mr Kelly’s evidence. The council identifies the house as “Woodside” in the district plan.

comparable example being the Hannah Building in Leeds Street, which was also a shoe factory, that has now been converted into residential apartments.

[309] Mr Kelly notes that the building has historical connections of local and national significance as the building's longest standing owner was Zig Zag - cigarette paper manufacturers, which was once a thriving industry in New Zealand, and it has also housed the New Zealand Correspondence School.

[310] A document in the Agreed Bundle of Documents³⁶ cites the Old Correspondence School as a historically significant building in terms of previous use and architectural style. It is stated to be a perfect example of early modern buildings of the Heroic Period in Europe in the 1920s and 1930s resembling the German industrial buildings of Walter Gropius. It is now a residential block and houses various film and prop companies. Its age takes it technically outside the scrutiny of the building archaeologists.

215 Vivian Street

[311] Vivian Street was named after Lord Vivian, a New Zealand Company Director. "Woodside" at 215 Vivian Street was a boarding house for many years. The general style of the house is Italianate. Mr Bowman records that the house is a good representative example of a substantial inner city house in Wellington of the 1880s. Its decorative elements appear not to have been selected from a catalogue (common for the period), but possibly especially designed and made by its first owner.

[312] The site and house is associated with Thomas McDonald, a highly successful early Wellington businessman and public figure. Mr Bowman notes that the exterior form and most of the stylistic elements have been retained. Extensions at the rear (accommodation lodge rooms) have reduced design, craftsmanship and materials authenticity, but they are to be removed. The house retains authenticity of immediate setting from the 1930s. Behind the lodge is the old industrial estate and stables.

³⁶ E Veber addressed Noleen Barton. Agreed Bundle of Documents Volume 3 page 948.



[313] Mr Bowman notes that the roof is rusting and there are areas of borer and rot on the exterior.



215 Vivian Street

Subsurface Archaeology

[314] In the Western Section it is not perceived that a large-scale, detailed, in-ground investigation will be required. It is most likely that archaeological features will have been affected by the construction of the motorway off ramp in the 1970s.

[315] Dr McGovern-Wilson suggests that subsurface remains of the original Brunswick Hotel may survive on the corner of Willis and Ghuznee Street.

Western Section's Authority - Specific Conditions

[316] There are two specific conditions for the Western Section. It is proposed that archaeological sites in former Town Acres 92, 113, 114, 115 and 116 will be monitored under s. 17. The approved person shall identify, record, measure, investigate, assess, sample, and analyse any archaeological structures.

[317] The second specific condition requires Transit to submit a final report on the archaeological work. The report must contain an inventory of material covered, including a catalogue of artefacts.

[318] The Eastern and Central Sections have conditions in place to investigate and record archaeological buildings prior to removal, but the Western Section has no such condition.

[319] In his evidence, Dr McGovern-Wilson states that:

... the Western Section of the Bypass (Authority 2002/98) covers an area of mainly old houses that date to the late 19th century, many of which will be relocated or sold for removal or demolition. It was not perceived that large-scale detailed in-ground investigations would be required in this area.

The authority reflects this assumption.

[320] Mr Petchey states in cross-examination that the date of pre-1900 buildings is merely a hurdle to pass over before an assessment of significance. He notes the omission of the houses to be relocated or removed from the specific conditions is not necessarily a significant one, as the Tonks Avenue and Arthur Street houses are identified as the important areas, and this is the focus of the archaeological work to date.

[321] The paucity of reference to the archaeological sites and buildings we found elsewhere (in the draft research strategy and management plan) and discuss this further under the heading *querying whether the authorisations was deficient* later in this decision. Meanwhile, given Dr McGovern-Wilson's definition of 'monitoring' discussed elsewhere, in the HPT's professional assessment of the Western Section, we accept that the Western Section Authority does not require modification of conditions.

- ***Do the Values Justify Protection?***

[322] The consensus of the Court is that the historical and cultural values of the bypass route are high - very high - to the extent that they justify protection in a form that can be legally accommodated in the particular circumstances of this case.



- ***What Does Protection Mean?***

[324] Focussing on the word ‘protection’ first of all in s.20(6)(c), the HPT, Transit and the council point out that it is not absolute in its term. In *Te Runanga o Ati Awa ki Whakurongotai Inc v Kapiti Coast District Council*³⁷:

The HPA does not set out to fully protect waahi tapu areas or archaeological areas because permission can be sought to destroy, damage or modify archaeological sites in advance of development.

[325] The protection options which the HPA provides are limited - the Court can decline the authorities or grant them with conditions. And, as pointed out by Transit, the Court in most contexts cannot assure protection as an absolute outcome.

[326] The council observes that the requirement to justify ‘protection’ in s.20(6)(a) creates a presumption in favour of landowner’s right to use its land in a way that it is authorised to do, notwithstanding the fact that it destroys, damages or modifies an archaeological site. That is the first issue. The second is that ‘protection’ per se is not a singular consideration. It is counter-balanced by considerations of law. These require consideration of Transit’s ability to lawfully use the land for the bypass purposes, consideration of the legitimate interests of the council, and consideration of those otherwise ‘directly affected’, such as the tangata whenua.

[327] The council observes that the legislature could have emphasised protection by framing the HPA in such a way as created a presumption in favour of protection - rather than requiring it to be justified - as set out in the wording of s.20(6)(a). Such analysis has merit in the context of the facts of this case.

[328] The options available to “protect” the relevant cultural and historical heritage values are:

- to decline the authorities sought through the retention of the sites *in situ* (ie the status quo);
- to modify the authorities sought through the imposition of conditions to, ensure that the modification and destruction caused by the project is carried out in

³⁷ W 23/02 page 6 Environment Court Decision.

controlled circumstances (achieved through setting conditions on the archaeological authorities, and to retention and relocation of heritage buildings;

- to modify the authorities by imposing further or new conditions [which] would have a similar outcome.

[328] Transit point out that:

- to decline to confirm the authorities would make it unlawful for the applicant to take action (such as site works) which would “*destroy, damage, or modify*” the archaeological sites: but it would not necessarily protect the archaeological sites from, in any event, being destroyed, damaged or modified by other means (in this case particularly through building deterioration, or repair, or interior renovation);
- to confirm the authorities subject to the conditions imposed by the HPT could secure protection to the extent that it governs what is to be done in the undertaking of works on a site, including specifically the protection of the identified values of the site.

[329] We accept it is inherent in the authorisations that loss of historical and cultural heritage value will arise if any works on the site are undertaken and, on the evidence, that the loss will be considerable. All experts were very clear in that regard. We accept too, that Transit’s “*protection of historical and cultural heritage values along the bypass route*” operation has the connotations of a ‘rescue’ package, in that the applications for the authorisations have been made after confirmation of the designation for the bypass route.

[330] But given the fact that the HPA appears to restrict the HPT approvals on authorisations to a two year timeframe before they lapse (s.14(10)), we are puzzled as to how else Transit could have proceeded. Mr Hasell identifies that Transit was mindful that the HPT consents had a two year lapse period. Transit needed to have finalised the details of the project so that it was very clear what was intended in and along the site before it went to that final (authorisations) stage. He makes the point, and we agree, that the (integration) of the HPA and RMA are not helpful in that regard.

[331] Generally, the detail of what is now planned by Transit and the HPT we are satisfied that it is much more than a ‘rescue’ archaeological excavation, First of all, we take the HPT’s point that the in-ground archaeology to be examined is a highly significant part of the work. It will be the biggest archaeological excavation the City has experienced. In that regard, the

focus just on buildings is misleading to some extent. Discussing the statutory principles in the HPA, the Court held in *Ngatiwai (1)*:

*The principles of the Act do not necessarily require the retention in situ of all archaeological remains. Depending on the intrinsic value of the site, the principles may be recognised by providing for careful investigation, recording of deposits under appropriate supervision, reporting of findings, and curation and storage of selected materials. That is what the conditions imposed by the Historic Places Trust require on the exercise of the authority which it granted. We find that in circumstances of this case those conditions are an appropriate recognition of the statutory principles.*³⁸

[332] As Ms O’Keeffe identifies, all parcels of land to be impacted on by the project have known historical pre 1900 use; therefore all are likely to yield archaeological features. Some particular land parcels have higher archaeological potential than others, based on what is known or can be inferred from the documentary sources studied for the assessments and subsequent use of the area. For example, the survey plans of the area around Tonks Avenue dating to the 1870s show a number of structures and features marked, including houses, outbuildings, wells and streams. Also plans for Buckle Street dating from the 1870s show buildings with military functions, including a drill hall, barracks and so on.

[333] ‘Protection in place’ was a consideration for Ms O’Keeffe too when she weighed up Maori heritage issues when deliberating over recommending s.15 archaeological investigations as opposed to s.17 investigations for Buckle and Arthur Streets. She notes for Buckle Street . . . *where minimal engineering cuts or invasive work is required the archaeologist will record exposed archaeological material, which will be sealed over rather than fully investigated, on the principle of avoid rather than mitigate.*

[334] The excavations of designated parts of former Town Acres 97, 99, 101, 102, 103, 105 and 107 are to be planned strategic scientific investigations, with a detailed methodology, a full workforce and sufficient time to undertake the required work. That the HPT is carrying out this detailed work itself a consideration the appellants’ archaeological advisers support. The archaeological work planned is to be guided by a comprehensive research strategy and

³⁸ *Ngatiwai Trust Board v NZ Historic Places Trust* [1996] NZRMA 222 at page 234.

management plan, and there are stringent conditions both on the designation and the authorities to control the actions of the contractors in relation to the work.

[335] When we assessed in detail the conservation (protection) work Mr Bowman is to undertake on the heritage buildings and also what is required under the HPT authorities, both gave assurance that the details of the heritage fabric of the heritage buildings shall be protected and conserved before the buildings are relocated. Only non-significant heritage elements are to be demolished or elements which are too badly damaged to survive relocation. Regular inspections of the work are also scheduled over and above what Mr Bowman is specifically required to do.

[336] The relocation of the heritage buildings, despite its critics, **‘protects’** in some large measure these buildings for the future. It is worth noting too that condition 23B of the designation requires that the buildings may again only be relocated back to their original sites. This condition is also recorded in the district plan³⁹.

[337] The general consensus by the HPT, Transit and the council is that should the archaeological authorities not be granted, and should the buildings and properties be disposed of and developed individually, this would have an extremely adverse outcome for the archaeological resource. The heritage fabric and archaeological resource would be at risk of destruction on an ad hoc basis for each individual property, with no overall comprehensive excavation or recording possible, and without the guiding hand of a research strategy and management plan. The council notes too the benefits of the comprehensive approach of the conditions governing the archaeological authorities. And in being questioned by counsel for HPT about the results if there are a series of related sites excavated under different authorities by different people, Ms O’Keeffe identifies there could be years of difference in any of the sites being investigated, with different archaeologists supervising, and ending up with a “mish mash” of archaeological results. The “mish mash” might never be linked up in any management historical or archaeological research. Dr McGovern-Wilson was also quite clear in this regard.

³⁹ Agreed Bundle of Documents Volume 2 *Appendix G Inner City Bypass Stage 2 ... Terms and Conditions*. 2-408.

[339] Transit and the council emphasise in terms of relative effectiveness that when considering the options whether to approve or not approve the authorisations, it is relevant to compare the alternative protection options which are available. We effectively see none that will preserve the remaining value of the buildings as successfully as Transit's proposal.

[340] Subject to funding:

- Transit has a legal right to build the bypass.
- HPT has no jurisdiction to direct a landowner to preserve the buildings and no mandate to take them over itself.

[341] If the bypass does not proceed:

- Transit will require the buildings to remain where they are in a search for further alternatives, or the buildings will be required to be returned to previous owners or land-banked for Treaty claims.

[342] We conclude too that Maori heritage values along the route (if established), and the Maori protocols that surround them, are sufficiently protected in the authorisations on the basis that it will be deliberated over by those most affected, the tangata whenua, and eventually re-covered if necessary. These issues we also address elsewhere.

Finding

[343] The archaeological values of the site are high - very high. The current state of the buildings leaves them very vulnerable to ongoing exposure to the weather and other influences. The subsurface values have been significantly modified, particularly in the Western and Central Sections.

[344] The HPT's fundamental aim was to implement authorities that gave the best outcome for archaeological heritage, and the practical legal options for protection leave none other than those the authorisations provide.



- ***Any Other Factors Justifying Protection***

Costs

[345] Mr Hasell identifies the considerable archaeological investigations required for the project will be a substantial cost to the project, but advises that Transit *will commit the necessary resources to ensure that the work to the heritage buildings and archaeological investigations provide quality information and that this information [will be] disseminated to the public generally.*

[346] With regard to the costs involved, Ms Forbes states that the costs assessments by Transit based on a per building equation are likely to be on the low side. Costs also need to be considered for the work required for the land areas between buildings and where buildings are proposed to be moved. And extensive artefact analysis will also be required.

[347] Mr Bowman identifies that:

The contract documents will require the contractor to notify the architect of any significant material encountered during the works, and I have been commissioned to carry out regular inspections of the work, in part to check for such finds or review finds by the contractor. The form of contract will also allow for variations, should there be any significant finds, usually budgeted for in the contingency sum for each building. ... usually 20%.

[348] In re-examination, Mr Bowman identifies that a very experienced quantity surveyor from Opus International has undertaken the costing estimates for Transit.

[349] \$3.3 million is budgeted for the work overall, of which preliminary cost estimates of \$650,000 have been made for the archaeological work. This includes s. 15 HPA investigations and the monitoring/investigations of the other sections pursuant to s.17 HPA. Dr McGovern-Wilson observes from his experience, it is rare for this sort of funding to be made available for archaeological research in New Zealand.

[350] Mr Moore, from his experience in Thorndon, discusses what he considers are the general underestimates of costs for the relocation and restoration of the identified buildings. As for 289/291 Cuba Street, which are to be relocated across the street, Mr Moore considers

the relocation and restoration of these buildings will require about \$850,000. 274 Cuba Street, which requires reconstruction with serious architectural supervision and conditions, will require funding he estimates at \$2000-\$2500 a square metre for an area of 360 square metres. Mr Cockburn, from his experience, estimates about \$600,000 might be required for their restoration and relocation. 219 Vivian Street, which is structurally complete by way of contrast, would probably require refurbishment in the order of \$1300 a square metre. In effect, Mr Cockburn indicates that Transit's estimates for the work disclose a possible underestimate of \$6-8 million dollars.

[351] It appears that Transit is not to be responsible for interior 'restoration' of the heritage buildings - that was made clear by Mr Hasell. But Mr Bowman identifies that all the heritage fabric (such as stairs restoration) has been taken into account in the costs evaluation. Mr Tonks states it is his understanding that Transit will bring the buildings up to their former condition on the exterior, and they will then be sold off. In many cases, meeting new building codes will mean they will be constructed of modern material and thus fitted out at the discretion of the owner. Dr Barber for his part confirms that priority does not need to extend to full reconstruction of an original form of a building in the exercise Transit is to undertake.

[352] We nevertheless set out here what the reality of preserving many of these badly deteriorating buildings involves - whether or not they are relocated. We conclude as follows:

- in the HPT's experience it is rare for the funding identified by Transit to be made available for archaeological research in New Zealand, which is not just to be applied to the buildings;
- the costs are going to be substantial and possibly underestimated;
- nothing we have seen from CBC and THT, despite their very best [and commendable] intentions, indicates they are able to meet the costs of saving and preserving the buildings the subject of the appeals, let alone those that are not;
- even if the bypass does not proceed it is very unlikely the buildings would be available to private landowners.

[353] Our site visits confirmed the distressed state of many of the buildings. Many exteriors were in poor repair. Staircases had been removed and in one heritage building, concrete had been poured on the floor. We remain concerned that for some buildings, if not

most, there is an urgent need for some protection let alone restoration and refurbishment. For those buildings in the direct path of the bypass, we see the only solution is relocation.

[354] Mr Hasell and Dr McGovern-Wilson set out at some length why their organisations are unable to assist the future of the built heritage if the bypass does not proceed. Mr Hasell states there will be no funding available for protection apart from basic maintenance, and if alternative routes have to be found, the buildings are to be land-banked with Transit against new eventualities. Further, if Transit does not proceed with the bypass, all of the land and its buildings may well be land-banked against future Treaty settlements. They will not be sold off.

[355] Dr McGovern-Wilson makes it clear that the HPT cannot fund maintenance work and nor has it the power to require private landowners to undertake maintenance.

[356] The point we make is, that overall if there are any further delays, a significant opportunity for preservation and conservation of the heritage buildings on the bypass route alone will be lost. If the heritage and cultural values of the site are considered very high - high, mitigation of the anticipated loss of these by relocation of the buildings, should be one reason the authorisations are approved.

Finding

[357] The costs inherent in the archaeological research are likely to be considerable. It is rare for such funding to be made available in New Zealand.

Purpose and Principles of the Act: S.20(6)(b)

[358] Section 20(6)(b) requires that the Court shall have regard to the purposes and principles of the Act. These are outlined in s.4 as follows:

4. Purpose and principles

- (1) The purpose of this Act is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand.**

- (2) **In achieving the purpose of this Act, all persons exercising functions and powers under it shall recognise-**
- (a) **The principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand’s distinct society; and**
 - (b) **The principle that the identification, protection, preservation, and conservation of New Zealand’s historical and cultural heritage should-**
 - (i) **Take account of all relevant cultural values, knowledge, and disciplines; and**
 - (ii) **Take account of material of cultural heritage value and involve the least possible alteration or loss of it; and**
 - (iii) **Safeguard the options of present and future generations; and**
 - (iv) **Be fully researched, documented, and recorded, where culturally appropriate; and**
 - (c) **The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga.**

[359] CBC and THT allege that the decisions of the HPT do not accord with the purpose and principles of the HPA.

