

BEFORE THE INVERCARGILL CITY COUNCIL HEARINGS COMMISSIONER

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for land use consent (RMA/2025/115) to
demolish the former Briscoe and Company Building at 104–106
Dee Street, Invercargill, a Category 2 Historic Place on the New
Zealand Heritage List / Rārangī Kōrero

BY **104 DEE STREET PARTNERSHIP**
Applicant

LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

Hearing date: 15 October 2026

Counsel acting: Clare Lenihan, Barrister
80 Layard Street, Invercargill 9810
Tel: (03) 214 1674; 027 577 6823
clare.lenihan@environmentallawyer.co.nz

MAY IT PLEASE THE COMMISSIONER:

INTRODUCTION

1. These submissions are presented on behalf of the applicant, 104 Dee Street Partnership, in support of its application (RMA/2025/115) for land use consent to demolish the fire-damaged former Briscoe and Company Building at 104–106 Dee Street, Invercargill.
2. The applicant's case in essence is that the building was gutted by an accidental fire on 6 September 2023 — after the owners had kept it tenanted and maintained, with Council heritage grants, for fourteen years. In the three years since the fire, the owners have done everything that could reasonably be asked of them: they have commissioned three structural engineering assessments, three rounds of quantity surveying covering seven options, two heritage assessments, contamination advice and a demolition methodology; they have engaged with Heritage New Zealand Pouhere Taonga (HNZPT) and Council from the first month; they have sought funding from every source open to them; and they have marketed the building for sale since December 2023 without a buyer emerging. None of that has produced a path to retaining the building that the owners can fund.
3. The above is also now the considered view of the Council's reporting planner, who has moved from a recommendation to decline to a recommendation to grant,¹ of the applicant's heritage expert, and of HNZPT. The only witness who maintains that alternatives have not been adequately explored is Council's heritage peer reviewer, Mr Barsby.
4. The applicant doesn't understate the heritage loss. The applicant accepts — and has always accepted — that demolition will have significant², irreversible adverse effects on a listed building and on the Dee Street Historic Area. The question is not whether there is a loss. It is whether, in these particular circumstances, the District Plan contemplates that loss being accepted. These submissions say that it does, and that the plan itself provides the relevant matters to consider in approaching that question.

SUMMARY OF SUBMISSIONS

5. In summary:
 - (a) Consent can be granted. The application passes the s 104D(1)(b) gateway: both planners, in both rounds of evidence, find the proposal is not contrary to the objectives and policies of the District Plan.³ That finding has not been challenged by any planning witness⁴.

¹Addendum to s 42A report at [6]–[8], [66]–[68].

² There is disagreement about the level of effect.

³Section 42A report of Joanne Skuse, 23 July 2026, section 13; Addendum to s 42A report, 17 September 2026, at [7] and [68].

⁴ Only Mr Barsby, who is not a planning expert. This is addressed below.

- (b) The decisive issue is whether all *reasonable* alternatives to demolition have been investigated and evaluated (HH-P5(2)). The plan's own assessment criteria expressly allow alternatives to be discounted for reasons of financial cost, safety and technical feasibility, and require professional advice proportional to the effects. The applicant has met that standard. Mr Barsby applies a higher one than the plan does.
 - (c) The two "make-safe" propping options (Options 6 and 7) that are now the focus of Mr Barsby's evidence are, on the uncontradicted engineering evidence, temporary measures with a five-year design life. They are not alternatives to demolition in the sense used by HH-P5(2): they defer the decision; they do not answer it. They also cost money the owners do not have.
 - (d) In terms of heritage loss, conditions are proposed which require recording, salvage, interpretation, archaeological controls, a vacant site management plan and a registered covenant binding future owners to a heritage-guided design process. The applicant has also withdrawn the BI Architects concept design as a design benchmark in response to both heritage experts criticisms.
 - (e) The alternative to consent is not retention. On the evidence of every heritage witness, left as is, the building will continue to deteriorate toward the same loss, with the footpath, kerbside parking and a prominent CBD corner effectively held hostage in the meantime.
 - (f) The draft conditions are broadly agreed subject to some tidying for certainty and internal consistency before they are imposed. Counsel identifies the specific points below.
6. The applicant will call the following witnesses: Ms Linda Lee (owner); Mr Robert Lane (structural engineering); Mr Phillip Griffiths (quantity surveying); Ms Susan Irvine (heritage); and Ms Christine McMillan (planning). The memorandum of Mr Simon Beardmore (contaminated land) is relied on in writing.

