

**BEFORE COMMISSIONERS
APPOINTED BY WELLINGTON
CITY COUNCIL**

**WELLINGTON CITY COUNCIL PROPOSED DISTRICT
PLAN**

IN THE MATTER of Hearing Stream 3 – Heritage

AND

IN THE MATTER of a submission by Jane and Turi
Park in relation to 134 Brougham Street

SYNOPSIS OF SUBMISSIONS IN SUPPORT OF JANE AND TURI PARK

5 May 2023

Counsel acting: Ian Gordon
Stout Street Chambers
Level 6, Huddart Parker Building
1 Post Office Square
PO Box 117
Wellington 6011
T: 04 472 9026
ian.gordon@stoutstreet.co.nz

MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. These submissions are made on behalf of Jane and Turi Park in relation to their property at 134 Brougham Street, Mount Victoria (**134 Brougham**). The Proposed District Plan (**PDP**) has proposed including 134 Brougham in the Moir Street Heritage Area. That proposal was suggested by the Historic Heritage Area Evaluation Report (the **Report**) and is supported by the evidence of Moira Smith, Heritage Advisor.
2. The Submitters oppose that approach. They submit 134 Brougham does not have significant heritage value and does not require greater protection than that already provided by its inclusion in the wider Mount Victoria Character Precinct. The additional restrictions of the Moir Street Heritage Area are unnecessary and unreasonable.
3. Under the Mount Victoria Character Precinct, most development is a discretionary activity requiring resource consent. This means that reasonable and carefully planned development can occur.
4. By contrast, the restrictions in the Moir Street Heritage Area results in the dwelling at 134 Brougham being subject to an avoidance policy which provides only a very narrow path for any redevelopment. This is too blunt an instrument for heritage protection for a now poor example of a middle-class Victorian cottage on Brougham Street and the Submitters assert that there are no compelling RMA reasons for 134 Brougham to be included in the Moir Street Heritage Area (of Victorian working-class cottages) in that context.

Legal context

5. Under Policy 3 of the NPS-UD, in relation to tier 1 urban environments, regional policy statements and district plans must enable a specified level of development and density. District plans may modify the relevant building height or density requirement as set by Policy 3 only to the extent necessary to accommodate a qualifying matter in that area.¹

¹ NPS-UD, Policy 4.

6. Further, subpart 6 of the NPS-UD requires every territorial authority to identify the building heights and densities required by Policy 3.² If it considers that it is necessary to modify the building height or densities to provide for a qualifying matter, it must identify the location where that qualifying matter applies and specify the alternate building heights and densities proposed for those areas.³
7. One of the qualifying matters that may be considered is a matter of national importance that decision-makers are required to recognise and provide for under section 6 of the Resource Management Act 1991.⁴ Section 6(f) includes “the protection of historic heritage from inappropriate subdivision, use and development” as a matter of national importance.
8. If the Council identifies a qualifying matter, it then has discretion as to how to respond. It may consider it necessary to modify the building height or densities to provide for a qualifying matter.⁵ If it does consider that is necessary, it may make *only* the modifications necessary to accommodate the qualifying matter.⁶
9. Section 6(f) has been considered by the Environment Court:
 - (a) In *New Zealand Historic Places Trust / Pouhere Taonga v Manawatu District Council*, the Environment Court considered s 6(f) noted that the section “plainly does not mean that every building which might be said to be of significance as historic heritage has, individually, become a building of national importance”.⁷ Section 6(f) required that “the protection of the historic heritage [the building] represents from “inappropriate ... use and development” is to be recognised and provided for. The historic heritage embodied in the building is not, therefore, to be protected at any cost, but is to be weighed as

² NPS-UD, cl 3.31(1).

³ NPS-UD, cl 3.31(2).

⁴ NPS-UD, cl 3.32.

⁵ The use of the word “if” in NPS-UD, cl 3.31(2) makes it clear that this is at the Council's discretion.

⁶ NPS-UD, Policy 4.