CBC’s Case

[360] CBC considers that the decision whether to grant or decline the authorities must be made in accordance with the provisions of the HPA. The purpose of the HPA does not mention words that refer to the *modification* or *destruction* of sites. The CBC maintains the primary purpose of the HPA is to promote the conservation of heritage.

[361] CBC considers that once a building is removed, the historic place is extinguished, its lasting value has gone. Removing heritage buildings from their place extinguishes historic areas which consist of an inter-related group of historic places. As an example, a new Tonks Avenue will not be and can never become a historic area.

[362] CBC further submits that s.4(2)(b)(i) maintains that it is inappropriate to separate historical from other information and the availability of considerable historic survey and site information is particularly important in this case which covers such a great deal of inner city Wellington.

[363] In addition, s.4(2)(b)(ii) states the principle in s.4(2) should take account of material of cultural heritage value and involve the “least possible alteration or loss” of it. CBC

considers that this means losses of heritage values must be distinctly justified. It is noted that there are many sites which are not in the carriageway of the road and for which no reasonable justification for destruction or modification has been given.

[364] CBC endorses the principle in s.4(2)(b) (that “*the identification, protection, preservation and conservation of New Zealand’s heritage*”) should safeguard the options of present and future generations: s.4(2)(b)(iii). It considers that careful thought and justification is required if pre 1900 sites are to be disturbed and material taken from the ground, as the resource is no longer intact for future generations. This reinforces the principle of least possible alteration or loss in carrying out the task. CBC considers that the risk of making error or mistakes in the proposed excavation (which is proposed to take place within a few months over one summer) must be compared with a piecemeal approach advocated by its own archaeological consultants, which would manage that risk over a longer period of time and reduce it considerably.

[365] CBC submits that it is important to determine what might potentially be important in the future, and which will not remain once these sites are modified or destroyed. What is dug up today can only answer the questions of today, whereas future generations will have different questions. CBC also states that we must consider whether the proposed conditions for retaining only representative samples of some materials, are sufficient.

[366] CBC considers that there has been little consideration of why sites, with standing buildings in particular, must be modified and destroyed to collect and disseminate information, contrary to s.4(2)(b)(iv).

[367] Dr Barber identifies that the principles of the HPT [should] conform to the international standards and advice for cultural heritage preservation in its own place and setting. He states that the greatest dilemma for modern heritage management is identifying the threshold point at which the less preferred options of preservation by record or salvage are insufficient mitigation, for the loss of an archaeological resource in its place and larger setting.

Transit’s Case

[368] Transit submits that the purpose and principles of s.4 apply to the range of matters addressed by the HPA (such as the protection of historic places, registration, and the functions



and powers of the HPT and the Maori Heritage Council), not just to the archaeological authority provisions. In relation to archaeological sites, the HPA in fact contemplates that its purpose will be achieved in the context of granting authorities to “destroy, damage, or modify” archaeological sites (ss. 10-20).

[369] Transit identifies that s.4(1) defines the purpose of the Act as being to “promote” the various matters specified in that subsection. Transit considers that the definition of “promote” is to require some sort of action or encouragement, but does not go as far as “to achieve” or “to ensure”. Transit observes also that it is not the case that the authorities granted must “accord with” the purpose and principles. The words ‘accord with’ only loosely capture the influence that s.4(1) and (2) are intended to have in the determination of the appeals.

[370] Ms O’Keeffe states that the authorities are generally consistent with the specific principles noted in s.4(2)(b)(i)-(iv). She notes that archaeological investigations by their very nature are generally destructive processes, as information can usually only be obtained by modification or destruction of the site. Therefore researching, documenting and recording of archaeological sites will, in most cases, involve destruction. She acknowledges that the decision on whether the value of the information to be obtained justifies the destruction of the site, is a complex one - to be made on a case by case basis.

[371] The witness points out that this particular work is premised on a principle of minimal disturbance of the archaeological resource. If construction work does not require exposure of an archaeological feature or horizon, it will not be investigated. The resource will remain intact for possible investigation by future generations with improved techniques. And in the meantime, those buildings in the path of the bypass will be relocated, providing a measure of conservation.

- ***Purpose of the HPA***

[372] The case law supports the contention that while principles in s.4(2) recognise that historic places have intrinsic value (s 4(2)(a)), they contemplate the alteration to or loss of sites of cultural heritage value (although seeking minimisation of this) in s 4(2)(b)(ii) and (c)(iv).

[373] The purpose of the HPA has been considered in *Ngatiwai (I)*⁴⁰ (and subsequently in *Taipari*⁴¹) where it was held that the Act contemplates the destruction or modification of archaeological sites in appropriate circumstances:

We have already quoted section 4 of the Historic Places Act which sets out the purpose and principles of the Act. We accept that they need to be understood according to their context. Relevantly, the references to protection and preservation need to stand with the provisions of Part I of the Act which empower the Historic Places Trust to authorise destruction of archaeological sites in appropriate cases. The Act contemplates that any destruction or modification will be done under controlled circumstances, so that the full historical record that may be available is obtained ...

The principles of the Act do not necessarily require the retention in situ of all archaeological remains. Depending on the intrinsic value of the site, the principles may be recognised by providing for careful investigation, recording of deposits under appropriate supervision, reporting of findings, and curation and storage of selected materials.

[374] We note elsewhere in this decision, the extensive task the HPT is preparing for under the authorisations - of which the identification of the archaeological material is a significant part. Then, too, we have stressed repeatedly the protection of the buildings, whilst not *in situ*, is a significant part also of what is to occur. Most of those heritage buildings to be moved cannot be preserved in their current settings.

[375] While CBC considers the primary purpose of the HPA is to promote the conservation of heritage, the HPA does provide for the HPT to grant authorities permitting the destruction of an archaeological site. These activities do not have to be mutually exclusive; the modification or destruction of a site may be the only way to promote the conservation of the site in the circumstances. We iterate, Dr McGovern-Wilson is clear that:

[a] the properties are in a state of disrepair;

⁴⁰ *Ngatiwai Trust Board v Historic Places Trust (Pouhere Taonga)* [1996] NZRMA 222, pages 233-234.

⁴¹ A102/97.

- [b] the Trust has no power to order private land owners to undertake maintenance work to properties, even if they are listed on its register;
- [c] as the buildings deteriorate and literally fall apart their heritage values will diminish to the point that there will be nothing left to protect;
- [d] without a substantial investment of time and money the outlook of these buildings is grim.

Obviously, this continuing state of affairs does not accord with the HPA's principles.

[376] In his rebuttal evidence, Dr McGovern-Wilson also gives a negative view of the future options for the Te Aro area if the bypass does not proceed. If the land is sold to developers, they will need to apply to the HPT for authorities. Such applications may span decades and in the meantime the buildings would continue to decay. Some sites may go to those who wish to restore them. Nevertheless, the HPT would, in effect, be faced with a series of applications over an archaeological and historic landscape made in a random fashion with investigations carried out in a piecemeal fashion. Opportunities for the public to gain information about archaeology and Wellington's colonial heritage would be severely curtailed. The ability to be able to recover and study information in a co-ordinated and meaningful way would be greatly diminished. We found Dr McGovern-Wilson's evidence compelling in this regard.

[377] As the HPT believes, the best outcome for heritage in this particular case, is to seize the opportunity afforded by the conditions to the authorities to comprehensively research and record the sites. If this is not done the buildings will deteriorate to the extent that they become unsalvageable. And the in-ground archaeology will be lost on a piecemeal basis without any coherent research strategy. The HPT lays stress on the fact a focus on the in-ground archaeology is important and the focus on the buildings alone is misleading.

[378] We note that Ms Forbes in her 1995 report to Works Consultancy provides a checklist of issues and some general recommendations. That document focuses on the buildings, the land under the buildings, and the land to which they are being relocated. In terms of her recommendations in the report, Ms Forbes accepted in cross-examination that most of her recommendations on the bypass heritage buildings are reflected in the conditions as expressed in the designation project: see *Estate of P A Moran*. In her document, she also recommends to protect the heritage values *wherever possible* - by whoever possible. In other words, Ms Forbes recognises that 'protection' is not an absolute.

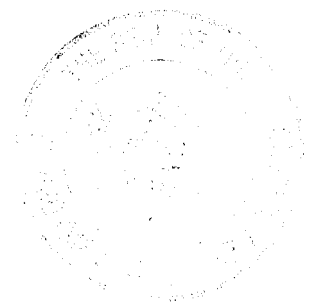
[379] The HPT also considers that by placing specific conditions on the authorities and ensuring they are carefully managed as set out in the management plan, the HPA's principles are best adhered to. The HPT's role in achieving the HPA's purpose is thus a significant one. In this regard, it is stated by various of the appellants' archaeological witnesses that they have:

- nothing but regard and respect for the HPT's work - and its archaeologists;
- there are many fine and even innovatory approaches and requirements in the HPT's conditions (Dr Bader has some reservations however about putting some of them into practice as a result of archaeological work recently undertaken at Fort Dorset);
- there is nobody better than the HPT to assess the period that is required for the s.15 work;
- the s. 17 work in the Eastern Section is given the same timeframe as the s. 15 work so it will not be a hasty undertaking as the appellants imply;
- it is not necessary to identify all specific sites within the area in the application area to achieve what s.20(6) requires;
- the archaeological work will take months;
- there will be sufficient stand down time if significant sites are discovered - and for the Maori Protocol procedures to take effect.

[380] We consider all of these issues, when put together, contribute to fulfilling the HPA's purpose, on the basis that if the bypass is to proceed, there are almost no other options available to what is proposed and no one authority better than the HPT to undertake the majority of the site specific work.

Finding

[381] We are satisfied that the authorisations meet the purpose of the HPA.



- **Take account of all relevant cultural heritage values, knowledge and disciplines: s.4(2)(b)(ii): be fully researched, documented, and recorded, where culturally appropriate: s.4(2)(b)(iv)**

[382] The appellants, through various expert witnesses, claimed a serious information deficit in the following areas:

- section 11 authorisations should have been applied for instead of s. 12;
- the archaeological assessments undertaken by Transit were seriously deficient;
- a research strategy should have driven the archaeological assessment;
- the authorisations themselves are deficient.

Section 11 Instead of s. 12 Authorities

[383] We determine first of all, as a question of law, whether Transit should have applied for s.11 or s. 12 authorities to modify or destroy the sites, etc. We see this as a knowledge issue because of the basis on which it is raised.

[384] Sections 11 and 12 state as follows:

11. **Application to destroy, damage, or modify archaeological site-**
 - (1) **Any person wanting to destroy, damage, or modify the whole or any part of any archaeological site shall first apply to the Trust for an authority to do so.**
 - (2) **An application for an authority to destroy, damage, or modify an archaeological site shall include the following information:**
 - (a) **A description of the activity for which the authority is sought and its location:**
 - (b) **A description of the archaeological site over which authority is sought to modify:**
 - (c) **An assessment of any archaeological, Maori, or other relevant values and the effect of the proposal on those values:**
 - (d) **A statement as to whether consultation with tangata whenua and any other person likely to be affected---**
 - (i) **Has taken place, in which case details of such consultation shall be provided, including the identity of the parties involved and the nature of the views expressed; or**
 - (ii) **Has not taken place, in which case reasons as to why such consultation has not taken place shall be provided:**
 - (e) **The consent of the owner if the owner is not the applicant.**

- (3) **The Trust may, by written notice to the applicant, require the applicant to provide further information relating to the application.**

12. Application for general authority to destroy, damage, or modify archaeological site -

- (1) **Any person wanting to destroy, damage, or modify the whole or any part of-**
- (a) **All archaeological sites within a specified area of land; or**
 - (b) **Any class of archaeological site within a specified area of land,-**
- may, instead of making an application under section 11 of this Act, make an application under this section for the grant of a general authority under section 14 of this Act.**
- (2) **Subsection (1) of this section applies notwithstanding that some or all of the sites or possible sites within the specified area of land have not been recorded or otherwise previously identified.**
- (3) **Consultation with tangata whenua and any other person likely to be affected-**
- (i) **Has taken place, in which case details of such consultation shall be provided, including the identity of the parties involved and the nature of the views expressed; or**
 - (ii) **Has not taken place, in which case reasons as to why such consultation has not taken place shall be provided:**
 - (e) **The consent of the owner if the owner is not the applicant.**

[385] Transit applied for general authorities under s.12 HPA to destroy, damage or modify the whole or any part of the archaeological sites instead of site specific ones. The evidence of Ms O’Keeffe and Mr Petchey for Transit, and Dr R McGovern-Wilson for the HPT is that the s.12 authorities are the best method of managing the complex and inter-related archaeology covered by the authorities.

[386] CBC on the other hand argues that:

- Transit should have applied for s.11 not s. 12 authorities because s. 11 authorities are more applicable to site specific archaeological sites;
- a cost benefit analysis counts against the granting of the s.12 authorisations;
- the Court has no power to remedy any defect the HPT made . . .

so therefore the authorities should be declined.

[387] When an application for s. 12 is considered under s.14(1) of the Act, the HPT must consider s.14(2)(a) and (b). CBC submits that the Environment Court hears matters *de novo*, so it “stands in the shoes” of the HPT, and must also consider s.14(2) matters when

reviewing s. 14(1). Alternatively, CBC submits that s.14(2) is allowed for in s.20(6) because s.20 refers to the ability to consider *any matter* the Court considers appropriate.

[388] It is further submitted that s.14(2) is an important check on s.12 applications, otherwise important sites may be missed. CBC considers that s.12 applications would seem to be most relevant in situations where a large unbuilt area (such as a forest or sand dunes) are under consideration and there is little evidence above-ground or of historical data to work from. The check which s. 14(2) provides also has to be seen in the context of the Act which:

- states where a person has reasonable “cause to suspect” that a site exists and they must not interfere with it without obtaining an authority (s.10);
- provides as a first option that a specific authority is required for each site (s.11).

[389] CBC submits that s.10 provides it is unlawful to destroy an archaeological site where there is reasonable cause to believe one exists. This suggests that what is required is information of the probability that some pre 1900 material may remain in a site. The provision would seem to require:

- some information about the possibility of sites in the specified area and their likely number;
- some information about the likely cost of identifying each site;

this does not include excavating or recording.

[390] In terms of the definition of “site” it has generally been accepted that site means a house with surrounding land and the subsurface elements beneath them so the building and ground forms one archaeological unit⁴². Since “site” is not defined by the HPA it may mean areas more extensive than that - for example at the Oak Park Avenue end of the bypass route, there are a number of factory buildings which could qualify as archaeological sites.

[391] In this case, there are some pre 1900 standing buildings which are archaeological sites. In addition, the Ward map provides a great deal of information which clearly defines house sites. An overlay of existing historical maps and an examination of ratepayer rolls will

⁴² O’Keeffe NOE page 36.

assist to determine whether each site is intact or the earth has been excavated. In addition, there are quite a number of vacant lots where demolition has already occurred e.g. 7 Tonks Avenue.

[392] Further, all three areas are said to have important archaeological values. Transit therefore cannot begin to excavate most of the sites identified, because it has reasonable cause to suspect that archaeological sites exist at all properties - but which have not been deeply excavated since at least 1900. Therefore, if there is reasonable cause to suspect that there is an archaeological site, and if Transit could not proceed under s.10, then how can it be stated the cost of locating and identifying each individual site would be prohibitive versus the benefits that could be provided?

[393] The existence of possible underlying Maori sites is also a potential in many situations. Section 14(2) HPA would be meaningless if such sites were to be taken account of in every case. This would allow the possible existence of underlying sites to defeat the purpose of s. 14(2) even when overlying sites are clearly known about.

[394] Further, there is no evidence from Ms O'Keefe, archaeological consultant to Transit, that s. 11 was specifically considered.

[395] Finally, it is submitted s.14(2) must have some meaning. If it does not apply in a case where there are acknowledged to be high archaeological values and a wealth of resources to draw upon to both locate and identify sites in an urban area, then there would be little more than a test of the most cursory kind. CBC considers that the danger of a cursory approach to s.14(2) is apparent in this case. Had the HPT insisted that most sites along the route could be relatively readily located and identified, then s. 11 applications would have been required and each site would have been fully researched and assessed.

[396] In summary, CBC considers that s.12 authorisations in this case cannot be issued. Further, the Court cannot replace the s. 12 authorisations with s.11 ones. It may only modify the decisions made under s.20(4) HPA. The requirements of s.11 to each site so far have not therefore been made out.

Consideration

[397] We note the authorities granted by the HPT and which form part of the two appeal documents are made under s.14(1) HPA. This is important to identify at the outset, for it controls what the purported appellants may require of the Court. Its implications unfold in an analysis of the general legal provisions involved.

[398] Transit and the HPT consider that s.20 only refers to s.14(1), not s.14(2), and in that regard the legislation is specific. For example, s.14(1)(c) lists the powers the HPT may exercise, and the list is specific to five sections only, namely ss.5, 16, 17, 18 and 21.

[399] Turning now to the general provisions which control these aspects. We note section 290 RMA sets out that with regard to appeals and inquiries:

- (i) **The Environment Court has the same power, duty and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.**
- (ii) **The Environment Court may confirm, amend, or cancel a decision to which an appeal relates.**

[400] The Environment Court's power to hear and determine matters on a *de novo* basis is reinforced by section 296 of the RMA. That section provides relevantly that:

If there is a right to refer any matter for inquiry to the Environment Court or to appeal to the Court against a decision of a local authority, consent authority or any person under this Act or under any other Act or regulation -

- (a) **No application for review under Part 1 of the Judicature Amendment Act 1972 may be made: . . .**

unless the right has been exercised by the applicant in the proceedings and the Environment Court has made a decision.