THE APPLICATION

What consent is sought for

- 7. The application is for demolition only. Demolition of a building listed in Appendix 3.2 of the District Plan is a non-complying activity under Rule HH-R9.
- 8. Construction of a replacement building is not part of the application and no consent is sought for it. This matters because the original s 42A report treated the absence of a replacement building as a central reason for decline. The applicant has not responded by proposing a building it cannot afford to build. It has responded by offering conditions that control what any future owner may build — which is a principled response from an owner whose plan is to sell the cleared site.
- 9. Consistent with the above, the applicant no longer offers the BI Architects concept design as an "Approved Concept Design". Ms McMillan's supplementary evidence

records its withdrawal from the conditions in light of the views of both heritage experts.⁵ The concept design should therefore be treated as background to the application only. Counsel returns to the consequence of this for condition 1 below.

The NES-CS component

10. The applicant has, at the s 42A author's invitation, added a consent under the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (**NES-CS**) to address soil disturbance, supported by a detailed site investigation condition. The s 42A author agrees with that course.⁶
11. The applicant is mindful that the authority for adding a further consent at hearing is not strong. The usual test for amending a consent application is whether the amendment is within the scope of the application as notified.⁷ Counsel submits it is: the notified application described demolition and site reinstatement with associated earthworks; the NES-CS consent regulates the same physical activity on the same land; no one is prejudiced because the effect of the condition is to impose additional controls, not to authorise anything new; and the only submitters (the Halligans and HNZPT) could not sensibly have submitted differently. If the Commissioner has doubt, the fallback is the course the s 42A report itself identified — a condition requiring any NES-CS consent to be obtained before this consent is given effect to.⁸

WHERE MATTERS NOW STAND

12. The ground between the parties has narrowed considerably since the original s 42A report:
 - (a) **The reporting planner** now recommends grant, finding that the applicant "has now undertaken a reasonable level of investigation into alternatives" and that reasonable alternatives "have now been evaluated to an appropriate level for decision-making".⁹
 - (b) **HNZPT** has reviewed its position. Its 3 June 2026 email accepts that, given the building's deteriorating condition, the range of options explored by the owners and their sustained and unsuccessful attempts to sell, full demolition "may now be the last resort", and asks that the NZHP addendum recommendations be imposed as conditions. HNZPT no longer wishes to be heard.¹⁰

⁵Supplementary statement of Christine McMillan, 15 October 2026, under "Heritage NZ Pouhere Taonga".

⁶Addendum to s 42A report at [35]–[36].

⁷*Shell New Zealand Ltd v Porirua City Council* (CA 57/05, 19 May 2005) is the usual authority that an application may be amended at hearing if the amendment is within the scope of the application as notified.

⁸s 42A report, section 4, page 5.

⁹Addendum to s 42A report at [6]–[8], [66]–[68].

¹⁰HNZPT email to ICC, 3 June 2026, as quoted in the s 42A report at p 11.

- (c) **The applicant's heritage expert**, Ms Irvine, does not support demolition from a heritage perspective (no heritage expert would), but considers that alternatives have now been thoroughly examined.¹¹
- (d) **The only submission in support**, from Mr and Mrs Halligan, describes the building as dangerous and a blight on the CBD, and the cordoned footpath as an obstacle to pedestrians, including people with disabilities.
- (e) **Mr Barsby** maintains his opposition. His evidence is now confined, in substance, to two matters: whether Options 6 and 7 have been costed in enough detail, and the design controls for a replacement building.