⁷ *New Zealand Historic Places Trust / Pouhere Taonga v Manawatu District Council* EnvC Wellington W81/04, 3 November 2004 at [14].

a nationally important factor in deciding whether the proposal promotes “sustainable management”.⁸

- (b) In *Palmer v Masterton District Council*, the fact that the building in question had limited heritage value despite being formally designated as such was relevant to the Court's consideration of whether resource consent should be granted to make alterations.⁹ The Court made it clear that the fact a building has limited historic significance or architectural merit will be relevant to whether alterations to the building is contrary to the objectives and policies in a district plan.¹⁰

10. To summarise the law:

- (a) The mere fact that 134 Brougham may have some heritage value is not the end of the inquiry. The Council has a discretion whether to modify the requirements in Policy 3 once qualifying matters are identified.
- (b) When considering whether subdivision, use or development would be inappropriate, the Council should consider the heritage value of 134 Brougham as against the objectives and policies of the NPS-UD and the disadvantage to Property owners. Those factors are all relevant to assessing what restrictions are necessary to preserve heritage.
- (c) That assessment is to be pursuant to s 32 of the RMA. That report must, among other matters, identify other reasonably practicable options for achieving the objectives of the RMA and assess the efficiency and effectiveness of the current proposal in achieving the objectives. Identification of heritage elements alone is insufficient. A cost benefit assessment is required both in respect of these owners but also in terms of opportunity cost to the city.¹¹

⁸ At [16].

⁹ *Palmer v Masterton District Council* EnvC Wellington W105/07, 3 December 2007.

¹⁰ At [96]–[97] and [102].

¹¹ Evidence of Mr Jeffries at paragraph [4.30]–[4.34], and from paragraph 33 below.

Heritage value

11. The heritage value of 134 Brougham is not significant. The Submitter has considered the rationale for treating 134 Brougham as having heritage value and sets out its responses below.

Connection with Reverend Moir

12. Ms Smith's evidence and the Report both identify the fact that Moir Street was developed by Reverend Moir to be of primary importance to its heritage value.

13. There is very little evidence, however, that 134 Brougham was considered important to Rev Moir or his family. It was habitable on completion from 1879, but tenanted until 1892.¹² Rev Moir lived there only for three years or so from 1892 until his death in 1895. That is a scant and very temporary connection between him and 134 Brougham. The fact he tenanted it is further evidence that Rev Moir's personal connection to 134 Brougham was slight.

14. Second, Rev Moir's contribution to the area can be recognised in other ways that are more meaningful. The adjacent street continues to bear his name, as will the heritage area that is the cluster of worker's cottages.¹³

15. The Submitters are open to installing a plaque to commemorate Rev Moir, recording the years he lived at 134 Brougham. Such a plaque could even reference the church where he was a Minister for a time but either way, his legacy is still adequately provided for in the protections to Moir St¹⁴ itself.

Physical features of 134 Brougham

16. The report to the Council notes the value of Moir Street from a heritage perspective as examples of working-class cottages from, noted for their "repetition of basic form, construction, and materials."¹⁵ 134 Brougham does not fall into that definition. It is larger, was not built as a working-class

¹² This is the year given in the Evidence of Moira Smith at [880].

¹³ the Moir Street Heritage Area

¹⁴ The Moir Street Heritage Area.

¹⁵ Page 90.

cottage, and is formally more complex.¹⁶ The cottages face into Moir St itself while 134 Brougham faces Brougham St and is physically and socially distinct from the Moir St properties. The Report does not acknowledge this. It focuses on the physical attributes of the working-class cottages in Moir St that do not pertain to 134 Brougham, but then concludes that 134 Brougham should be included in the proposed heritage area without explaining its particular heritage value.¹⁷