[401] Sections 14 and 20 HPA state as follows:

14. Powers of Trust in relation to authority application---

- (1) **On receipt of an application for an authority to destroy, damage or modify any archaeological site or sites under section 11 or section 12 of this Act, the Trust may, subject to subsection (3) of this section, exercise one or more of the following powers:**

- (a) Grant an authority in whole or in part, subject to such conditions as it sees fit:
 - (b) Decline to grant an authority in whole or in part:
 - (c) Exercise all or any of the powers specified in any of sections 5, 16, 17, 18 and 21 of this Act.
- (2) Where an application is made for a general authority, under section 12 of this Act, the Trust shall grant that application only if it is satisfied on reasonable grounds that there is no particular benefit to justify the likely cost of locating and identifying -
- (a) Every individual site present within the specified area of land; or
 - (b) Every individual site of the class to which the application relates that is present within that area.
- (3) Where an application made under subsection (2) of this section relates to a site or sites that the Trust considers to be a site of Maori interest, the Trust shall refer that application to the Maori Heritage Council to make such recommendations as the Council may consider appropriate, following such consultation as the Council considers appropriate.

20. Rights of appeal-

- (1) Any person who is directly affected by any declaration, decision, condition, or review of any decision made or imposed by the Trust under -
- (a) Section 9 of this Act (which relates to the Trust's power to declare that a site is or may be able to provide significant evidence relating to the history of New Zealand); or
 - (b) Section 13 of this Act (which relates to the Trust's power to carry out an investigation where no authority application has been lodged); or
 - (c) Paragraph (a) or paragraph (b) of section 14(1) of this Act (which relates to the Trust's powers in respect of an authority application); or
 - (d) Section 15 of this Act (which relates to the Trust's power to grant an authority subject to the condition that an archaeological investigation be carried out); or
 - (e) Section 16 of this Act (which relates to the Trust's power to review the conditions of an authority); or
 - (f) Section 17 of this Act (which relates to the Trust's power to consent to the holder of an authority engaging a person to carry out work under the authority); or
 - (g) Section 18 of this Act (which relates to the Trust's powers to investigate archaeological sites) -

may appeal against that declaration, decision, condition, or review to the Environment Court.

...

- (4) Without limiting the powers of the Court under the Resource Management Act 1991, but subject to subsection (6) of this section, in considering an appeal under

this section the Court may confirm or reverse a decision appealed against or modify the decision in such manner as the Court thinks fit.

- (5) Subject to subsections (2), (3), and (6) of this section, every appeal shall be made, heard, and determined by the Environment Court in the manner prescribed by the Resource Management Act 1991 and the regulations made under that Act.
- (6) **In determining an appeal under this section in respect of a decision made under paragraph (a) or paragraph (b) of section 14(1) of this Act, the Court shall have regard to any matter it considers appropriate, including (but not limited to) -**
(our emphasis)

and then follows a specific list.

[402] There is no mention of s.14(2). What CBC essentially requires of the Court is in essence a review of why the HPT granted general authorisations under s.12 and not specific ones under s. 11.

[403] Section 14(2), however, establishes the powers of the HPT upon receipt of an application for a general authority under s.12. The HPT shall grant the application **only if it is satisfied on reasonable grounds that there is no particular benefit to justify the likely cost of locating and identifying every individual site present within the specified area of land ...** (our emphasis)

[404] When assessing an application for a general authority under s.12 HPA, it is the HPT which has to be satisfied on reasonable grounds etc; those grounds are not part of the issues which may be appealed under s.20(6) (a)-(e).

[405] The HPT's decisions that are subject to appeal are specifically listed in s.20(1). Section 20(1)(c) refers to paragraph (a) or paragraph (b) of section 14(1) of this Act (which relates to the Trust's powers in respect of an authority application). Section 14(2) is not referred to anywhere in s.20.

[406] Under s.14(1), which relates to the HPT's power to either (a) grant or (b) decline an application under either s.11 or s.12. the decision *whether to grant an authority* is/should be the basis for the appeal.

[407] The decision regarding *which type of authority* is the most appropriate for the Trust to apply for however, is made under s. 14(2), and s.20(1) does not provide for that issue to be appealed. Transit considers that this reflects a policy inherent in the HPA that, although a

directly affected person can appeal the granting or declining of authorities, it is not open to that person to appeal *the type of authority* granted. This is a technical decision within the expertise of the HPT.

[408] Transit considers that had CBC wished to challenge the Trust's decision under s.14(2), it was open to it to apply for judicial review of the decision. What has characterised CBC's case throughout, however, has been its dogged pursuit of this procedural point and its narrow focus on alleged defects in the information as presented to the HPT by Transit and its advisers.

[409] We note that under s.296(a) RMA, a party with a right to appeal to the Court may only apply for review when the Environment Court has heard the appeal and made a decision. In this case, we have established that CBC and THT do not have standing to appeal, so they have always had a right to apply for review - but they were not aware of the Court's view of their status of the outset of proceedings.

[410] Nevertheless, matters supporting the interpretation of the HPA which disallows the HPT's decision under s. 14(2) being questioned by the Court (or in) an appeal are:

- [a] s.20(6) sets out the considerations for an appeal under **“paragraph (a) or paragraph (b) of section 14(1) of this Act”**, again with no mention of s.14(2);
- [b] while the Court *“stands in the shoes”* of the HPT, this is limited - s.20(5) is **“subject to subsections (2), (3), and (6) of this section”**, which, as Transit submits, is a general power subject to specific ones; s.20(5) in effect restricts the appeals to s.14(1)(a)(b);
- [c] the HPA gives different powers to the HPT and to the Environment Court over authorisations. Section 20(6) lists a number of considerations that the Court may have regard to under s.14(1)(a) (b): these are considerations for the Court rather than the HPT: thus, although consistency with RMA *procedures* seems to be an aim of the HPA, it also foresees that the *powers* of the HPT and the Environment Court should be different; and this can be seen in the HPT's powers to consider s. 14(2) matters;

- [d] the specific legislation (HPA) should take precedence over the more general (RMA);
- [e] the Court cannot examine the HPT's decision under s.14(2) as “**any matter it considers appropriate**” under s.20(6);

Finding

[411] The Court has no jurisdiction to decide whether a s.11 authority is to be preferred over a s. 12 authority. Accordingly the issue is put to one side. Regarding the allegation that Transit failed to supply enough evidence to assess the value of pre 1900 buildings, we discuss this later in the decision.

- *Transit's Archaeological Assessments are Seriously Deficient?*

[412] The information requirements for an authority application are set out in s. 11(2) as follows:

- (2) **An application for an authority to destroy, damage, or modify an archaeological site shall include the following information:**
- (a) **A description of the activity for which the authority is sought and its location:**
 - (b) **A description of the archaeological site over which authority is sought to modify:**
 - (c) **An assessment of any archaeological, Maori, or other relevant values and the effect of the proposal on those values:**
 - (d) **A statement as to whether consultation with tangata whenua and any other person likely to be affected ---**
 - (i) **Has taken place, in which case details of such consultation shall be provided, including the identity of the parties involved and the nature of the views expressed; or**
 - (ii) **Has not taken place, in which case reasons as to why such consultation has not taken place shall be provided:**
 - (e) **The consent of the owner if the owner is not the applicant.**

[413] The HPT can seek further information (s.14(4)), and did so in this case in relation to:

- the location of any building constructed prior to 1900, and the effects of the project on those buildings; and
- the views of other persons.

[414] In legal submissions, CBC submits that Transit's application for the authorisations was not been properly undertaken and important archaeology has been missed. CBC considers that there are gaps in assessment testing, the rigour of the information, gaps in the knowledge of the activity and its location, site information such as changing land use patterns between 1840-2002/3, plans which require precise overlay and did not have it, and the addition of GIS work which would add enormous value to the project.

[415] Mr Kelly sees s.4(2)(b)(iv) only as the need to record properly. We, however, see s4(2)(b)(i) and s.4(2)(b)(iv) as closely aligned and evaluate them together.

[416] Mr Kelly identifies in terms of building archaeology a number of archaeological sites (nine buildings) which he considers were missed out of the inventory/historical research process.

[417] Referring to the Statement of Facts and Issues which had been filed with the Court, Transit say that no jurisdictional issue had been raised by CBC as to the completeness of the applications in terms of the statutory requirements. Ms O'Keeffe states that only as much information to confirm the legal archaeological resource and activate the Act is required in any assessment.

[418] Ms Forbes was doubtful in cross-examination that the authority applications and assessments contained all of the information which s. 11 required. It was the amount and type of information which were her concerns. She considers the assessments incomplete - for example the fact that the Hauwai Basin Reserve area is not discussed in an archaeological cultural context. She cites examples too of domestic work from the nation's leading colonial architects which have been missed out - such as that of W Gray Young, John Swan and William Turnbull and which should be recognised: also evidence of the early transport systems: evidence of sporting activities such as the Wellington Bowling Club and Tennis Courts near Footscray (on land bought by Jobson in 1870): evidence of the old industrial area and stables existing at 215 Vivian Street: evidence of the city infrastructure such as drainage,

eg the stormwater culvert which flows under 13 Tonks and Footscray . . . and so on. Dr Barber raises similar but more general concerns.

[419] Mr Petchey, who peer reviewed Ms O’Keeffe’s work, considers that Transit’s assessments on the applications reference relevant documentary sources and he generally agrees with Ms O’Keeffe’s set of mitigation conditions. He states:

In each assessment there is then a section titled “archaeological sites in the study area”. In each case, early survey plans are used as to the main basis for a discussion of specific developments in each study area. While this is a sound approach, I did not find these discussions clear, and felt that much of the information presented in each should have been included in the earlier history sections. The identification of potential archaeological sites was based mainly on the portrayal of buildings and other features on early plans, particularly Ward’s 1891 city survey, but the discussions made no clear distinction between the historical evidence of a structure being present and the archaeological potential today of that building, or site. Physical structures such as buildings were simply included in the discussion of land tenure change over time. The exception to this was the discussion of the changes to Mount Cook and its vicinity, where much modification associated with military, prison and museum activity has occurred. I also felt that there was a lack of consideration of the existing environment in the discussion, not in terms of the heritage buildings themselves, but in terms of the nineteenth century townscape that they represent and the assistance they might be in predicting archaeological site location. It would have been useful to have a more general discussion of townscape development, and the always unrecorded elements of such a townscape, such as rubbish pits, latrines, and minor cutting and filling to level domestic sites. It is this type of small-scale feature that often provides the greatest amount of archaeological information in urban sites, and a comparison with previous urban excavations in other cities, both in New Zealand and internationally, would have illustrated this. However, the basic identification of site type and overall distribution based on early survey plans is sound.⁴³

⁴³ Petchey EIC page 6.

[420] Ms O’Keeffe, in her rebuttal evidence, more specifically identifies commercial and residential buildings and their foundations and sites as having archaeological values. She specifies military buildings, such as barracks, wells, latrines, walls and other features in Buckle Street (within the study) area which are likely to leave archaeologically locatable remains. She notes that the survey plans of the area round Tonks Avenue dating to the 1870s show a number of features, including outbuildings, wells and streams. And she notes that any works in the wider Te Aro Flat Area would be likely to impact upon subsurface archaeological evidence. Hence she colours any gaps in the assessments noted by others with greater detail in her evidence analysis, and in the draft research strategy even later introduced in her supplementary evidence⁴⁴.

[421] Ms O’Keeffe also acknowledges that social history is an important contextual value of archaeology but considers it is to be fully considered at length during the research and analysis phase of the work. She has a different approach from the CBC witnesses, considering that the assessment process is just the first step in the statutory process:

*The investigation subsequently undertaken and the associated research is of greater importance, and in this research most archaeologists would under the integrated work advocated by Ms Forbes, place the revealed archaeological material in context. This approach is ensured for the archaeology, by the research strategy and management plan, which will guide what work is undertaken and how it is undertaken.*⁴⁵

[422] Dr Barber (a predecessor of Dr McGovern-Wilson as senior archaeologist to the HPT), accepted in cross-examination that there was sufficient evidence in the assessments to process an authority for 19th century European and other urban archaeological heritage. But he later explains that by that statement he means there is, without question, enough information available to submit an application for an authority pursuant to s.11, so that the HPT would be required to lodge the application. He identifies that that process however, must not be confused with the HPT’s responsibilities to consider whether sufficient information has been provided on the lodged application pursuant to s. 11(3), but in our view that is quite a different issue - which we assess elsewhere.

⁴⁴ Appendix I 28 August 2002.

⁴⁵ O’Keeffe Rebuttal Evidence page 5.

[423] Dr Bader, for his part, when asked what information was lacking, acknowledges that *all the bits are pretty much somewhere distributed throughout the documentation, but it had not been brought together in a concise manner*. He regrets that the applicant did not provide research-analysed information - although he appears to be talking about plan overlays.

[424] Dr McGovern-Wilson however, whilst acknowledging that in places there were less than extremely detailed analyses (such as specific archaeological details relating to numbers 8, 32 and 40 Arthur Street) states that the HPT considered that there was sufficient information provided with the applications to allow it to make a decision - *and if we required more information we would have asked for it...*

[425] Further, as submitted by Transit, some of CBC's criticisms of the information provided were not put to the relevant Transit witness for a response. For example, counsel for CBC and CBC witnesses both stated that "overlay" plans should have been provided with the archaeological assessments. Counsel for CBC did not put this allegation to Ms O'Keeffe, and therefore she had no opportunity to refer the Court the compilation plans prepared for, and included in, her assessments. Transit say, and we accept, that omission in this regard, may be due partly to CBC's witnesses' lack of detailed knowledge of the area under investigation, and unfamiliarity with the assessment documentation. Drs Barber and Bader were in Wellington briefly before the hearing and appear to have had only had a cursory look at plans, etc.

[426] Dr McGovern-Wilson was questioned as to whether HPT adopted Transit's assessment for the archaeological authorisations. He puts the issue in the following perspective:

We accepted Ms O'Keeffe's assessment as part of the application and you are correct in stating that the Trust does not undertake its own assessments in relation to authority applications. In other words, it is incumbent upon the applicant to provide us with information and we have the ability to go on asking for more information until we are satisfied we have sufficient to enable us to make a decision. We are a statutory decision making body and it would be incorrect for us to gather information to support an application by an external party.

[427] Dr McGovern-Wilson also made it clear that many of the appellants' criticisms on the deficiencies in the archaeological assessment report for the authorisations were known in advance before the HPT deliberated upon the authorities and before it set conditions. The matters raised in submissions by some of the archaeologists were specifically taken account of by himself and others in the Trust before reaching a decision. They resulted in the HPT going beyond what was suggested in Transit's assessments for the authorisations.

Finding

[428] The appellants have not made out their allegations that there was a serious information deficit in the archaeological assessments.

- *Lack of a research strategy*

[429] The HPT considers matters of a research strategy nature when deciding whether to authorise an archaeological investigation under s.18. Counsel for the HPT points out that the HPT research strategy is an in-house policy document. It is therefore different from the Transit research strategy for the bypass which is directly related to the applications.

[430] Suggestions were made by witnesses for CBC that Transit should have prepared its research strategy before making its application for the authorisations (or deciding on the bypass route). It is considered that the investigatory work should guide the strategy.

[431] A key condition of the authorities is the requirement for a research strategy to be developed to guide the archaeological investigations. Mr Petchey identifies there is an increasing awareness amongst archaeologists internationally, that a simple policy of excavation and recording of development-threatened sites is not ultimately sustainable, as it amounts to mere stamp collecting, and does not provide any long-term benefits to either researchers or communities. This is particularly the case on large-scale sites such as this one, where a large amount of information is to be expected, and without a suitable approach meaningful interpretation would be difficult. This does not displace the need for basic field excavation and complete recording of sites and artefacts, but gives these activities a framework to operate within.

[432] Ms O’Keeffe is not in favour of the research strategy coming before the assessments because:

- it remains to be seen whether an authority will be granted;
- if granted, for what geographic areas;
- there may be conditions on the authority which have relevance;
- the questions in the research strategy can then be specifically directed to the archaeological work to be done.

[433] In her 1995 report to Works Consultancy, Ms Forbes herself recommends that if sites cannot be left undisturbed, then a plan must be developed to mitigate effects. This plan should include archival research done, recovery map overlays, and methods to protect sites *in situ*. She considers that the research strategy should be peer reviewed prior to work starting. At one level, this is what is occurring now.

[434] Transit’s applications are made under s.12 to “*destroy, damage, or modify*” archaeological sites. Given that this is a s.12 application, the conditions on the authorisations require a research strategy that will guide the construction and excavation work to follow (General Condition 1). The Eastern Section Authority decision, for example, records as follows:

An important condition of the authorities is the preparation of the Inner City Bypass Research Strategy. It is intended that this strategy will direct the archaeological work towards questions relating to the cultural history of the distinctive social enclave at Tonks Ave and the early history and development of inner city Wellington. The results of the archaeological work will complement and enhance the new precinct and contribute to a better understanding of Wellington’s past.

[435] Transit’s strategy has to be approved by the HPT (in other words peer reviewed) and Ms Forbes accepts that this has value for the project.