13. No planning witness supports decline.

STATUTORY FRAMEWORK

14. The application falls to be determined under ss 104, 104B and 104D of the Resource Management Act 1991 (**RMA**).

Section 104D — the gateway

15. Consent can only be granted if one of the two gateways in s 104D(1) is passed. The applicant accepts that adverse effects are more than minor, so s 104D(1)(a) is not available.
16. The application passes s 104D(1)(b). Ms Skuse found in her original report that the proposal was "inconsistent with, but not contrary to" the District Plan objectives and policies, and that consent could therefore be granted.¹² That distinction was deliberate, and it is correct: "contrary to" means repugnant to or opposed to, not merely failing to achieve every policy. In her addendum Ms Skuse goes further and finds the proposal "not inconsistent" with the objectives and policies read as a whole. Ms McMillan agrees.
17. Mr Barsby states that the proposal is "contrary to the objectives and policies concerning heritage".¹³ That is a planning conclusion on a statutory test. Mr Barsby is a building surveyor and heritage specialist, not a planner, and he does not undertake any assessment of the plan as a whole. Respectfully, his opinion on that point falls outside his expertise and should be given no weight on the gateway question.¹⁴

Section 104 and Part 2

18. Passing the gateway does not oblige the Commissioner to grant consent; it opens the overall evaluation under s 104(1) and the discretion under s 104B.

¹¹Addendum to s 42A report at [19]–[20].

¹²Section 42A report of Joanne Skuse, 23 July 2026, section 13; Addendum to s 42A report, 17 September 2026, at [7] and [68].

¹³Barsby at [15].

¹⁴Code of Conduct for Expert Witnesses, Environment Court Practice Note 2023, cl 9.2(a) (evidence within area of expertise).

19. Where a plan has been competently prepared and contains a coherent set of provisions dealing with the issue, a consent authority would ordinarily expect to give effect to Part 2 by applying the plan; resort to Part 2 is not precluded, but is unlikely to add anything.¹⁵ That is the position here. The Operative District Plan (2019) has a specific rule for heritage demolition with twelve assessment matters, and the Southland Regional Policy Statement addresses heritage directly. Those instruments already strike the balance the Commissioner is asked to strike.
20. Section 6(f) requires the protection of historic heritage "from *inappropriate* subdivision, use, and development". Whether development is inappropriate is assessed against what is sought to be protected and the context.¹⁶
21. The leading authority on what s 6(f) requires of a consent authority faced with an application to demolish a heritage building is the High Court's decision in *Lambton Quay Properties*.¹⁷ The Court held that:
 - (a) s 6 requires the consent authority to ensure heritage buildings are demolished only in "appropriate" circumstances, meaning when it is proper to do so;
 - (b) the above requires an assessment of whether demolition is a balanced response in which all competing considerations are weighed, and the outcome is fair, appropriate and reasonable;
 - (c) s 6 does **not** require the consent authority to "exhaustively and convincingly exclude" alternatives to demolition before granting consent. That is a materially higher obligation than s 6 imposes, and the Environment Court had overstated s 6 by applying it; and
 - (d) the Environment Court had also misread the district plan: by omitting the word "reasonable" from the plan's requirement to consider *reasonable* alternatives, it imposed a test materially higher than the plan set.
22. That decision is directly relevant to this application. The Wellington plan clause the Court was construing directed attention to reasonable alternatives to demolition, as HH-P5(2) does here. The error the High Court corrected — treating "reasonable alternatives" as if it meant "all alternatives, exhaustively excluded" — is the error in Mr Barsby's approach.
23. The High Court also held that public safety "must always prevail", and that in assessing reasonable alternatives the decision-maker must consider the risk of nothing being done because the owner cannot comply with a Building Act notice.¹⁸ The Environment Court has since emphasised that this decision binds hearing commissioners, and

¹⁵*Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

¹⁶*Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [101]–[105].

¹⁷*Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878, (2014) 18 ELRNZ 295. At [71]–[79]; also reported at [2014] NZRMA 257.

¹⁸*Lambton Quay* (HC), above, at [88]–[92].

allowed an appeal from commissioners who had treated public safety as insufficient on its own to support demolition.¹⁹ Here the Dangerous and Insanitary Building Notice has been in force since November 2023. The owners cannot fund the make-safe options, and the realistic consequence of refusal is that the cordons, containers and closed footpath remain.