17. In her supplementary evidence, Ms Smith has put forward an entirely new argument as to why 134 Brougham has heritage value that was not previously raised in the Report.
18. Rather than arguing that 134 Brougham has heritage value because it forms part of the repetitive structure of cottages, she now argues the opposite: 134 Brougham allegedly has heritage value because it is different from the cottages.
19. Ms Smith opines that the Moirs selected the best site for their own house and the separation and difference of the properties illustrates the relationship between the working and middle classes.
20. On this reasoning, 134 Brougham is separate and distinct from the heritage narrative of cottages in Moir St and not subject to the same rationale for heritage protection. Instead, its vernacular is middle class and of Brougham Street.
21. Quite aside from being a complete 180-degree shift in reasoning, the Moirs did not live in 134 Brougham for the majority of the time it was habitable within Rev Moir's lifetime, as explained above. Seemingly, it was not important enough to them to move into upon completion.
22. If the dwelling at 134 Brougham is indeed an example of Victorian middle-class dwellings, the PDP should be open about that and acknowledge its distinct character rather than confusingly suggest that it is 'of' the workers cottages in the proposed heritage area because of the

¹⁶ Evidence of Dr Kebbell at [20].

¹⁷ See also the Evidence of Mr Jeffries at [5.1(a)], noting that there is no dispute that 134 Brougham does not qualify for individual historic heritage listing on its own account.

connection to the Moir family. This new rationale is confusing and opaque.

Consistency with Moir Street streetscapes

23. Brougham Street is a wider street than Moir Street with larger site sizes. It does not have a consistent row of worker cottages that characterises Moir Street. 134 Brougham is barely visible from the main axis of Moir Street and is of an entirely different streetscape.¹⁸
24. The Submitter asserts that 134 Brougham is not part of the Moir St streetscape because:
- (a) 134 Brougham is spatially and visually separated from Moir St by distance and elevation;
 - (b) 134 Brougham is part of the Brougham St streetscape, which is heavily modified and distinct from Moir St in form; and
 - (c) there is limited potential for any changes to 134 Brougham to intrude on the streetscape values of Moir St.

Alterations

25. 134 Brougham has had significant alterations and renovations undertaken to it. Additions include a veranda, windows, a sunroom, porch and kitchen, converting a bedroom to a bathroom, and it seems at some point the house was turned into flats.¹⁹ The report notes that the exterior of 134 Brougham has remained similar since the 1930s, suggesting it changed between the time it was built and the 30s. These are significant changes.
26. It is possible for buildings to be altered and retain character values. But in this case, the rationale for giving 134 Brougham heritage protection is its connection to Rev Moir and as an example of late 19th century settlor living. Both of those rationales are undermined by significant alterations

¹⁸ Evidence of Mr Jeffries at [4.35]–[4.37] and the comparison of streetscapes and spatial separation in figure 2 and 3.

¹⁹ Historic Heritage Area Evaluation Report at page 30.

to 134 Brougham. It has resulted in “a building that no longer belongs to the era under heritage protection”.²⁰

27. The original 2017 report into a Moir St Heritage Area, considered 134 Brougham and the individual house report concluded that, “The many changes to the house makes it an unlikely candidate for listing”.²¹ The Report itself described 134 Brougham as a “highly modified example of a Victorian cottage”.²² The fact that the various reports have drawn different conclusions as to 134 Brougham, and explicitly accepted that it is “highly modified”, further reinforces that its heritage value is weak.

Conclusion on Heritage Value

28. 134 Brougham was identified as of heritage value because of its connection to Rev Moir and because the other properties he had built are good examples of old settlor working cottages. But there is no evidence that the Moirs were particularly connected to 134 Brougham given their relatively brief occupation of it in Rev Moir’s lifetime, and that it is physically, socially and architecturally distinct from the other cottages on Moir St. It has undergone numerous modifications since it was built. Its heritage value is not significant. The Report and Ms Smith appear to acknowledge this by focusing on the role 134 Brougham plays in the “narrative” of Moir St, rather than making a direct contribution.²³
29. The Submitter reminds the Panel that if 134 Brougham is not included in the Moir St Heritage Area, that does not mean there is a free-for-all in terms of building and alterations. 134 Brougham will remain in the Mount Victoria Character Area and be subject to the provisions applicable. For example, the demolition of any pre-1930s building is a discretionary activity with specific criteria to be met. A homeowner has to demonstrate that the contribution of the building to the character of the area is low, with reference to:

- a. The level of visibility of the existing building from surrounding public spaces;

²⁰ Statement of Evidence of Dr Kebbell at [21].