[436] One of Ms Forbes’ chief concerns is with the architectural drafting - and the necessity to reproduce the relevant plans in the same scale and overlay them with the addition of GIS work. In cross-examination Dr McGovern-Wilson states that, in his opinion, he does not believe the fundamental questions asked in the Transit’s research strategy will change at all, but what may change might be some of the techniques used to obtain the answers. In our

opinion, these may include the GIS systems, which we note [in Exhibit 151, the archaeologists say is applied internationally as part of a coding system for research using multiple methodologies. The archaeologists state it is urgently needed for major urban areas in New Zealand.

[437] Exhibit 15 also identifies that when the Wellington study commences it will identify research areas including high priority ones for intensive investigation and risk sites such as areas which are physically vulnerable. Finally, Exhibit 15 acknowledges that the Transit research strategy and management plan should be flexible - those we viewed had such inbuilt flexibility.

[438] In Exhibit 15 the four archaeologists stated that it is desirable to have research questions identified in the archaeological assessment. They state:

1. *We agree the assessment process should consider:*
 - *The values of an archaeological site for its own sake*
 - *based on what is proposed for the site, is the value of the information recovered balanced by the loss of a non-renewable resource?*
2. *We agree that archaeological assessments should follow, as a minimum standard, the process as set down by Gumbley 1995, and the Simmons (n.d.) . . .*

[439] The key in this case lies with the second bullet point “*based on what is proposed for this site*”. The conditions on the designation require the heritage buildings to be relocated and any others to be demolished or removed at Transit’s option. The issue here, under the HPA, is whether other pre 1900 buildings (not heritage) should be removed altogether out of the area because of their cultural values and their status as archaeological sites. If those research questions had been identified in the assessments, we would have been more comfortable.

[440] In conclusion, on this matter of knowledge and disciplines, we note that in the case of Transit it has employed a heritage architect, an historian, archaeologists (2) and engineers. Dr McGovern-Wilson also identifies a buildings archaeologist is required to make detailed analysis of the buildings before they are relocated, along with the project archaeologist. Ms O’Keeffe identifies she had had discussions with one in Auckland at the time she had been preparing her evidence. If a buildings archaeologist is part of the project, we consider

that all relevant cultural heritage values, knowledge and disciplines will be accounted for on Transit's part.

[441] Meanwhile, the HPT is providing its own (highly approved) archaeologists and teams, supervised by Dr McGovern-Wilson for much of the project, particularly in the identified sensitive areas of the Eastern and Central Sections.

Finding

[442] The authorities cover all questions of research. It would have been desirable however, to have had the pre 1900 sites, other than heritage sites, identified for their values prior to the authorities being issued.

- *Are The HPT's Authorisations Deficient?*

[443] The appellants express concern at the paucity of information the HPT was supplied with by Transit on the Western section. Only the pre-1900 buildings that were heritage were inventoried, and no site-specific excavations are required in the specific conditions.

[444] The appellants and the archaeologists in Exhibit 15 record that they also disagree whether monitoring is an appropriate condition for such a large site that is suspected to have unknown scattered discrete features. Transit's research strategy (Draft 8) records the difference between the s. 15 investigations and the s. 17 monitoring⁴⁶:

The only exceptions to this principle will be the section 15 archaeological investigations, which are more strategic and contextual in nature, and will therefore open a larger area of land and may investigate to a deeper level in order to meet the research objectives. Archaeological investigations as part of the monitoring, on the other hand, may not necessarily require the total excavation of every feature encountered, nor may it necessarily go deeper than the lowest level for the required road cut.

[445] At first glance, it is proposed under the HPT authorisation for the Western Section that the archaeological sites in Town Acres 92, 113, 114, 115 and 116 will 'only' be

⁴⁶ Draft Research Strategy page 2.

monitored. CBC's witnesses were critical that the archaeological work for this section was being undertaken under this section of the Act. The impression given was that a bulldozer would turn up on the day to any given site, once the buildings had been moved, and begin scrapping away with the archaeologist only ready to intervene if an artefact emerged. If this happened, this would not comply with the purposes and principles of the Act.

[446] In addition, apart from Mr Bowman's extensive evidence on the historical aspects of the affected archaeological sites and buildings, there appears to have been a paucity of information on some of the buildings that went to the HPT for the authorisation on the Western Section. There is no mention in the authorisation that the HPT consider the buildings at 323, 272 and 270a Willis Street are pre 1900 sites.

[447] Dr McGovern-Wilson is however confident that the requirements in the conditions of the authority address those buildings at 323, 272 and 270a Willis Street given his analysis of what 'monitoring' requires.

[448] In cross-examination, Dr McGovern-Wilson acknowledges also, that in the draft management plan⁴⁷, numbers 132A-132B and 81-87 Abel Smith Street (Town Acre 113) are specifically identified as having a high probability of *in situ* archaeological material and require a s. 15 type of investigation, as well as [possibly] 39, 274, 278, 282 and 286 Willis Street and 215-217 Vivian Street. Such investigations are therefore now proposed in a number of distinct areas. Section 15 input may be required but not until the archaeologist-in-charge considers it is necessary.

[449] Mr Petchey in discussing the issue, identifies that there is an amount of flexibility in how the HPT manages the work both in the authorities and the research strategy. These will take care of the possibilities that come up. He also states that monitoring is a standard and quite acceptable approach, whereby an archaeologist closely observes the mechanical earthmoving or other construction activity, and can investigate any archaeological features that are exposed. If a site is found it can then be excavated by standard archaeological methods.

[450] Dr McGovern-Wilson explains that the HPT did not consider a s.15 investigation was needed in the area because the predominant archaeological buildings and their associated

⁴⁷ Which was attached to his further evidence at the second stage of the hearing.

curtilage falls in that period of the last decade of the 19th century as distinct from the much earlier and potentially more significant period in the Central Section. He states the closer *clustering of the 1850s, 60s and 70s buildings and the more scattered late 19th Century ones certainly don't require such detailed information.* He considers the authorisations are comprehensive enough to achieve what the HPT wish to achieve.

[451] Mr Petchey also believes that the detailed work specified by Ms O'Keeffe is reflected in the conditions. Condition 11 specifies under 'Monitoring', that the archaeologist shall investigate any archaeological structures, stratigraphy, etc. And under 'General Method' (2) work on the buildings (including pre 1900 ones), and the ground features beneath them, is a specific focus. Mr Petchey was also queried about the lack of provision to record pre 1900 buildings. He replies that what is identified in the research strategy will take care of the problem.

[452] Mr Petchey identifies that in her draft research strategy, Ms O'Keeffe has noted generic recording methods as including:

2 *Fieldwork*

2a Continuing work on recording the built structures to an archaeological standard.

2b Recording the below ground features of the buildings.

[453] Finally, with regard to Mr Bowman's omissions from the heritage inventories of some of the non-heritage buildings, we note he identifies in cross-examination that in the conditions on the authorities selected buildings require information in inventory form. And Dr McGovern-Wilson identifies in the Eastern Section that 8, 32 and 40 Arthur Street as pre 1900 sites fall within whatever conditions that the HPT would consider relating to buildings archaeology. He points out that archaeology monitoring requires detailed assessment, recording and measurement of the buildings.

Finding

[454] We do not find the HPT's authorisations deficient in information and method of investigation. Some specific sites, however, are only identified in the related draft research strategy and management plan.

- **Take account of material of cultural heritage value and involve the least possible alteration or loss of it: s.4(2)(b)(ii)**

[455] Mr Kelly considers s.4(2)(b)(ii) and (iii) are very important. He had always understood that the key principles to guide the HPT's work is minimal intervention (the least possible alternative) coupled with the need to safeguard present and future options. He acknowledged that this was the statement he had in mind when writing his evidence.

[456] There are three aspects to the provision. The first is that buildings which are archaeological sites having cultural heritage value should not be moved without very good reason. The second is that heritage fabric involved in the buildings should be disturbed as little as possible. The third is that the archaeological sites themselves should also be disturbed as little as possible.

[457] CBC considers that to comply with the principles of the Act the losses anticipated by the HPT must be reasonably justified. It points out that some of the sites that will be modified or destroyed are not in the direct carriageway of the road and no reasonable justification for the alteration or loss has been given.

[458] Ms O'Keeffe states that in her experience, road construction projects are generally not limited to just the carriageway where the cars will go, they also include ancillary work such as footpaths, access-ways etc. Therefore the impact on the subsurface (and the above ground archaeology) is generally wider than simply the carriageway.

[459] The archaeologists who took part in drawing up the Exhibit 15 document, record under the heading Authority Conditions that *We agree as a general principle that buildings not affected by the carriageway and ancillary works should not be moved.* We too agree with that principle. But most of the buildings are in the way of the carriageway and ancillary works.

[460] The HPT granted the authorities with information from the applications. The applications consisted of a bypass route that covered more area than the carriageway, and consequently the HPT granted the authorities to destroy and modify archaeological sites within the footprint as a whole. The HPT considers that if the authorities are declined then it is likely that more of the heritage structures will be lost, therefore the granting of the authority accords with s.4(2)(b)(ii).

[461] It is Mr Coulam's evidence for Transit that any buildings that are very likely to be demolished both in the bypass route and outside of it are based on the following reasoning:

- the commercial viability (high cost) of relocating unreinforced masonry and reinforced concrete buildings (the Boys Brigade building, 30 Arthur Street, and the doctors' houses 276 and 280 Willis Street, and 1 Oak Park Avenue);
- certain buildings, particularly 2 Oak Avenue, require earthquake strengthening in addition to removal; and
- some buildings that could potentially be removed may not find a buyer due to the condition, or nature of the buildings.

[462] Mr Coulam identifies that the final decision about whether a building (which Transit has not already determined will be relocated) will be demolished or sold for removal will be for the contractor to make. The contractor will make this decision after considering any offers made for the purchase and removal of buildings.

[463] We do not wish to comment on Mr Coulam's categories of buildings, because the reasons given for their demolition or removal status appear sound. If costs relating to the relocation of one of the masonry buildings (the Boys Brigade building) could be reconsidered, however, that would clearly better retain the heritage of the Cuba Street area if it could be relocated to a site close by.

[464] In his rebuttal evidence, Mr Kelly states that the destruction of outbuildings demonstrates that "least possible alteration" is not a principle guiding this work. He gives examples of outbuilding destruction, like the brick side building at 5 Tonks Avenue, and the building at the rear of 274 Cuba Street. We note the outhouse at 289/291 Cuba Street will also be demolished or sold for removal. Mr Bowman responds to this criticism as follows:

The decision on what is to be demolished is made on the basis of designation condition 18, which states that the "work can involve altering, removing or demolishing parts of buildings having regard to the contribution of the parts involved to the heritage character of the buildings." The heritage inventories have established heritage values of spaces and elements of each of the heritage buildings, while condition surveys of the buildings have identified the condition of each. Based on the combined information of the heritage inventories and condition surveys, decisions have been made to retain, repair and restore

authentic spaces and fabric. Only non-significant heritage elements will be demolished, or elements which are too badly damaged to survive relocation.

[465] In cross-examination, Mr Bowman admits to not doing any specific recording of the buildings at the back of 274 Cuba Street - the salt-room and stables and chiller. He states that he has the original plans and he has extensively documented the stables and they have been measured for drawings by Opus. He explains that these buildings are to be demolished, as they are very badly deteriorated and the salt house may even be dangerous. Mr Bowman also acknowledges he did not make any specific assessment of the small brick building behind 3 and 5 Tonks Avenue, although he did inspect it.

[466] We consider if any of the outbuildings of a building to be relocated are sufficiently safe to also relocate, they should be. In terms of 274 Cuba Street the evidence establishes that the related structures are not in good enough condition to do so. The same may be said for the back verandah attached to the ‘Catacombs’, which we viewed on our site visit. Finally, the small brick building between 3-5 Tonks Avenue does not seem to be identified at all, and the decision has been made to sell the outbuildings of 289/291 Cuba Street. We note however, that the designation decision was given under the RMA, so the question of outbuildings as part of an archaeological site did not arise.

[467] Mr Bowman identifies that drawings and specifications for the buildings to be relocated are in draft form. Changes are possible and (probable) based on new knowledge having acquired in the course of the work.

[468] In considering the question as to the least possible loss or alteration to the cultural heritage values of the buildings to be demolished or removed, we paid heed to the following Transit submission⁴⁸:

CBC and THT allege in their appeals that the HPT’s decisions “did not consider adequately alternatives to relocation for the heritage buildings the subject of the applications.” In its reply to appeals, the HPT denies this allegation. The Statement of Facts and Issues records that the appellants have now qualified this allegation as follows:

⁴⁸ Transit Opening Submissions, page 26.

It will not be relevant for the Court to consider alternative sites, routes or methods for achieving Transit’s purpose, except to the extent that those alternatives are authorised by the “State Highway (Inner City Bypass - Stage 2)” designation (as included in the Wellington District Plan), and existing resource consents. (para 26.3)

As the HPT, and this Court on appeal, is limited to confirming the authorities, declining them, or modifying them (eg through the imposition or alteration of conditions), any alternatives must be considered in light of Transit’s applications. Thus, alternatives which cannot be encompassed within the designation and resource consents, including all the conditions on the designation and resource consents, are outside the scope of those appeals. There has been no evidence exchanged on such alternatives, and they would not be within the ambit of Transits authority applications. (our emphasis)

[469] Thus, whilst we looked very carefully at retaining some of the Tonks Avenue houses *in situ* and identifying others in Willis and Vivian Streets for relocation onto Transit land outside the designation area, we are bound by the conditions on the designation which:

- [a] require the Tonks Avenue houses to be relocated [condition 17]; and
- [3] require [subject to conditions 17-18, 20 and 23A] [condition 21], *at the option of Transit, all other buildings within the boundaries of the designation may be demolished or removed. . . .* (our emphasis)

Finding

[470] In terms of the least possible alteration and loss of material of cultural heritage value, the conditions on the bypass designation fundamentally control what may happen to the identified buildings.

[471] The Court endorses the principle of retaining an archaeological building *in situ* if it is not on the carriageway. We do accept, nonetheless, that the buildings need attention urgently, and Transit’s plans for them best recognise the need for mitigating the loss of value.

[472] We suggest the issue of moving the outbuildings with their respective buildings be revisited.

- **Safeguard the options of present and future generations: s.4(2)(b)(iii)**

[473] CBC has submitted that careful thought and justification is required if pre 1900 sites are disturbed and material taken from the ground, as the resource will be no longer intact for future generations (s.4(2)(b)(iii)). CBC considers that if the dinner plates and cutlery of residents of Tonks Avenue are dug out of an existing vacant site, the present and future generations should not be denied the ability to view it in authentic context on the kitchen table next door.

[474] Ms O’Keeffe considers that the options for future generations are safeguarded in the methodology endorsed by the authorities. If the construction work does not require the exposure of an archaeological feature, it will not be investigated. The archaeological resource will remain intact for possible investigation by future generations with improved techniques.

[475] Mr Petchey considers that the conditions of the authorities are the best and most thorough he has ever seen and show a good understanding not only of the archaeological issues, but also of the practical problems that can occur during urban excavations.

[476] The HPT authorisations detail archaeological investigations and research strategies which require identification, recording, measurement, investigation, etc of archaeological features, structures and remains which will reinforce and expand on Transit’s initial records.

[477] We consider that the conditions set by the HPT will safeguard the options of present and future generations (as do those on the designation). The in-ground archaeology will be well analysed and documented, and perhaps not even disturbed by the excavation. Some of the archaeological/heritage houses are in a very poor state of disrepair and urgent maintenance and recording is needed before the resource is lost. Mr Bowman’s inventories and requirement for the replacement of heritage fabric will ensure that the important structures will remain for future generations.

[478] As the HPT submit on this final principle:

The natural inclination is to say that one can only preserve the options of future generations by leaving material alone. However, another perspective is to say that if nothing is done today then more will be lost tomorrow. This certainly rings true for the buildings, and in relation to the in-ground

archaeology [a] piecemeal approach that will most likely result will not provide the depth of knowledge and understanding that granting these authorities will achieve.

Finding

[479] We conclude that what is proposed under the authorities is the best outcome for archaeology in the City in the particular circumstances of this case. The work to occur under the authorities will safeguard the options of present and future generations as far as they are able.

- **The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga**

[480] All three authorities require that:

- a) *Any archaeological work shall be undertaken in conformity with the Cultural Heritage Protocol and Procedures agreed to by Tangata Whenua and the authority holder,*
- b) *The discovery of taonga and recognised Maori cultural material requires notification to the Ministry for Culture and Heritage or local public museum (pursuant to the requirements of the Antiquities Act 1975), and*
- c) *If any koiwi tangata (human remains) are encountered, no further modification of the site concerned shall occur until Tangata Whenua and the Trust have been advised and their responses received. Any further work will be subject to the results of such consultation.*

[481] As noted, the archaeologists disagreed on whether sufficient information was provided to the HPT to allow the organisation to make its statutory decisions on the authorisations⁴⁹. This seemed (*inter alia*) to be more pressing around the issue of identification of possible Maori sites.

⁴⁹ Exhibit 15 *Archaeological Discussion to Assist the Court*, H D Bader, S Forbes, Dr R McGovern-Wilson, M O'Keeffe.

[482] Dr Bader, for example, refers to two streams which he identified in the Central Section which he considers could be possible Maori sites. He states that the streams were not identified in Transit's application to the HPT.

[483] Dr Barber states in cross-examination that Transit should have been instructed that it is not appropriate for the Trust to grant an authority, either under s. 11 or s.12 HPA, for Maori archaeological heritage. He considers that the extent of the Maori archaeology cannot be reasonably or realistically identified and assessed on existing knowledge. He does not believe that it is appropriate for HPT to give away to Transit the right to respond if unknown and potentially highly significant Maori heritage is found.