24. The Environment Court has likewise held that s 6(f) does not mean a heritage building is to be protected at any cost; heritage is a nationally important factor to be weighed in deciding whether the proposal promotes sustainable management.²⁰ Ms Irvine makes the same point from a heritage-practice perspective: heritage conservation "cannot always be achieved at any cost".²¹ The District Plan and Regional Policy Statement say expressly that cost is relevant.

THE CENTRAL ISSUE: HAVE REASONABLE ALTERNATIVES BEEN INVESTIGATED?

What the plan actually requires

25. The heritage policy at the heart of this case is HH-P5:

To promote the active management, in particular the adaptive re-use, of heritage buildings to: 1. Avoid serious risk to human safety. 2. Investigate and evaluate all *reasonable* means of restoration, adaption, re-use and relocation as alternatives to demolition.

26. Three features of that policy are important.

- (a) First, it is directed at *reasonable* means, not all conceivable means. The policy does not require every option to be investigated to the level of detail a peer reviewer would prefer.
- (b) Second, the alternatives it is concerned with are restoration, adaptation, re-use and relocation — ways of giving the building a future. It is not concerned with ways of holding a building in suspension.
- (c) Third, limb 1 — avoiding serious risk to human safety — sits alongside limb 2. Ms Skuse accepts demolition gives effect to HH-P5(1).²²

27. The plan then guides the decision-maker how to evaluate alternatives. HH-R10 assessment matter 8 directs consideration of:²³

The reasons for the proposed activity and reasons why alternative less adverse options for achieving the same or similar outcome have been discounted. For clarification, reasons for discounting alternative options

¹⁹ *View West Ltd v Auckland Council* [2018] NZEnvC 237 at [47] and [53]–[54].

²⁰ *New Zealand Historic Places Trust / Pouhere Taonga v Manawatu District Council* EnvC Wellington W81/04, 3 November 2004, [2005] NZRMA 431 at [15]–[17].

²¹ Brief of evidence of Susan Irvine, 31 August 2026.

²² Addendum to s 42A report at [6]–[8], [66]–[68].

²³ Invercargill City District Plan, HH-R10, assessment matter 8.

can include amongst other matters financial cost, natural hazards, safety and technical feasibility.

28. That is an unusually explicit statement. The plan does not merely tolerate cost as a consideration; it anticipates that an owner may legitimately discount a less-adverse option because it is too expensive. Policy HH.2 of the Regional Policy Statement is to the same effect: on a case-by-case basis, take into account "the significance of heritage values, financial cost and technical feasibility".²⁴
29. Assessment matter 12 then addresses the level of professional advice required: it should include a thorough analysis of alternatives and "should be proportional to the scale and intensity of the effects".²⁵ The applicant accepts that the effects here are significant and that substantial advice was therefore required. It has been provided.

The applicant has done everything she reasonably can

30. Ms Lee's evidence, with its detailed chronology, establishes the following.²⁶
- (a) **Fourteen years of active stewardship before the fire.** The partnership bought the building in October 2009. The owners painted the exterior on purchase, repaired the roof and plumbing after the 2010 snowstorm (over \$25,000), commissioned a seismic assessment in 2020 part-funded by the ICC Heritage Fund, and restored the verandah with a Council heritage grant matched dollar-for-dollar from their own funds. They kept the building tenanted through difficult retail conditions with rent-free periods, funded fit-outs and reduced rents, and ran monthly markets in the arcade.²⁷ These are not owners who let a heritage building decay.
 - (b) **An immediate, cooperative response to the fire.** The fire was accidental — Ms Irvine records that the building's condition is the result of an accidental fire, not any action of the owners.²⁸ Ms Lee responded the same day, agreed to fund the FENZ-requested engineer, flew to Invercargill for a meeting with Council, insurers, engineer and demolition contractor on 13 September 2023, and complied with every requirement of the Dangerous and Insanitary Building Notice: occupation ceased, the roof was made safe and the windows boarded, the façade was monitored, and containers, ramps and fencing were installed and maintained at the owners' cost. Council staff acknowledged her proactive response.²⁹
 - (c) **Expert advice, tested rather than assumed.** Kensington Consulting's first assessment (September 2023) concluded that demolition was the most

²⁴Southland Regional Policy Statement 2017, Policy HH.2, set out in the s 42A report at section 10.