²¹ Mount Victoria Heritage Study Report, Appendix 5 at page 9.

²² Historic Heritage Evaluation Report at page 93.

²³ Historic Heritage Evaluation Report at page 93.

- b. Whether the building is consistent in form and style with other pre-1930 buildings that contribute positively to the character of the area;
 - c. The extent to which the existing building retains its original design features relating to form, materials and detailing and the extent to which those features have been modified;
 - d. Whether the building is an integral part of a row of buildings that are consistent in form, scale and siting; and
 - e. Whether the building represents a rare or unique example of pre-1930 architecture
30. There are further rules for the alteration to existing structures, including a consideration of the Residential Design Guide Character Precincts Appendix. A homeowner clearly has responsibility to ensure that replacements and alterations are consistent with the character of Mount Victoria.
31. That is the appropriate level of protection for a property that was not important enough for a heritage listing on its own merits and contributes to the character of a wider area indirectly by being part of a "narrative", rather than making a direct contribution. That is a fair and reasonable responsibility to place on a homeowner.
32. Those reasonable restrictions must be compared to the stringent environmental bottom line that is imposed on a homeowner in the Moir St Heritage Area through the avoidance policy as to demolition. The proposed rules for the Moir St Heritage Area would make demolition a discretionary activity, with guidance requiring the Council to "avoid the total demolition of contributing buildings and structures within heritage areas" unless it can be demonstrated that there are no significant adverse effects on the heritage values or alternatives to total demolition have been explored and demolition is a reasonable option. It is worth noting those rules are nearly identical to the rules for the demolition of individually scheduled heritage buildings in Policy HH-P10 of the PDP, which similarly require the avoidance of demolition unless there are no reasonable alternatives. The Panel should bear in mind that including 134 Brougham in the Moir St Heritage Area imposes deeply restrictive requirements akin

to a heritage listed building, even though all experts accept 134 Brougham does not qualify for heritage listing in its own right.

Costs of inclusion in Moir St Heritage Area


33. Including sites in a historic heritage area imposes significant economic and social costs on the individual property owners, including opportunity costs of lost development potential and the financial cost of maintenance and restoration. It also imposes cost on the wider city in terms of lost development capacity. That development capacity is particularly important in relation to 134 Brougham because it is an area that is within walkable distance of the city in an area of high housing demand. It is for that reason that the NPS-UD requires greater building heights and densities.
34. The Submitter notes that the Historic Heritage Section 32 assessment for the PDP included no assessment of the benefits and costs of introducing new heritage areas, such as the proposed Moir St Heritage Area. There was no specific assessment of the cost and benefit of including 134 Brougham within this area.
35. Given the nature of costs identified and the statutory requirements, that oversight must be rectified and until it is, the Panel can only guess at the relative economics of the proposal.

Conclusion

36. The question for the Council is whether it is *necessary* to include 134 Brougham within the Moir St Heritage Area to accommodate the protection of historic heritage from inappropriate subdivision, use and development.
37. The Submitter says it is not necessary to subject 134 Brougham to more restrictive rules and different density and height requirements to protect the minimal heritage value that 134 Brougham has for the reasons outlined above.
38. The evidence of Dr Kebbell and Mr Jeffries can be relied on and is to be preferred. Dr Kebbell takes a sensible and real-world approach to the value of 134 Brougham and its contribution to the character of

Mount Victoria. Mr Jeffries provides a more holistic approach to the RMA issues engaged and methods available in respect of an old and highly modified building does not reach the threshold for heritage protection on its own merits.

39. The Council already recognises there is value in protecting the character of the Mount Victoria area. It does that through the Mount Victoria Character Area which provides adequate safeguards while enabling sensitive intensification to occur.²⁴



IM Gordon
Counsel for the Submitter
5 May 2023

²⁴ The "ZavosCorner" per Jeffries at [4.36].