[484] Dr Barber further considers that to proceed on the basis of select oral historical tradition and use that as a basis for an authority decision over unknown Maori heritage is not appropriate. He notes that the evidence for the application is based on tradition, and the history of Maori occupation at Wellington is extremely complex and vexed.

[485] Dr Barber suggests instead that the digging should go ahead without an authority, so if material is found, work must cease immediately. He considers that if the Court confirms the authorities, it has given Transit the ultimate power to destroy and modify the Maori heritage found.

Evaluation

[486] Section 11(2)(c) HPA requires that the applicant for any authorisations make an assessment of any archaeological, Maori, or other relevant values and the effect of the proposal on these values. Section 11(2)(d) requires the applicant acquire a statement as to whether consultation with the tangata whenua has taken place, and if so the details of the consultation. Section 12(3), which refers to general as opposed to specific applications, specifies that ss.11(2), 11(3) and 14 of the HPA shall apply with the necessary modifications to an application for a general authority made under s.12(1). Under s.14(3), when the applicant applies for s.12 authorities, the Trust shall refer that application to the Maori Heritage Council to make such recommendations as the Council may consider appropriate, following such consultation as it considers appropriate.

[487] It is Ms Forbes' evidence that six pre-European Maori heritage sites are known in and around the study area. All were occupied by Te Ati Awa hapu in 1839 but many were

named and/or occupied earlier than the Te Ati Awa settlement. The sites, all waahi tapu, are well known and recorded by Maori. Ms Forbes acknowledges this in her 1995 report to Works Consultancy:

The sites Hauwai, Kaipapa and Huriwhenua are not thought to be within the study area but records of their boundaries are sufficiently vague that their close proximity to the study area must be considered in action plans for roading or development. (Refer to Maps 1 and 2). The sites are also associated with sites in the study area (Te Aro pa, Puke ahu and WaiTangi), making it inappropriate to disconnect them in terms of their archaeological and traditional significance.⁵⁰

Ms O’Keeffe echoes this evidence in her archaeological assessment for the area identifying the sites from the report of Te Runanganui O Taranaki (1992).

[488] Ms O’Keeffe notes that Wellington had a substantial Maori population in the late 1700s and early 1800s. She deposes that the lack of archaeological sites of Maori origin from the central Wellington area in the database, is probably due to the early development and growth of the city, where sites were modified and destroyed before archaeologists were able to record them. She makes the point that many places are known only in tradition and memory and she considers it is inappropriate for her to enter places on the archaeological record. She points out too that most archaeologists deliberately do not assess the Maori values of a site, considering it more appropriate for iwi to undertake the assessment, and the HPT authority application forms require iwi to do this.

[489] Mr Petchey, who peer reviewed Ms O’Keeffe’s work, considers that the identification and location of prehistoric sites can be very difficult in environments where considerable historic modification has occurred, such as in an urban built up area like Wellington city. He considers that the only realistic approach to archaeological excavation of a large site like this is a general one under a s.12 HPA authority, where conditions are imposed on the project that allow for the identification and appropriate treatment of any archaeological features encountered during the work.

⁵⁰ Agreed Bundle of Documents. Vol 1 *Wellington Urban Motorway Inner City By Pass, Impacts on Archaeological and Heritage Sites*, prepared by Susan Forbes, Kotuku Consultancy, 1 at 21, 27.

[490] The evidence establishes that the recovery of archaeological material, especially pre-European material, is almost impossible in Wellington to ascribe to a particular iwi group given that there are a number of overlapping and competing interests. The recovery of Maori artefacts will not necessarily tell the archaeologists which iwi is associated with it. Nor has it been possible to specifically locate potential Maori sites in advance. But we note Ms O’Keeffe mentioned streams identified by Dr Bader, in her evidence-in-chief, relating them back to the survey plans she had identified around Tonks Avenue.

[491] The HPA provides for the destruction and modification of archaeological sites in appropriate circumstances, and it contemplates that any destruction or modification will be done under controlled circumstances so that the full historic record that is available will be obtained⁵¹. This includes Maori heritage.

[492] Ms Emily Tuhi-Ao Bailey (a member of the tangata whenua) in her affidavit for CBC on standing issues, deposes (*inter alia*) that the final HPT report makes mention that there may be Maori sites in the area and that any such archaeological evidence within Wellington city is extremely rare. She is upset by the lack of consultation with local Maori over the issue, considering that which was undertaken was only with two Maori individuals but resulted in the Cultural Heritage Protocol.

[493] The evidence demonstrates that even as far back as 1992, tangata whenua in the Wellington area were not opposed to the bypass project and suggested research methods, based on oral tradition and history, as the best way to estimate whether Maori archaeology would be unearthed. Tangata whenua records and information on occupation are detailed and comprehensive. Te Aro is an area known to have had a lengthy occupation history prior to colonial settlement and it is an area which requires more research work to be done.

[494] It is Dr McGovern-Wilson’s evidence that consultation with tangata whenua on the bypass route started about 1991. An Independent Review Panel was established at this time, to assist with information and consultation issues including those relating to Maori participation. A report encompassing tangata whenua perspectives on the bypass was then commissioned by Transit NZ on behalf of the panel. This report of Te Runanganui O Taranaki Whanui ki Te Upoko o Te Ika A Maui on the Wellington Urban Motorway Extension 1991 recommended a systematic survey and research programme to identify waahi

⁵¹ *Ngatiwai Trust Board v Historic Places Trust (Pouhere Taonga)* [1996] NZRMA 222, page 223.

tapu in the project area. This survey was carried out and the results reported back by Te Runanganui O Taranaki Whanui ki in 1992.

[495] That report found that none of the main pa or gardens could be precisely located within the project area. It was possible, however, that Maori material could be uncovered. A process to be followed if this was the case was outlined in the 1992 report. It requires that the tangata whenua be consulted and kept informed as the project planning continued.

[496] Te Runanganui and the Wellington Tenth Trust were then consulted about Transit's Notice of Requirement in 1995. As a result, condition 25 of the designation of the bypass in fact provides the process Transit is to undertake when artefacts are found. Work is to cease until the site is inspected by the tangata whenua and the artefacts are recovered.

[497] We note the application for authorisations by the HPT were made by Transit under s.14(2) HPA so s.14(3) applies. Section 14(3) states as follows:

Where an application made under subsection (2) of this section relates to a site or sites that the Trust considers to be a site of Maori interest, the Trust shall refer that application to the Maori Heritage Council to make such recommendations as the Council may consider appropriate, following such consultation as the Council considers appropriate.

[498] Section 14(3) is a specific as opposed to a general requirement. It is the HPT which considers whether or not a site is/may be of Maori interest and it is then required to refer the matter to the Maori Heritage Council established under Part 4 HPA. This Council has specific powers under s.85(e) HPA to make recommendations to the HPT on applications referred to it under s. 14(3) which relate to archaeological sites of Maori interest. That process is not part of what is relevant to the Court under s.20(6). Nevertheless, we record that HPT duly referred the authority applications to the Maori Heritage Council in this case and it reported⁵². We accept Transit's secondary submission that the HPT powers of investigation etc under the HPA, are more in keeping with its role in determining authority applications, unlike consent authorities under the RMA. The former role is primarily more technical/investigative rather than judicial. Who the Maori Heritage Council consulted,

⁵² Exhibit C to the affidavit of Alan Whiting for CBC dated 8 June 2002.

which is what CBC seems concerned about, is not an authorisation matter for the Court to consider.

[499] Mr Te One, Managing Trustee of the Wellington Tenth Trust (“the Trust”), gave evidence on behalf of Transit for the iwi having manawhenua for the Wellington region. With significant land holdings in the vicinity of the bypass project, the Tenth Trust is a neighbour and landowner affected by the work. Mr Te One outlined the Trust’s previous consultations with Transit (including with Ms O’Keeffe and Opus Consultants) that the Trust had undertaken them on the basis of:

... being well aware that sites or articles of cultural significance could well be uncovered in the course of excavation. It was for that reason we sought to develop a robust set of protocols to protect the integrity of any discoveries and the cultural safety of those working on the ICB project.

[500] The Trust in turn undertook the consultation it considered appropriate, and in December 2001 Mr Te One identified that the Trust and Transit had jointly prepared the protocol which is to control the Maori heritage which might be uncovered⁵³. At the request of the HPT, additional consultation was undertaken with Ray Ahipene Mercer from Wellington for Ngati Ira/Ngai Tara. As a result of this consultation, a Cultural and Heritage Protocol was drawn up between the two Maori parties and Transit. Mr Ahipene-Mercer signed the protocol on behalf of Ngati Ira and Ngati Tara.

[501] Ms Barton’s evidence shows that no Maori opposition was lodged when the applications for authorisations were publicly notified, so Transit was not wrong to assume the tangata whenua they were consulting represent a considerable number of the people in the region. Indeed, Dr McGovern-Wilson considers that Ms Barton’s report from the project in the late 1990’s, in conjunction with the Cultural Heritage Protocol and public submission exercise undertaken at that time, met and possibly exceeded the requirement under s.11 for consultation with affected parties.

[502] One of the individuals Ms Tuhi-Ao Bailey refers to in her affidavit on standing issues is Mr Te One, who represents over 30,000 people (conservatively) as members of the Tenth Trust. Mr Te One’s evidence sets out the responsibilities of all involved in the bypass

⁵³ Wellington Inner City Bypass Cultural Heritage Protocol and Procedures December 2001.

project and the agreed procedures should any archaeological evidence or signs of previous Maori occupation. They include observance of Tikanga Maori at various stages of the project, iwi access to the construction site, and likely time delays should any Maori evidence be found.

[503] The concern expressed by the appellants that Transit's assessment given to the HPT in regard to potential Maori issues is not sufficient, is therefore unsubstantiated according to the evidence. Extensive consultation with representatives of Wellington's tangata whenua ensured Transit that its process was thorough. The conditions suggested by Ms O'Keeffe on behalf of Transit and the conditions subsequently imposed by the HPT we consider represent an appropriate recognition of the relationship of Maori and their culture and traditions in the area of the bypass in this particular case⁵⁴.

Finding

[504] We find the way in which the authorisations identify Maori heritage values are entirely appropriate and meet the requirements of the HPA.

The Existing or Reasonable Future Use of the Site for a Lawful Purpose: s.20(6)(c) HPA

[505] A number of witnesses for the appellants sought to revisit the Environment Court's decision in *Estate of P A Moran* and through the provisions of the HPA attempt to overturn what was decided under the RMA where the protection of the heritage buildings themselves through relocation and urban landscape issues were part of the decision.

[506] These appeals have a more specific focus. What was decided under the RMA had a much wider result than what we are asked to address here, namely to address the provisions of s.20(6) HPA.

[507] The Court in *Estate of P A Moran* extensively discussed the heritage issues associated with the area having, heard comprehensive evidence from such notable witnesses as the late Professor David Hamer (historic and heritage), Mr Kernohan (architecture) and

⁵⁴ As also concluded by the Court in *Taipari v Pouhere Taonga (New Zealand Historic Places Act)* A102/97, page 8.

Mr S Nevin (urban design). Mr Bowman and Mr Kellaway also gave somewhat similar evidence to that which has been given in this case, although Mr Bowman has addressed heritage issues and inventories more exhaustively here.

[508] In its decision on *Estate of P A Moran*, the Court records that the HPT did not oppose the proposed re-siting options at that time, and considered that the location proposals were consistent with the principles of the ICOMOS Charter. And in approving the designation, the Court held:

*It is an irony that because the designation existed in the previous plans, most of the heritage buildings now at risk are still existing because they are on the designated route. Many of their immediately adjoining neighbours not owned by Transit or its predecessors have disappeared, either to be replaced by utilitarian structures or none at all. The result is a distressed urban landscape with little coherence, historical or otherwise. It is all the more reason to try and conserve and preserve what is left. We looked carefully at how the problem of the buildings relocation could be overcome and could find no alternatives; for our findings on the lack of options to the bypass leave us none.*⁵⁵

[509] Transit submits s.20(6)(c) counter-balances s.20(6)(a). No justification for protection is required - the use must be either *an existing or reasonable future use* of the site for *any lawful purpose*. The Court not required to enquire whether the use is needed or justified - submissions we accept.

[510] As Transit submit:

- declining the authorities would impact to the greatest extent, in that it would deny opportunity to undertake the bypass;
- confirming the authorities on their existing conditions would have some impact on the manner in which Transit could proceed with the bypass, but would still allow Transit to proceed with the project in accordance with the designation and resource consents;

⁵⁵ Page 251, para 1197.

- modifying the authorities (eg replacing or adding conditions) could materially impact on Transit's intended use: s.20(6)(c) provides that this impact should be considered before such modifications are made.

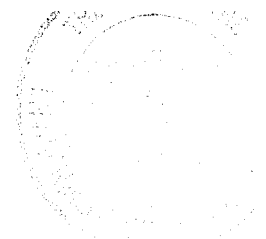
[511] The WCC too considers that it is of fundamental importance in this case that lawful use is more than just the road carriageway. The use incorporate the plans and schedules attached to the bypass decision. Lawful use can only be implemented if the designation conditions are fully complied with, namely the prescriptive conditions of the designation prescribing certain outcomes and which are subject to final approval by the council. Such issues are landscape, urban design and heritage. Condition 17, for example, provides that the following buildings must be relocated to specific locations on the bypass route, namely:

289-291 Cuba Street;
272 Cuba Street;
1, 3, 5 and 13 Tonks Avenue;
278, 282, 284, 286 and 319 Willis Street; and
215 Vivian Street.

[512] The WCC considers that requiring any one of these buildings to remain *in situ* or leaving say 270 Cuba Street in the location planned for 289-291 Cuba Street and 1, 3, 5 Tonks Avenue, would do more than restrict the lawful use of the site. It will stop it. And it will have significant consequences for the overall design integrity of the bypass project.

[513] It is submitted if the Court was to amend the proposal in any significant way, it would risk disregarding its own extensive and comprehensive findings when it was specifically charged to look at the bypass in its broader context.

[514] As far as Transit is concerned, even if we had jurisdiction to either confirm the authorities or modify the conditions, the only conditions we would consider modifying are those relating to several of the Tonks Avenue buildings. Otherwise, declining the authorities would deny the opportunity to undertake the bypass and modifying the conditions to any material extent would (let alone could) materially impact on Transit's intended use. In this we have paid particular attention to the relocation of buildings in Cuba Street and Able Smith/Willis Street and Oak Avenue.



[515] The WCC also poses the question as to what are the alternative lawful [permitted] uses for the land involved if the authorisations are not approved. It suggests that implicit in the comparison is that if other lawful uses could be contemplated for the sites that have worse effects. The proposed use with less effects should therefore be considered favourably in the s.20(6) assessment. Such lawful uses in this instance include:

- leaving the sites as they are;
- refurbishing the pre 1900 buildings not listed in the district plan;
- demolishing the pre 1900 buildings not listed in the district plan (it is permitted to demolish buildings that are not listed, although in the Central Area a resource consent is required to create open spaces)
- major earthworks on a certificate of title, site by site basis.

[516] Transit, the HPT and the council all consider that the effects on the archaeological sites, if any of the above occur and the authorities are declined, will have major adverse repercussions. Certainly we conclude that three of these alternatives will have major adverse effects. As far as refurbishing the pre 1900 buildings is concerned, who is to achieve this if the money cannot be found for the heritage buildings? The pre 1900 buildings would probably be demolished. Thus we agree if the sites are sold and developed on an ad hoc basis, the effects on the archaeological sites would be greater.

Finding

[517] Confirming the authorities provides for reasonable future use of the site.

The Interests of Any Person ‘Directly Affected’ by the Decision of the Trust: s.20(6)(d) HPA

[518] Under s.20(6)(d) HPA we are required to have regard to those whose interests are “directly affected”. We consider this status applies to three entities only. We do not consider that CBC or THT or the people they represent are persons directly affected.

Transit

[519] Transit is “*directly affected*” because the decision by the HPT enables Transit “*to destroy, damage or modify archaeological sites in its construction of the bypass*”. Transit’s

interests in pursuing this project are in accordance with its statutory functions under the Transit New Zealand Act 1989, and as owner of the land along and adjacent to the route of the bypass. As Transit submit, confirming the authorities granted by the HPT will enable Transit to progress the bypass project, subject to the conditions of these authorities (and of the designation and resource consents). Not confirming the authorities could therefore prejudice Transit's interests. This can be ascertained when regard is paid to s. 20(6)(c), which we have considered, and which requires the Court to have regard to the "*extent to which protection of the site prevents or restricts the existing or reasonable future use of the site for any lawful purpose*".

Wellington City Council

[520] The Wellington City Council is "directly affected" by the decision of the HPT in that it has a proprietary interest as a land owner of some sites encompassed by the authorities granted. Securing the council's consent was also a pre-requisite for Transit being able to apply for the authorities (s. 11(2)(e) HPA).

[521] The council's interests in having the authorities confirmed are outlined in the evidence of Ms Black, who identifies the urban design, heritage and landscape issues for the City in these appeals. These issues are important to the City as it is depending on their advancement for the wider advantages the bypass will bring - such as urban renewal - particularly for southern Te Aro.

[522] THT's witnesses expressed serious reservations about the proposed urban renewal of the area which the council anticipates will result from the approval of the authorisations. But short of restoration of all the buildings on site (which is not possible under s.20(6)(d) HPA), the buildings on the relocated sites can at least contribute to that renewal while at the same time being protected against even more severe deterioration (and even destruction) which, in our opinion, is a very much better outcome for the heritage and cultural values of the area.