²⁵Invercargill City District Plan, HH-R10, assessment matter 12.

²⁶Brief of evidence of Linda Lee, 31 August 2026 (executed 14 October 2026).

²⁷Brief of evidence of Linda Lee, 31 August 2026 (executed 14 October 2026).

²⁸Brief of evidence of Susan Irvine, 31 August 2026.

²⁹Brief of evidence of Linda Lee, 31 August 2026 (executed 14 October 2026).

practical and cost-effective course unless substantial finance was available. Rather than act on that, Ms Lee obtained a second engineering opinion from Lewis Bradford on Ms Irvine's suggestion, costings from Rhodes + Associates, a full heritage impact assessment and, when the s 42A report and Mr Barsby identified a gap, the further make-safe options and costings now before the Commissioner.³⁰

- (d) **Every funding source pursued.** The Lottery Grants Board does not fund private owners. The Southland Heritage and Preservation Fund was being wound up with \$20,000–\$30,000 available. The National Heritage Preservation Incentive Fund declined Ms Lee's August 2024 application;³¹ HNZPT's submission records that this was because the building was listed for sale.³² The owners were therefore caught in a bind: they could not fund retention themselves, which is why they were selling; and because they were selling, the one heritage fund available to them was closed. In any event, that fund typically contributes up to \$100,000–\$150,000 — a fraction of any retention option.
- (e) **A buyer sought for nearly three years.** Bayleys has marketed the property nationally since January 2024 under a sole agency signed in December 2023. Ms Lee also approached local investors and developers directly. There have been no written offers. The only tangible interest is from a neighbour wanting a cleared site for car parking, at \$250,000–\$300,000.³³ No one has come forward to restore the building.
- (f) **No means to fund retention.** The partnership is two private individuals, with no corporate or institutional backing. Ms Lee is 66 and retired; her evidence is that no bank will lend multi-million-dollar commercial debt to a borrower of her age against a façade-retention project that produces no income. The building was insured on an indemnity basis only (replacement cover having become unobtainable after the Canterbury earthquakes); the insurer assessed it as a total loss with a net negative value. The building has earned no rent since the fire, and the owners continue to meet rates, mortgage and site costs from their own funds.³⁴

31. The costed options, updated in 2026, are:³⁵

- (a) repair and redevelopment behind one or both retained façades, or a new building with replica façades (Options 1–3): approximately **\$7.0 million to \$10.7 million**;

³⁰Brief of evidence of Linda Lee, 31 August 2026 (executed 14 October 2026).

³¹Brief of evidence of Linda Lee, 31 August 2026 (executed 14 October 2026).

³²HNZPT submission, 8 October 2025, at [22].

³³Brief of evidence of Linda Lee, 31 August 2026 (executed 14 October 2026).

³⁴Brief of evidence of Linda Lee, 31 August 2026 (executed 14 October 2026).

³⁵Brief of evidence of Linda Lee, 31 August 2026 (executed 14 October 2026).