Tangata Whenua

[523] The tangata whenua may be "*directly affected*". The bypass route runs through an area of known Maori occupation as well as an older part of the European settlement of Wellington. At the time of European arrival, there were several substantial Maori settlements in the area now covered by Wellington City as well as numerous cultivation grounds, pa etc.

Te Runanganui O Taranaki Whanui ki Te Upoko o Te Ika identified several sites in the vicinity of the proposed road. The precise location and extent of these sites, however, is no longer known. The sites are: *Te Akatarewa Pa* (located somewhere behind Wellington High School); *Waitangi Lagoon* (around intersection Courtenay Place and Cambridge Terrace); *the Hauwai cultivations* (near swamp that is now Basin Reserve); and *Puke Ahu* (pa or defended site on Mt Cook ridge now the location of the former National Museum building).

[524] In order to achieve the purpose of the Act, s.4(2)(c) HPA requires that the HPT recognise the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga⁵⁶.

[525] As to Dr Barber's concerns, we note that the Maori Protocol for the bypass excavations and the conditions on both the designation and the authorisations have much the same effect as he proposes, although because of the nature of the work, the tangata whenua representatives already understand any significant sites discovered may be re-covered eventually.

Finding

- Transit will not be able to carry out the work for which it is legally responsible unless the authorisations are approved;
- the WCC will be unable to proceed with its urban renewal programme and carry out that work lawfully;
- there is some possibility that Maori heritage will be recovered which will be significant for the tangata whenua of Wellington: such opportunities appear to be very rare.

⁵⁶ Consideration of Maori values is an important part of recognising the principles of the Act, but is not a principle in itself: "Functionaries are directed by section 4(2) to recognise the relationships described in para (c), and that is an important duty. However, Parliament has specifically identified the contents of paras (a) and (b) as principles, and in the same subsection has avoided describing the content of para (c) as a principle...While accepting the duty imposed by section 4(2)(c), we hold that the contents of that paragraph are not a principle of the Act." *Ngatiwai Trust Board v Historic Places Trust (Pouhere Taonga) (No 1)* [1996] NZRMA 222, page 233.

Any Other Matters: S.20(6)

- ***International Instruments***

Introduction

[526] CBC and THT consider that the HPT’s decisions fail to accord sufficient weight to international obligations in relation to historical and cultural heritage. We are asked to consider:

The weight to be given (if any) to the ICOMOS New Zealand Charter for the Conservation of Places of Cultural Heritage Value⁵⁷ and UNESCO recommendations on historic and cultural heritage, when considering whether it is appropriate to confirm the authorities.⁵⁸

[527] CBC submits that the Court should consider the ICOMOS⁵⁹ Charter and UNESCO⁶⁰ under section 20(6), “any matter it considers appropriate”.

[528] THT considers that the authorities determining this case are not free to put to one side the various heritage charters and declarations, as they are part of a comprehensive international approach to the conservation and protection of places of cultural and heritage value.

ICOMOS Charter

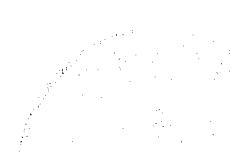
[529] ICOMOS is an international non-governmental organisation of heritage professionals dedicated to the conservation of the world’s historic monuments and sites. The organisation was formed in 1965, and the New Zealand National Committee was established in 1989. The ICOMOS New Zealand Charter for the Conservation of Places of Cultural Heritage Value is widely used in the New Zealand cultural heritage sector. Mr Bowman is a founding member of ICOMOS New Zealand Charter.

⁵⁷ Agreed Bundle of Documents, Volume 1, pages 2-10.

⁵⁸ Exhibit 13.

⁵⁹ “International Council on Monuments and Sites”.

⁶⁰ “United Nations Educational, Scientific and Cultural Organisation”.



[530] The HPT is not part of ICOMOS New Zealand. But central government ministries and departments, local authorities, iwi groups, and heritage practitioners all use it as a set of guiding principles.

[531] THT submits that the Charter emphasises preservation and conservation, not relocation. It identifies that the ICOMOS Charter refers to relocation of a “site” or “structure” in the singular, and does not envisage relocation on the massive scale proposed by Transit.

[532] THT further considers that the HPT has granted the authorities contrary to Principle 6 of the Charter, which states:

6. *Setting*

The historical setting of a place should be conserved with the place itself.

If the historical setting no longer exists, construction of a setting based on physical and documentary evidence should be the aim. ...

All the emphasis, says THT, is on preservation and conservation.

UNESCO

[533] Dr Barber states that the re-assembly and rescue excavation archaeology, which has been permitted by the HPT, is well short of the integrated, expert administrative and management standards recommended by UNESCO. He outlines three international documents supporting the retention of historic areas *in situ*: the UNESCO Recommendation⁶¹, the Burra Charter, and the Riga Charter⁶².

[534] Dr Barber states that in his view, insufficient planning weight has been given by the HPT to the UNESCO priority for “preservation *in situ*”, thereby preserving “historical associations and continuity”. He considers that what is required in this case is a comprehensive comparative assessment process involving local and national agencies, consideration of project variations, and a presumption against heritage destruction and the destruction of a heritage setting, as recommended by UNESCO and its international affiliates.

⁶¹ In Paris 1968, UNESCO adopted a formal Recommendation termed “Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works”.

⁶² The Charter was a result of an international forum held in Riga, Latvia, in 2000: “Authenticity and Historical Reconstruction in relationship to Cultural Heritage”.

[535] Salvage operations are to be acknowledged only where overriding economic and social conditions exist. And road building, in particular, is seen as a particular danger to sites or to historically important structures or groups of structures. Ms Forbes observes the bypass project seems to be directing the outcome rather than having a strategy inform the decisions about development. If it had been the other way round, it probably would not have resulted in excavation or investigation in areas of high value, such as Tonks Avenue and Cuba Street. And any salvage or rescue operation should require careful study of the cultural property involved and the preparation of detailed records in advance.

Legal Status

[536] CBC considers that as far as its wording allows, the HPA should be read in a way that is consistent with New Zealand's international obligations. This presumption should apply whether or not the legislation is enacted for the purpose of implementing the relevant text⁶³.

[537] THT considers that the HPT does not have an unfettered discretion to ignore relevant international instruments, such as the Charters and the Recommendation of UNESCO. It submits that the law should be interpreted and applied consistently with international instruments unless the law specifically precludes otherwise.

[538] THT refers to *Kumar v Minister of Immigration*⁶⁴, which contemplates the question of what constitutes a sufficient compliance with relevant obligations. In that case the High Court held that:

It must be shown in respect of mandatory considerations such as those imposed by the relevant international instruments, that genuine and not merely token or superficial regard has been given.

[539] THT also identifies *Tavita v Minister of Immigration*⁶⁵ where it was held that a New Zealand Court invites criticism if it accepts that the executive is free to ignore international human rights, norms or obligations if the domestic statute does not explicitly mention them. As stated in the preamble to the Charter, for example, it is intended as a frame

⁶³ *New Zealand Air Line Pilots' Association v Attorney-General* [1997] 3 NZLR 269. M 184/99 HC Randerson J Unreported 8.

⁶⁵ *Tavita v Minister of Immigration* [1994] 2 NZLR 257, at 266.

of reference for all those who are involved in the different aspects of conservation of places of cultural heritage in New Zealand.

Evaluation

The ICOMOS Charter

[540] Our evaluation of the legal status of these documents is that neither the ICOMOS Charter nor the UNESCO Recommendation has been incorporated into domestic law in any form that makes them obligatory. Ms O’Keeffe states in her evidence that the Charter has not been “signed” by any government department. It has the status of guiding principles only rather than binding obligations and no government agencies must abide by it. Dr Barber agrees with her. Dr McGovern-Wilson confirms that the Charter is persuasive on the HPT but not binding. The HPT may *consider* the principles as part of making its decision to grant an authority to damage, destroy, or modify an archaeological site. But neither ICOMOS, nor UNESCO he states, confer international obligations upon the organisation.

[541] This Court has also held previously that the ICOMOS Charter has no binding influence on matters to be determined under the RMA⁶⁶. Like the UNESCO Recommendation it is a “guide”, and not a document that will implement rights into domestic legislation.

[542] We accept too it is not acceptable to elevate the principles from ICOMOS New Zealand and a number of overseas charters over and above the legislative framework of the HPA. The overriding considerations must be those set out in s.4, and s.20(6). Persons exercising functions under the Act *shall recognise* s.4 matters to achieve its purpose. And under s.20(6) the Court *shall have regard to* those issues listed, which includes “*other matters*” - such as we are evaluating here. The New Shorter Oxford Dictionary defines “*recognise*” to include:

Acknowledge the existence, legality or validity of, esp. by formal approval or sanction,. accord notice or attention to; treat as worthy of consideration . . .

⁶⁶ *Estate of P A Moran v Transit New Zealand* W055/99, para 1082.

[543] And the Courts have determined that “*shall have particular regard to*” as a duty to be an enquiry in relation to s.7 RMA: *Quarantine Waste (NZ) Ltd and Waste Resources v Manukau City Council* [1994] 12 NZRMA 529. The phrase in s.20(6) omits the word “*particular*” but nevertheless requires genuine thought and attention on behalf of the decision maker before accepting or weighing the issues in s.20(6)(a) - (d). But such phrases are not, as Transit submits, requirements or standards that decision-makers are obliged to fully meet.

[544] The ICOMOS Charter is helpful by recommending the proper care of heritage buildings. Likewise, the UNESCO Recommendation indicates to consent authorities the global attitude to heritage conservation, which is an important aspect when determining heritage value. But neither document dictates the decision making process in this context where the HPA controls the principles and the purpose of the work.

- *Relocation*

[545] THT in referring to General Principle 6 of the Charter did not give the full text:

6. *Setting*

The historical setting of a place should be conserved with the place itself. If the historical setting no longer exists, construction of a setting based on physical and documentary evidence should be the aim. The extent of the appropriate setting may be affected by constraints other than heritage value.

The last line and a half was omitted by counsel and therefore reference to the first three lines only was misleading. In this case the extent of the appropriate setting for the buildings is constrained by the bypass route which displaces many of them. Ms O’Keeffe identifies that the Charter includes a reasonably long narrative of degrees of intervention, as does the HPA, so both documents recognise that whilst it is ideal to primarily safeguard the values, in realistic terms this cannot always be achieved. Both documents therefore provide methods by which relocation damage or destruction can be appropriately managed.

[546] Of the heritage buildings affected by the bypass, 12 are listed for relocation in Schedule 2 of the designation. The exceptions are 30 Arthur Street, which is to be demolished, and 274 Cuba Street, which is proposed to be reconstructed using as much original fabric from the existing building as practicable.

[547] The HPT identify that in fact it took into account the Charter Principles, specifically Principle 8, which permits relocation if the assessment shows that relocation is the only means of saving the structure:

8. *Relocation*

The site of an historic structure is usually an integral part of its cultural heritage value. Relocation, however, can be a legitimate part of the conservation process where assessment shows that:

- (i) the site is not of associated value (an exceptional circumstance); or*
- (ii) relocation is the only means of saving the structure; or*
- (iii) relocation provides continuity of cultural heritage value.*

A new site should provide a setting compatible with cultural heritage value.

[548] It is Mr Bowman's evidence that the HPT's policy for relocation is largely word for word of Principle 8. He considers that the buildings will be relocated, repaired, restored and reconstructed consistent with international standards, including this ICOMOS Principle. As a result the proposed relocations, in his opinion, follow accepted good international conservation practice. *These include maintaining close proximity to the original locations, re-establishing the original relationship with the street where possible, maintaining the original orientation where possible and maintaining together significant groupings of buildings.* This was the Court's view in *Estate of P A Moran* also.

[549] It is Mr Cockburn's evidence for THT however, that the proposed Tonks Avenue re-creation fails to comply with three out of four of these aspects. And there is clearly a difference of opinion between the experts about whether the site is a significant one in the context of its historical and cultural values.

[550] We have signalled that we consider the relocation of some of the Tonks Avenue houses may be able to be re-considered, because there may be a window of opportunity on access matters and the invasive nature of the work.

[551] Meanwhile, we note Mr Kelly acknowledges that relocation is a viable option in conservation terms (albeit the least viable) short of demolition. An appraisal only needs to be made of 274 Cuba Street to recognise that relocation is the only way some conservation will be provided.

[552] Dr McGovern-Wilson states that it is the HPT's opinion that if it is not for the relocation and restoration of the buildings, they will not be saved and soon there will be no heritage value worth protecting. We accept that if that occurs, the heritage values of Wellington will be seriously impaired.

[553] Therefore, the authorisations overall comply with Principle 8. The modification we would make to the Central Section authorisation, if we had jurisdiction, would relate to retaining as much of Tonks Avenue as possible *in situ*.

[554] Principle 9 of the Charter states that "*archaeological or structural investigation can be justified... where knowledge may be significantly extended.*" In this case we accept that the archaeological investigation is justified by the obtaining of information which will help to significantly extend the knowledge of the general public, academics, archivists and importantly - if there are Maori cultural finds - the tangata whenua.

Finding

[555] Of the three Charter Principles cited to us, we find the authorisations (and Transit's proposals) largely accommodate all of them.

The UNESCO Recommendation

[556] In the UNESCO Recommendation identified by Dr Barber (Exhibit 13), we note three relevant paragraphs under Part III:

Preservation and salvage measures

13. *The preservation or salvage of cultural property endangered by public or private works should be ensured through the means mentioned below, the precise measures to be determined by the legislation and organizational system of the State:*

- (a) *Legislation;*
- (b) *Finance;*
- (c) *Administrative measures;*
- (d) *Procedures to preserve and to salvage cultural property;*
- (e) *Penalties;*
- (f) *Repairs;*
- (g) *Awards;*
- (h) *Advice;*
- (i) *Educational programmes.*

Administrative measures

20. *Responsibility for the preservation or salvage of cultural property endangered by public or private works should be entrusted to appropriate official bodies. Whenever official bodies or services already exist for the protection of cultural property, these bodies or services should be given responsibility for the preservation of cultural property against the dangers caused by public or private works. ...*

21. *At the preliminary survey stage of any project involving construction in a locality recognized as being of cultural interest or likely to contain objects of archaeological or historical importance, several variants of the project should be prepared, at regional or municipal level, before a decision is taken. The choice between these variants should be made on the basis of a comprehensive comparative analysis, in order that the most advantageous solution, both economically and from the point of view of preserving or salvaging cultural property, may be adopted.*

[557] Firstly, we note that ‘rescue’ by salvage is an appropriate preservation method. Ms O’Keeffe makes the point that the CBC witnesses fail to recognise processes for rescue archaeology whereby sites may be partially or totally destroyed so a strategic total recovery of information is undertaken.

[558] Secondly, in terms of Recommendation 20, the HPT has the responsibility for the cultural property concerned. It is putting together a large project team that consists of 27 experienced archaeologists and other specialists who will have a range of responsibilities.

The care of the work is to be undertaken by three teams of 5 skilled archaeologists. Teams of volunteers are expected to augment this care, including senior undergraduate and postgraduate students. Experienced historical archaeologists (a specialisation of general archaeology) from Australia are expressing interest in assisting. In addition, laboratory and survey staff are included in the project team. The management plan also requires Transit to provide on-site facilities for the clearing, processing and storage of artefacts, (the latter often a difficulty as Dr Bader explains).

[559] Therefore there is no foundation for the criticism levelled at the HPT by the appellants that there will be insufficient staff or organisational structure to cope with such a large project.

[560] Secondly, Dr McGovern-Wilson identifies that HPT's Senior Management Team and Control Region staff gave detailed consideration to the applications, the heritage values and the possible outcomes involved in the work. He identifies theirs was a very difficult decision. He points out "*the owners are making little or no effort to provide for the buildings in a manner befitting their heritage status.*" And he records that he had sighted correspondence from Transit that appeared to outline the degree of deferred maintenance that has been allowed to slip by over the years. The HPT obviously sees the buildings' archaeology as under serious threat (i.e. in danger) and in our opinion it is the appropriate body to make that judgement call.

[561] And we are not at all persuaded that HPT did not carefully weigh up every option when it approved the authorisations. It clearly identified the loss that will occur in archaeological terms as against:

- the preservation of the buildings by relocation; and
- a program of directed archaeological research providing new information about life in Wellington in 1840s-1900s,

both of which will go some way to assuage the loss of the extant heritage and cultural values of the site.

[562] As to UNESCO Recommendation 21, the WCC as the municipal authority has been involved at the outset of the bypass project with ongoing thought and care for the preservation of the buildings in an urban setting. Its attempts may be criticised but, in our opinion, with

such few other options available, it is doing its utmost to address all relevant issues - namely conserving or salvaging cultural property.

[563] Meanwhile, most of the measures indicated in paragraph 13(i) of the Recommendation are being implemented including public site visits and dissemination of information - through the conditions on the designation and the conditions on the authorisations.

[564] In discussing investigation and relocation as mitigation methods, Mr Petchey acknowledges that an archaeological site is an irreplaceable resource and mitigation of its loss can never be full and complete. But by a full and informal investigation of the site, information can be recovered and it then becomes a 'value' when disseminated to the public, museums, libraries, etc.

Finding

[565] We find that the appellants have not made out their case that the HPT failed to pay sufficient regard to the issues raised in the international literature, in this case, the UNESCO Recommendation. It has, in effect, addressed all relevant issues - in the context of the provisions of the HPA.

- ***The District Plan Heritage Framework***

[566] This is another matter to which we consider we should pay regard. It is Ms Black's evidence that the council's Built Heritage Policy 1998 embodies its approach to heritage conservation as a process to accommodate change rather than to resist it. Where new development affects heritage values, it should demonstrate the change and the connections with the past:

The success of Council's heritage intentions will be in providing every encouragement possible to the owners of the heritage resource to keep the building's heritage values intact and for commercial buildings to be used economically.

The conservation process involves degrees of intervention from non-intervention through repair to adaption (sic). The appropriate process will

*vary from building to building and from proposal to proposal. It is preferable that buildings are altered appropriately rather than demolished. Buildings in private ownership must be allowed to be put to reasonable economic use if those resources are to be sustained.*⁶⁷

[567] The district plan is the vehicle for providing a context for assessing proposals and demonstrates the council's approach to heritage values.

[568] It was Ms Black's evidence that the district plan contains a comprehensive set of criteria for establishing the heritage significance of buildings and other items of heritage significance. This includes cultural, use and contextual values (including levels of authenticity related to design, setting, materials and workmanship/craftsmanship).

[569] Objectives, policies and rules are prescribed to provide the level of protection and degree of change sought by the heritage policy. They are applied to any development proposal affecting an item of heritage significance listed in the plan. This determines a project's degree of appropriateness from a heritage perspective.

[570] In respect of total or partial demolition, destruction or removal of any listed heritage area, building or listed façades or other listed elements of a building, object, or site, a resource consent for a discretionary activity is required.

[571] Here, although resource consents were not required for the relocation of the buildings, the designation (and the conditions imposed) covered all the matters which would have been considered had resource consents been applied for under the RMA.

[572] Ms Black notes that the relevant assessment criteria for considering whether to grant consent and what conditions to impose in relation to a listed building or façade or significant building reflect the intentions of the council's policy and aim for flexible solutions that retain heritage values and provide for change:

- *The heritage significance of the building, façade or listed element of the building and whether there is any change in circumstance that has resulted in*

⁶⁷ Cited in Wellington City Council Built Heritage Policy 1998.

a reduction of the building, façade or listed element of the building's significance since the building was identified in the Plan

- *Whether the building, façade or listed element of the building can be economically adapted for re-use and the extent of any economic and other effects on the owner and occupier through the retention of heritage features*
- *Whether any alteration to the building, façade or listed element of the building can be made that retains the heritage significance of the building façade or listed element of the building while accommodating the objectives of the applicant*
- *Whether the building, façade or listed element of the buildings poses a risk to life in the event of an earthquake*
- *Whether the building, façade or listed element of the building can be relocated on or off the site and the impact that the relocation would have on the heritage significance of the building, facade or listed element of the building.⁶⁸*

Finding

[573] The district plan anticipates relocation in response to an established need - as in this case.

Matters of Concern to the Court Outside the Scope of the Appeals

[574] Both Transit and the council, through counsel, invited the Court to recommend through statements, comments or otherwise, if there are any matters about which we became concerned during the course of the hearing, but were outside the scope of the appeals - where, for example, the imposition of a condition or modification of an authority one would not be appropriate or possible (for example if the appeals were struck out). They identified they would welcome any such indications.

⁶⁸ "Heritage Rules", Wellington District Plan, Volume One, Chapter 21.3.1.1.

[575] The offer, in final submissions, came at the end of a lengthy hearing which did disclose some alternative solutions to some of the issues raised. It is an offer which is accommodating of those with concerns about the cultural and historical values which they see as being irrevocably modified or destroyed.

[576] We stress anything we record here does not have the official imprimatur of findings, able to be carried through to definitive action of some kind or another. We make our comments and recommendations conservatively, because they will need the agreement of the various authorities and parties involved, based on the advice of the experts.

[577] Ms O’Keeffe states in her evidence that there is a subtle difference between a building as an architectural entity and a building as an archaeological site. She acknowledges that while both are premised on physical fabric, an archaeologist would attempt to provide a context or meaning for the construction.

[578] She notes that the HPT and/or the council have registered a number of historic buildings. As some of these buildings were constructed prior to 1900, they are also archaeological sites under the HPA.

[579] Ms O’Keeffe states that she understood Mr Bowman would be discussing the effects of the project on heritage buildings (including heritage buildings that are archaeological sites) in his evidence. In his evidence, Mr Bowman states that he prepared 16 heritage inventories for “*various heritage buildings and non-heritage buildings that are archaeological sites*”. 270 Cuba Street is the only archaeological site with an inventory that is a not heritage building.

[580] This left somewhat of a “knowledge gap” in regard to the archaeological buildings along the bypass route in the archaeological assessments made to the HPT. They are not in the direct path of the road but adjacent.

[581] Exhibit 15, the record of the archaeological discussion to assist the Court, notes that the archaeologists agree that the assessment process should consider the values of an archaeological site for its own sake. Further, the assessment should consider (based on what is proposed for the site) what the value of the information recovered is, balanced by the loss of a non-renewable resource.

[582] Eight buildings along the bypass route are identified as archaeological sites but not heritage buildings. No inventories were undertaken on these buildings (with the exception of 270 Cuba Street) yet four are to be demolished/sold for removal, and three recorded as having potential use in Character area or as salvage materials.

[583] The draft estimate for s.17 work (as attached to Ms O’Keeffe’s supplementary evidence) identifies that the interior and exterior of:

- 1 Oak Avenue;
- 6 Tonks Avenue;
- 270 Cuba Street; and
- 8, 32 and 40 Arthur Street,

will be recorded, measured and photographed prior to removal from their sites.

[584] Archaeological research of the resource is a requirement of the HPT. Nevertheless, if Transit had made assessments of each identified archaeological building before decisions were made as to which were to be demolished or removed, then some of the issues raised by the appellants might have been avoided. The buildings identified to be sold for removal might have been identified to stay where they are, or relocated in the area where the cultural and historical values exist.

[585] Ms O’Keeffe explained to the Court in cross-examination that her evaluation of 8 Arthur Street’s value (and other archaeological buildings) was made by externally viewing the house. From this she gleaned the house’s age, architectural style, construction, fabric, and detailing. We believe this information should have been given to the HPT in Transit’s applications. She notes that her evaluations of archaeological buildings were done on archaeological grounds, not architectural or historical grounds.

[586] The issue we recognise here is that the HPA has a lower threshold for historic value than the assessment for heritage value. What is missing, we believe, is an assessment of the archaeological buildings in the wider *cultural landscape*, which exists around the bypass route.

[587] Ms O’Keeffe identifies, in her archaeological assessment of each section, that there maybe some older buildings within the study area (especially along Arthur Street) whose

construction dates are not known and that may pre-date 1900, and therefore are archaeological sites. Given time and cost limitations however, for the assessments it was not considered feasible to check CTs for all buildings to establish construction dates⁶⁹. She goes on to say that the assessment does not double as a social history of the area, and only as much information as is needed for accuracy and context is required.

[588] But until the houses are documented and recorded, the true extent of their cultural and historical value is not known. That value needs to be ascertained in order to assess the value of the information recovered, against the loss of the non-renewable resource, and before the decision is made to destroy the site.

[589] Mr Bowman's inventories are part of the recorded information for the authorities but because the omissions related to non-heritage buildings they are not identified specifically. As an architectural conservator his function is to identify the district history of the authorities which he had undertaken with the historian. In this case Transit's historian did not give evidence at the hearing on why the omissions occurred. There are therefore no inventories for 219 Vivian Street, 272, 323, 276, 270A Willis Street, and 8, 6, 32 and 40 Arthur Street.

[590] We turn now to some site specific buildings which are in the path of the bypass which we consider may be able to be relocated in the area. They were the subject of the further historical information provided by Mr Kelly.

Willis Street Houses

272 Willis Street

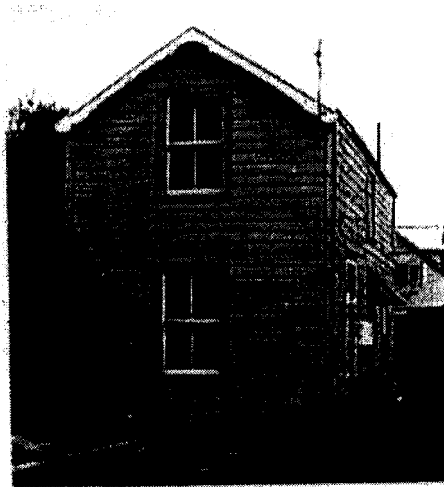
[591] This building is an archaeological site in that it was constructed prior to 1900. It is understood that Joseph Andrews, a manufacturer of house blinds, built this house in 1879 and had his factory opposite. Mr Kelly notes that confusion over house numbers makes identification of 272 Willis Street's history difficult.

[592] Mr Kelly identifies the external form of the house appears to have had comparatively little altered. It is, in every way, a typical if modest Victorian dwelling. It has representative

⁶⁹ Wellington Inner City By-pass Archaeological Assessment, by M O'Keeffe, report to Opus International Consultants. December 2001. Agreed Bundle, Volume 2, page 741.

value as a working class Victorian dwelling and Mr Kelly considers it a rare surviving inner city house from the 1870s.

[593] This house could possibly be moved into the Character Area (if it needs to be moved at all). It would be preferable, if there was space available, to keep it in its original area. We note it is not unlike the Petit Lyon restaurant building [1880] close by. Currently, it is opposite the Hardieboys Distillery which, regrettably, has to be demolished.



272 Willis Street

323 Willis Street

[594] This is an archaeological site as it is circa 1894. It requires historical and conservation research.

[595] From the reference plan 4 of Mr Coulam's evidence it seems that this site is not in the direct line of the bypass and thus could be kept on its original site. But we were advised on the site visit that the bypass clips the corner of the section and a cycle lane and landscaping might be involved.

[596] We consider if at all possible the siting of this house be revisited, as restored it could contribute to the group of houses adjacent in a richly cultural area.



323 Willis Street

325 Willis Street

[597] We have no information on 325 Willis Street and if the site is not required for a heritage building, we recommend the house stay *in situ*.

*Vivian Street House**219 Vivian St*

[598] This house is underrepresented because although it is not a heritage building, it is an archaeological site dated circa 1897. It is a twin to the house next to it and accordingly it should be kept as close as possible to its partner. We noted on our site visit that in Buller Street adjacent (named after Sir William Buller (1838-1906)), general refurbishment of older houses is taking place enriching the area.



219 Vivian Street

Arthur Street House

[599] We have identified the values related to some of the archaeological sites in Arthur Street. If the authorities consider they may be retained they could be relocated into sites available close by.

Kensington Street

[600] Kensington Street is named after W C Kensington (1845-1922), Under-Secretary for Crown Lands. Its remaining large buildings, very similar in style in this area, are Edwardian and are thus not archaeological sites. They appear to be related to the medical community. They could generally be kept as a group providing links to the older parts of Te Aro on either side. The similar nature of the houses could provide a strong urban edge to this street with the buildings largely retaining their original footprints.

[601] Numbers 14 and 21 (1902 - 1904), however, have both been allocated sites in the New Tonks Precinct Character Area. They are recognised as having heritage merit as a result of community discussions. Mr Bowman notes that these buildings have not been investigated for their building condition. We consider number 14 should be kept with numbers 10 and 12 to ensure that they remain part of the distinctive group that they currently form and relocated into that group accordingly. This is Ms Forbes' assessment for CBC and is also ours. We realise this may cut across the community operations however.



14 Kensington Street

[602] Mr Bowman was asked whether it was appropriate for the relevant Kensington Street buildings to have their original chimneys reinstated. His opinion is that chimneys were an

important element to these designs and rebuilding them can be advantageous. He comments however that it may not be necessary to build the actual chimneys but to consider rebuilding them using plywood and plaster as in the wooden government buildings. We suggest such a move would be appropriate.

[603] Numbers 13, 15 and 16 Kensington are to be sold for removal/ demolished. Numbers 13 and 15 (1902-1904) also possibly could be restored for business purposes and remain where they are.

[604] Number 21 Kensington is to be moved to the Tonks Precinct. If the four Tonks Avenue houses remain where they are, the relocation of 21 Kensington may provide access to a partially restored Tonks Avenue.

Tonks Avenue Houses

[605] We undertook several site visits to Tonks Avenue, both formally and informally, to reassess the various issues which were discussed before us at the hearing, and in the light of the additional archaeological evidence given, as well as Mr Hasell's comments. For, in discussing alternatives to relocating buildings and leaving sites *in situ* with THT, Mr Hasell states as follows:

... if there was a particular concern about a location, or one or two locations, there may be, might be and I'm only saying might be, some possibility of a rearrangement. If concern was more general, then there would be a different consideration.

Tonks Avenue is the location of particular concern.

[606] Mr Cockburn intimates that on the Shetland Islands, most of the archaeological relics were found outside the doors and windows of the houses remaining. Any such relics in Tonks Avenue could be found by leaving the buildings where they are. Ms O'Keeffe in fact considers the sites themselves may yield little archaeological information. But in terms of the conservation of the actual buildings, she considers that the invasive archaeology, which would have to be carried out on the buildings if relocated, would be less protective than otherwise. Mr Bowman made the point that it is more cost effective to undertake the urgently needed repairs, restoration and reconstruction of missing elements as soon as possible by relocation.

Mr Moore for THT however disputes this, stating that provided the buildings are kept water-tight and safe, their condition will not materially deteriorate further. He considers they are better left where they are, together with the other outhouses and structures associated.

[607] Mr Bowman says in his evidence-in-chief that the buildings in Tonks Avenue are significant in part because of their townscape qualities as a group. These qualities include their intimate proximity to each other and the Avenue, their variety of scale and age, and the gateway to the Avenue as defined by 274 and 276 Cuba Street.

[608] 274 Cuba Street is to be relocated and that move cannot be avoided, so that part of the 'gateway' will disappear. The townscape qualities of the buildings will be greatly reduced as they would face on to a busy road if they are not relocated. Half of the current intimacy would thus disappear but - equally - half would remain. What could occur instead is that the buildings on the present site could form an urban edge to the bypass route, when number 12 Tonks is removed.

[609] We paid particular attention to Mr Cochran's evidence in relation to these particular buildings:

The proposed Tonks Avenue re-creation, in fact, fails to comply with three out of the four aspects of the practice outlined by Mr Bowman:

- *It does not re-establish the original relationship of the buildings with the street. The original street disappears and the new street bears no resemblance to the old. It does not have dwellings facing each other across the street, nor a grand house defining the end of the cul-de-sac.*
- *It does not maintain the original orientation of the buildings, which was to the upper Cuba Street shops and commercial buildings.*
- *It does not maintain together significant groups of buildings. 13 Tonks Avenue, the lynchpin of Tonks Avenue, is not present in the 'new' Tonks Avenue. One of the existing gateway buildings is not part of the gateway to the 'new' Tonks Avenue. The highly significant cluster of Tonks family buildings from 270-274 Cuba Street is broken apart,*

[610] The bypass designation precludes the application of some of Mr Cockburn's criteria. But if the buildings could "largely be retained in their original sites" more of the

archaeological resource would be retained than lost. If 13 Tonks (“*Wharenui*”) is moved south into the area to be vacated by the 1950’s wooden building located on that site [and number 21 Kensington Street], that would keep the loose concept of the “hen and chickens” in the area of Cuba Street intact.

[611] We have concluded that, if at all possible, numbers 1, 3, 5 and 13 Tonks Avenue should be kept *in situ* because:

- Mr Bowman indicates 1, 3 and 5 Tonks Avenue could be left undisturbed;
- Mr Hasell indicates in cross-examination that 5 New Tonks Avenue would be closer to the bypass than its current location;
- counsel for Transit indicates no relocation of the Tonks Avenue houses would be cheaper for the company;
- Mr Kelly indicates if 1, 3 and 5 Tonks Avenue were left where they are then presumably they would be accessible from the new road; if, for whatever reason, that is not possible, then access could be offered from Victoria Street, assuming that Transit presently owns all the land alongside the bypass;
- relocation of 21 Kensington Street, which is to be provided as an urban edge to the bypass proposal, could perhaps provide a right of way into Tonks Avenue;
- a right of way is now being negotiated for the Moran property: from Mr Coulam’s Appendix 3⁷⁰, it seems that this may be able to be extended to the Tonks Avenue properties;
- Mr Cockburn indicates carparks should be exempted from such heritage sites; but this was not discussed further;
- such moves might allow for 6 Tonks Avenue to stay where it is also;
- such a solution would still allow Transit reasonable use of the site.

[612] We acknowledge that achieving this desired effect would require Transit to lodge a s.181 RMA modification to the designation. The desired effect would only be achieved if Transit, the WCC, CBC and THT agreed to the modification, on the basis that leaving these particular buildings where they are and only moving 12 Tonks would be protective of many aspects of what is a significant archaeological site. The Avenue and its buildings undoubtedly form part of the wider historical and cultural complex and archaeological landscape. And its retention would confirm the community’s esteem for the place in terms of the HPA.

⁷⁰ Set of Plans 5/9/02: Sheet 254: Revision RO.

[613] We acknowledge too that such an alteration would require the WCC to amend the district plan and for the HPT to modify its Central Section Authority. So the task is no small one and we are very mindful of this.

[614] We reiterate this is a recommendation only, without evidence of whether it may be feasible.

Summary of Findings

- ***The Applications***

[615] Transit has made applications to the HPT for authority to destroy, damage or modify archaeological sites throughout the bypass route.

- ***The Proceedings***

[616] What is discussed in these proceedings are the applications, authorities and archaeological work for the Wellington City Bypass.

- ***Magnitude of the Archaeological Project***

[617] This is the biggest and most significant urban archaeological project undertaken in New Zealand.

- ***The Authorities for the Project***

[618] The HPT Authorities, which have been granted to Transit to destroy, damage, or modify archaeological sites encompass all of the relevant Town Acres along the bypass route. The work, which consists of subsurface archaeology, will also include archaeological building(s) assessments before relocation, investigation, and recording of all specific sites.