- (b) retaining and temporarily stabilising one or both façades with nothing usable behind them (Options 4–7): approximately **\$2.28 million to \$4.80 million**, including ten years' monitoring and maintenance.
32. Ms Irvine — the heritage witness, who does not support demolition — has reviewed the investigations and concludes that "the applicant has undertaken a thorough investigation of the realistic options available", noting that the owners did not acquire the building to demolish it for gain and that, after the fire, they explored alternatives including sale to a party willing to restore it.³⁶
33. The contrast with cases where demolition or delisting has been refused is useful. In *Redmond Retail*, the Environment Court found that the owner had bought a building already the subject of a demolition application, focused on the site rather than the building, had not obtained advice on costs, and had apparently not pursued available heritage grants.³⁷ Every one of those features is absent here. These owners did not choose this predicament; a fire imposed it on them, and their first response was to explore retention.
34. Nor is this a case of an owner with the means to repair simply declining to do so. On remission in *Lambton Quay Properties*, the Environment Court again refused consent, regarding the owner's failure to repair as the unreasonable position. But its facts were the reverse of these. The Harcourts Building was sound and watertight; it could be strengthened to 100% of the new building standard for around \$12 million, after which it would be worth \$18–20 million and could be tenanted; and its owner was a substantial investor who also owned the adjoining tower. The Court treated repair as a reasonable alternative because it would "give the existing building a value and enable it to be tenanted". Options 6 and 7 in this case do neither.³⁸
35. The reasonableness of an owner's position must be judged against what that owner can actually do. Consistently with that, the Environment Court has held that the RMA does not place an obligation on owners of heritage buildings to undertake an unspecified level of maintenance, and that health and safety may carry significant weight;³⁹ and that heritage values were not so strong as to outweigh the imposition of the costs of strengthening and refurbishment on an owner who saw no viable alternative use.⁴⁰ An expectation that an owner fund works it cannot fund is not a reasonable alternative; it is a different outcome dressed as one.

³⁶Brief of evidence of Susan Irvine, 31 August 2026.

³⁷*Redmond Retail Ltd v Ashburton District Council* [2020] NZEnvC 78 at [73]–[75], [91]. That was a s 85 plan-change application, not a resource consent; it is relied on only for its factual contrast, not for any test.

³⁸*Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZEnvC 229 at [140], (the decision on remission, in which consent was again refused). See also at [78]–[86], [124], [129] and [138].

³⁹*New Zealand Historic Places Trust / Pouhere Taonga v Christchurch City Council ENC Christchurch C173/2001*, 9 October 2001. Referred to in *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZEnvC 229 at [122] (citing [99]–[101]) as a case in which demolition consent was granted on health and safety grounds.

⁴⁰*Hamilton East Community Trust v Hamilton City Council* [2014] NZEnvC 220, (2014) 18 ELRNZ 189.

36. The closest authority on its facts is *Manawatu*.⁴¹ The Environment Court upheld consent to demolish an intact Edwardian building with category B heritage status. The building was untenable and uninsurable for replacement value; the heritage funding available would go nowhere near the cost of restoration; and for its retiring owners the building had become a "fiscal millstone" — a prospect the Court said the community should not "lightly thrust upon them". The Court held that it would not promote sustainable management to impose on the owners the cost of preserving the building "as a form of museum exhibit", nor to refuse consent and so condemn it to slow deterioration until it had to be demolished as a safety risk. Recording the building before demolition was accepted as mitigation, albeit faint.
37. Every element of that reasoning applies here, with greater force. The Briscoes Building is not intact but gutted by fire, and Ms Lee is 66, retired, and without access to borrowing.
38. Opposers of consent being granted may point to *Taggart Earthmoving*, where the Environment Court refused an emergency authority to demolish a Christchurch heritage building and gave little weight to the owners' decision not to restore it.⁴² That case turned on facts absent here. The owners there had received an insurance payout of \$5.675 million, had not applied for grants for which they were likely eligible, and had not revisited their decision when lower restoration estimates emerged. These owners were insured for indemnity only and the insurer assessed the building as having a net negative value; they applied for every grant open to them; and they re-costed every option in 2026 in response to the peer review.

RESPONSE TO MR BARSBY

Options 6 and 7 are not alternatives to demolition

39. Mr Barsby's principal concern is that lightweight propping of the façades against wind loading, to lift the Dangerous and Insanitary Building notice, has not been costed in enough detail, and that it "could potentially be seen as a reasonable cost for the owner to incur".⁴³
40. The difficulty with that proposition is what Options 6 and 7 actually are. Mr Lane is clear that they are designed only to the level of structural performance needed to remove the notice; they are based on a five-year design life and wind loading only; and if they need to stay in place beyond five years they must be re-assessed and potentially upgraded.⁴⁴ Mr Barsby does not challenge that engineering evidence; he describes Mr Lane's work as a good examination of the options.