- ***Standing of the Appellants***

[619] The CBC and THT do not have legal standing to bring these appeals. They are not “*directly affected*” in terms of s.20(1) HPA. Accordingly the appeals are struck out.

- ***Decision on the Merits***

[620] We have proceeded to assess the appellants' cases on their merits, in case we are wrong about the standing of the appellants, as a question of law.

- ***The Decision of the HPT***

[621] The decision is upheld on the basis that:

- [a] the historical and cultural values of the site are not so high as to warrant their absolute protection nor are they unique;
- [b] the heritage buildings along the bypass route are able to be conserved by relocation;
- [c] the subsurface archaeology will be investigated, recorded and analysed to an appropriate standard;
- [d] the decision accords with the purpose and principles of the HPA;
- [e] the decision takes account of the relationship of Maori with their ancestral lands, water, sites, waahi tapu and other taonga;
- [f] the decision allows reasonable future use of the site for a lawful purpose;
- [g] the decision takes account of persons directly affected.

- ***Transit's Archaeological Assessments for the Authorities***

[622] The experts acknowledge there was enough information about the cultural and historical values in Transit's assessments to make adequate assessment applications to the HPT, although this was qualified in some cases by the CBC witnesses.

- ***The High Cultural and Historical Values of the Site***

[623] The site has high - very high cultural and historical values. The HPT in their authorities do not consider the values unique (on a New Zealand scale) to be so high that they may not be modified either:

- by investigation or excavation of the subsurface archaeology; or
- by relocation of the heritage and some non-heritage buildings.

- ***Section 11 Versus Section 12 Authorities***

[624] The Court has no jurisdiction to require the HPT to grant s.11 (site specific) authorities as opposed to s. 12 (general) ones.

- ***The HPT's Reputation***

[625] All parties endorsed the very high standing of the HPT's archaeologists. In an unusual move and because of the high - very high cultural values of the site, the HPT has required its own archaeologists to supervise/undertake the work involved in the Central and Eastern Sections. This is due to the multi-layered assessments it anticipates will be required in these areas.

- ***Conditions on the Authorities***

[626] The conditions on the authorities have been identified as the most comprehensive ever seen in this country. There is clear provision for extensive archaeological work throughout the bypass route. Provision for additional sites to be investigated, recorded, etc as the work continues is made in the documentation accompanying the authorities, such as the draft research strategy and management plan.

- ***Rescue Archaeology***

[627] What is involved here may be termed rescue archaeology. In order to build the bypass, Transit must modify the area, and they have a legal right to do so. Hence, it is the HPT's duty to make sure that the sites disturbed are thoroughly investigated, analysed, and recorded before the roading is laid. Archaeological sites are a non-renewable resource, and so recommendations for their destruction must be made with proper information.

[628] Such a form of archaeology is contemplated in the HPA and is set out in the provisions ss. 10-20.

- ***International Instruments***

[629] The decision of the HPT successfully addresses most of the relevant provisions of the international instruments relating to this project.

- *Recommendations*

[630] The Court was invited by Transit and the council to make recommendations if we had any concerns. We recommend as follows:

- *Arthur Street*

[631] We recommend the archaeological sites numbers 8, 26, 28, 30, 32 and 40 Arthur Street be reassessed for relocation.

- *Tonks Avenue*

[632] If all parties agree, and subject to appropriate access, we suggest that the 1, 3 and 5 Tonks Avenue houses remain where they are, except for 12 Tonks, which is in the direct path of the bypass. Although 13 Tonks Avenue is also directly affected, we would recommend that it be moved to the south of its present site to retain the “hen and chickens” concept.

- *Cuba Street*

[633] We recommend that the outbuildings to 289/291 Cuba Street be relocated if possible along with the buildings.

- *Kensington Street*

[634] We recommend as many of the Kensington Street houses be retained as possible.

[635] We note that they are covered by the archaeological authorities and that they have historical and cultural values in terms of the links they provide to Willis Street.

- *Willis Street*

[636] We recommend that 272 Willis street be relocated as close as possible to its present site if it needs to be moved at all.

[637] We recommend that 323 Willis Street remains where it is if Transit can accommodate the suggestion in terms of traffic.

[638] We recommend that 325 Willis Street remain where it is, if the land is not required for a heritage building (no information on this house).

- *Vivian Street*

[639] We recommend that 219 Vivian Street be relocated as closely as possible to its twin next door.

Conclusion

- The appellants' appeals are not sustained on their merits.
- In any event, they are not "*directly affected*" by the decision of the HPT on the authorities.
- Accordingly they lack standing to bring the appeals.

Determination

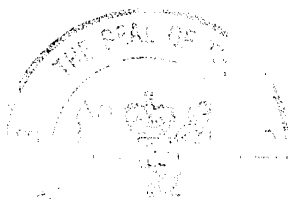
[640] The appeals are struck out.

[641] The decision of the HPT and all its conditions on the authorities relating to the bypass route are confirmed.

[642] It is our preliminary view that this is not a case where costs should be awarded. If the parties consider otherwise, they have 14 days to apply.

DATED at WELLINGTON this **30th** day of July 2003

For the Court:



S. E. Kenderdine
S E Kenderdine
Environment Judge

HERITAGE BUILDINGS AFFECTED BY THE BYPASS

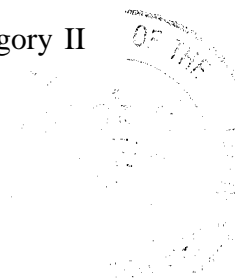
These buildings are listed in the Wellington District Plan:

- 30 Arthur Street;
- 272 Cuba Street;
- 274 Cuba Street;
- 289-291 Cuba Street;
- 1 Tonks Avenue;
- 3 Tonks Avenue;
- 5 Tonks Avenue;
- 13 Tonks Avenue;
- 215 Vivian Street;
- 278 Willis Street;
- 282 Willis Street;
- 284 Willis Street;
- 286 Willis Street;
- 319 Willis Street.

The NZHPT has registered several of those properties as Category II buildings in its Register. Category II are places of historical or cultural heritage significance or value, and usually of local importance. Those registered properties affected by the bypass are:

- 289-291 Cuba Street;
- 272 Cuba Street;
- 274 Cuba Street;
- 1 Tonks Avenue;
- 3 Tonks Avenue.

In addition, 18 Buckle Street (the Buckle Street Police Barracks) is registered Category II although this is not affected by the bypass.



APPENDIX 2

BUILDINGS WITHIN THE AREAS COVERED BY THE AUTHORITIES ANTICIPATED TO BE SOLD FOR REMOVAL

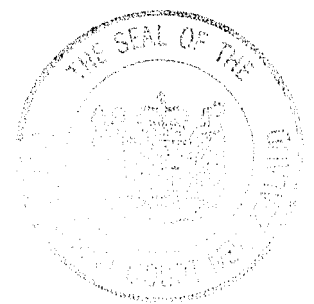
The buildings which are anticipated to be sold for removal. These buildings are:

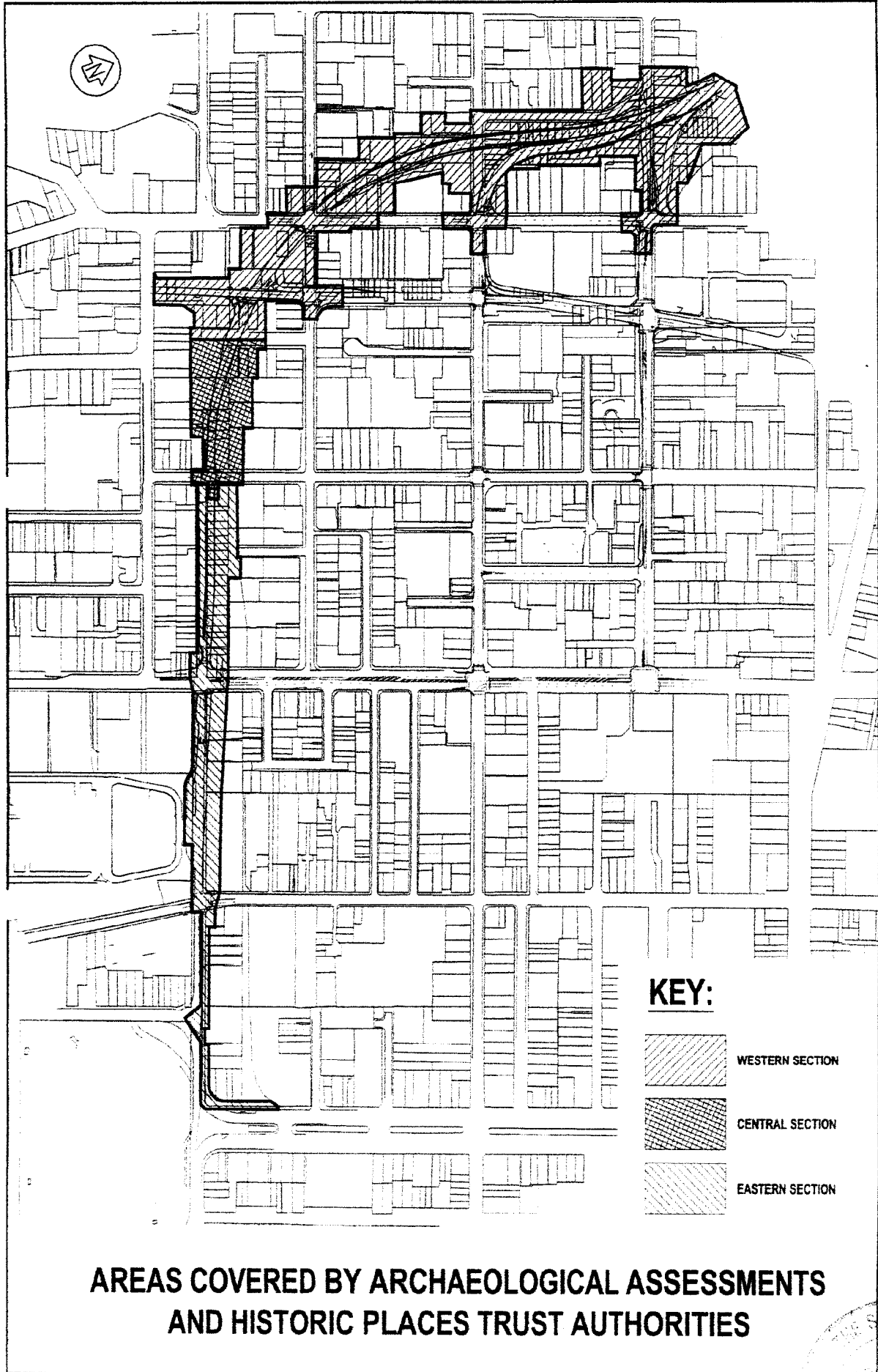
- 8 Arthur Street;
- 12 Arthur Street;
- 2 storey house at 20-24 Arthur Street;
- 26 Arthur Street;
- 28 Arthur Street;
- 32 Arthur Street;
- 40 Arthur Street;
- 6 Tonks Avenue;
- 13 Kensington Street;
- 15 Kensington Street;
- 16 Kensington Street;
- 323 Willis Street;
- 272 Willis Street; and
- 219 Vivian Street.

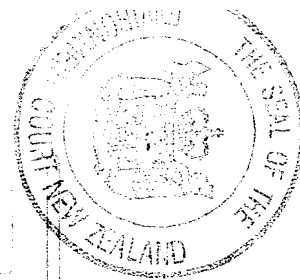
PRE-1900 BUILDINGS TO BE SOLD FOR REMOVAL

Of the buildings listed above for possible sale and removal the following buildings are identified as being constructed prior to 1900:

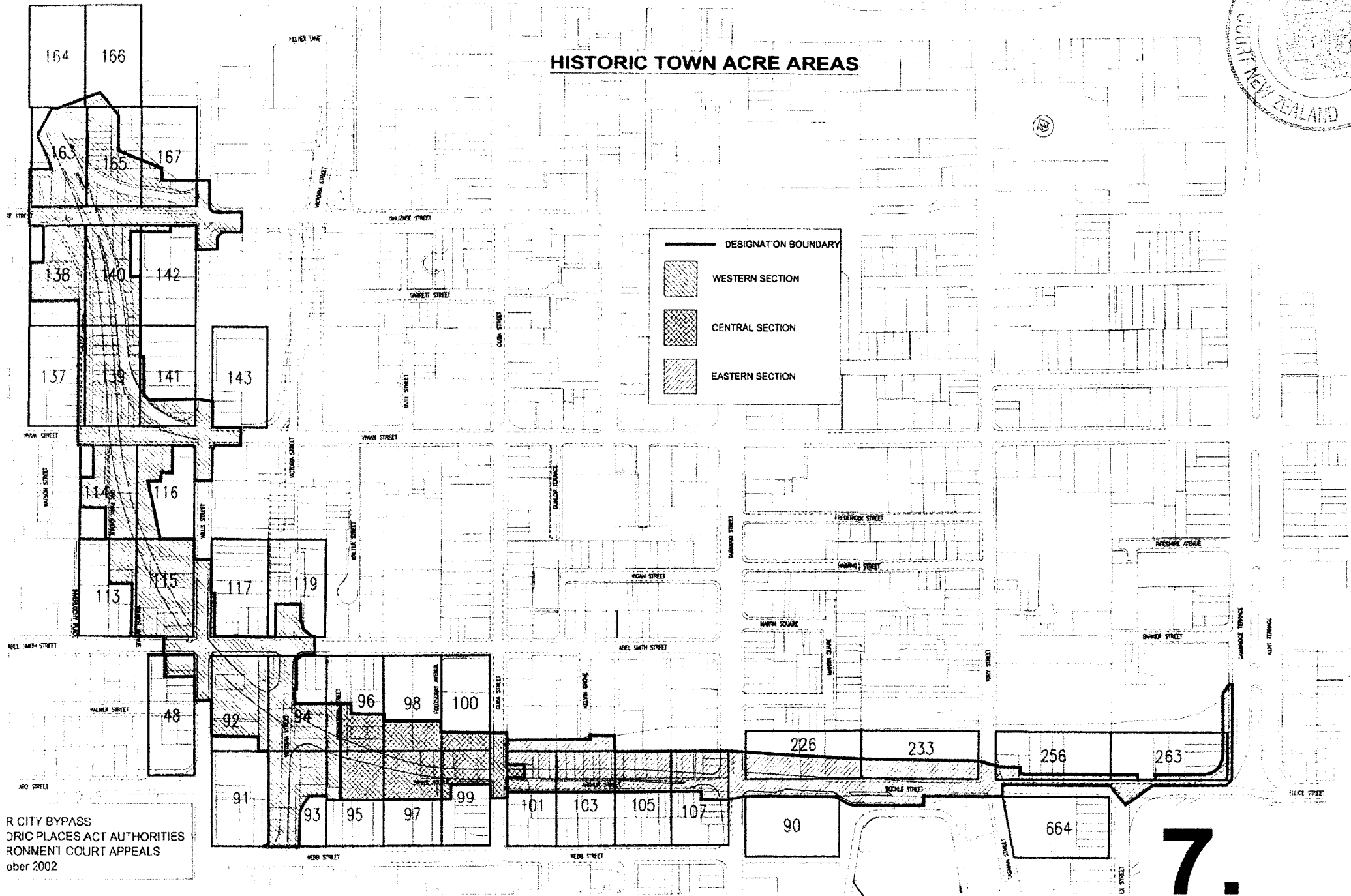
- 8 Arthur Street;
- 32 Arthur Street;
- 40 Arthur Street;
- 6 Tonks Avenue;
- 323 Willis Street;
- 219 Vivian Street; and
- 272 Willis Street.





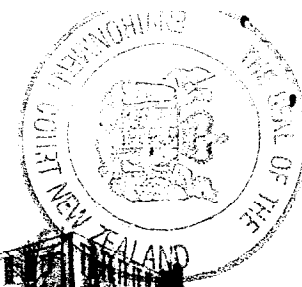


HISTORIC TOWN ACRE AREAS



R CITY BYPASS
DRIC PLACES ACT AUTHORITIES
RONMENT COURT APPEALS
ober 2002

**BUILDINGS WITHIN THE AREAS COVERED BY
THE ARCHAEOLOGICAL AUTHORITIES TO BE
DEMOLISHED OR SOLD FOR REMOVAL**



215 VIVIAN STREET
Part Relocation, Part Demolition – rear portion of building



219 VIVIAN STREET



1 OAK PARK AVENUE
Front Building



1 OAK PARK AVENUE
Rear Building



2 OAK PARK AVENUE



OLD CONCRETE GARAGES



270A WILLIS STREET



272 WILLIS STREET



272A WILLIS STREET



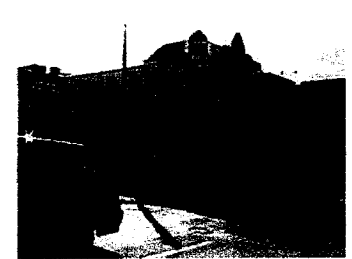
276 WILLIS STREET



278 WILLIS STREET
Part Relocation, Part Demolition – outbuildings and rear portion of building



280 WILLIS STREET



286 WILLIS STREET
Part Relocation, Part Demolition – rear portion of building



323 WILLIS STREET



81-87 ABEL SMITH STREET



132B ABEL SMITH STREET



13 KENSINGTON STREET



15 KENSINGTON STREET

INNER CITY BYPASS
HISTORIC PLACES ACT AUTHORITIES
ENVIRONMENT COURT APPEALS
7 October 2002

2.b.

APPENDIX 5