⁴¹ *Manawatu*, above, at [20], [26]–[27] and [31]–[34].

⁴² *Taggart Earthmoving Ltd v Heritage New Zealand Pouhere Taonga* [2016] NZRMA 439 (EnvC) at [129]–[132] and [170]. That case concerned an emergency archaeological authority under the Historic Places Act 1993 and the Canterbury Earthquake Recovery Act 2011, not a resource consent.

⁴³ Brief of evidence of Andrew Barsby, 18 September 2026, at [17], [23]–[24].

⁴⁴ Summary of evidence of Robert Lane, 12 October 2026, at [7]–[8].

41. Mr Lane adds two points that Mr Barsby's criticism of the costings does not engage with. First, the schemes are designed to the *lowest* threshold that could lift the notice — wind only, "normal circumstances" — and a building contractor may not accept that threshold for its own workers' safety; Mr Lane's recent façade-retention schemes (including those in Esk Street) were designed for both wind and earthquake loading.⁴⁵ The costed figures are therefore a floor, not a ceiling. Second, Mr Lane's view is that further engineering input would not substantially change the nature of the works.⁴⁶ There is no basis for assuming that more detailed costing would produce materially lower numbers.
42. It follows that Options 6 and 7 do not restore, adapt, re-use or relocate the building. They produce braced façades with nothing behind them (or, in Option 6, a weatherproofed shell) and no use. Ms Irvine accepts as much: propping the façades "would not, in itself, return the building to a viable commercial use or generate income towards its restoration".⁴⁷ At the end of the propping period the owners — or a purchaser — would face exactly the choice they face now: fund a \$7–11 million retention scheme, or demolish. Options 6 and 7 themselves would cost about \$2.97 million and \$2.28 million respectively over ten years. Propping is a holding measure. It is not one of the alternatives HH-P5(2) is directed at.
43. That is not to say Options 6 and 7 are irrelevant. They were properly investigated precisely because Mr Barsby and the original s 42A report asked for them, and the applicant was right to do so. But having investigated them, the applicant is entitled to discount them under assessment matter 8 because (a) they cost money the owners do not have, and (b) they do not achieve "the same or similar outcome" in any lasting sense.

The costings

44. Mr Barsby criticised the single-line presentation of Options 6 and 7, identified discrepancies in the tables and considered the figures surprisingly high. Mr Griffiths has responded in his supplementary evidence:⁴⁸
 - (a) the elemental estimates underlying Options 6 and 7 are now produced at Appendix 1 to his supplementary brief, showing the level of detail behind the summary figures;
 - (b) the discrepancies were presentational errors in the tables (a mis-stated 12% rather than 4% allowance and a mis-copied rate) — the totals were correctly calculated and do not change;

⁴⁵Brief of evidence of Robert Lane, 31 August 2026.

⁴⁶Brief of evidence of Robert Lane, 31 August 2026.

⁴⁷Brief of evidence of Susan Irvine, 31 August 2026.

⁴⁸Supplementary brief of evidence of Phillip Griffiths, 14 October 2026, responding to Mr Barsby at [37]–[44], and Appendix 1.

- (c) the estimates are informed by Harley Chambers and cross-checked against Invercargill comparators (Invercargill Central, Coxhead House and the Southland Times building);
 - (d) the higher cost of selective demolition over machine demolition reflects the need for external propping, mould remediation and careful staged demolition so that workers can safely install the internal façade propping.
45. Mr Barsby's Dunedin comparators (the Town Hall and Cargill's Castle) are offered without the scope, condition, procurement or programme information that would allow anyone to test them,⁴⁹ and neither involved a façade left free-standing after a fire. They are anecdote, not evidence that the Briscoes estimates are wrong.
46. More fundamentally, Ms Skuse has addressed the point directly: even if the costs were lower than presented, the question becomes "less about the precise quantum of cost and more about whether it is reasonable to require the applicant to pursue retention given the building's condition, the risks involved, and the absence of a feasible pathway to reuse".⁵⁰ Counsel adopts that. If Option 7 cost half what Mr Griffiths estimates, it would still be a large outlay on a temporary measure, by owners who cannot fund it, toward an end-state they also cannot fund.

The standard Mr Barsby applies

47. Mr Barsby says that, cost being the primary justification, the level of professional advice should be commensurate with the major adverse effect of demolition.⁵¹ The applicant agrees, and that is what assessment matter 12 says. But commensurate does not mean unending. Each round of advice has been provided in response to the last round of peer review. If the standard is that a further, more detailed costing can always be requested, no owner can ever meet it. That is the "exhaustively and convincingly exclude" standard the High Court rejected in *Lambton Quay Properties*.⁵² The plan's test is reasonableness and proportionality, and on that test the applicant has done enough. The reporting planner — who must weigh Mr Barsby's evidence with everything else — has reached the same view.

HNZPT's position

48. Mr Barsby suggests HNZPT's original relief — retention of the façades — "still stands".⁵³ With respect, that is not a fair reading of the 3 June 2026 email. HNZPT there reviewed its position in light of new information, accepted that demolition may now be the last resort, and identified the relief it sought as the conditions recommended in the NZHP addendum (recording, management plans, salvage and reuse, future

⁴⁹Supplementary brief of evidence of Phillip Griffiths, 14 October 2026, responding to Mr Barsby at [37]–[44], and Appendix 1.

⁵⁰Addendum to s 42A report at [6]–[8], [66]–[68].

⁵¹Brief of evidence of Andrew Barsby, 18 September 2026, at [17], [23]–[24].

⁵²*Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878, (2014) 18 ELRNZ 295. At [71]–[79]; also reported at [2014] NZRMA 257.

⁵³Barsby at [57]–[59].

design considerations, public interpretation and archaeological protection).⁵⁴ It did not ask that façade retention be imposed, and it withdrew its wish to be heard. Ms McMillan's supplementary evidence clarifies this.⁵⁵

Design of a replacement building

49. Mr Barsby's design concerns have largely been accommodated. The concept design has been withdrawn as a benchmark. The applicant accepts that the Invercargill City Centre Heritage Guidelines 2025 should anchor future design, consistent with HH-R10 assessment matter 5. The certification process in the draft conditions requires assessment by an independent suitably qualified heritage architect, approved by Council, and then review by Council's Heritage Advisor — two heritage professionals, not one.
50. Mr Barsby's preferred alternative — a design review committee — has no existing institutional home in Invercargill, no identified membership, cost or decision rules, and could not be made the subject of a certain condition. Mr Barsby himself acknowledges its practical difficulties.⁵⁶ The applicant submits the two-stage certification is a proportionate response and that a committee would add cost and uncertainty to the very redevelopment the Business 1 provisions seek to encourage.
51. Mr Barsby also asks, rhetorically, whether it is fair to pass the cost of quality design to a purchaser. The answer is that the Business 1 provisions already require every new building on a CBD corner within a heritage area to be well designed; the covenant does not create that cost, it secures the outcome.

EFFECTS

Heritage effects

52. The applicant accepts that demolition will result in the complete loss of the building's heritage fabric and a significant, more than minor adverse effect on the Dee Street Historic Area. The heritage witnesses differ on whether the effect on the Historic Area is "moderate" (Ms Irvine) or "major" (Mr Barsby); that difference does not need to be resolved, because the applicant does not seek consent on the basis that effects are minor.
53. Two contextual points are, however, relevant to how that effect is weighed.
 - (a) The building is not intact. The fire destroyed the interior and roof and compromised the masonry. Mr Lane's evidence is that the original lime mortar is likely to have lost strength where exposed to high temperatures. What remains is a fire-damaged shell behind façades.
 - (b) The relevant comparison is not between demolition and a restored building. It is between demolition and what will otherwise happen. Every heritage witness

⁵⁴NZHP Addendum to HIA (May 2026), as quoted in the s 42A report at p 10; HNZPT email of 3 June 2026.

⁵⁵Supplementary statement of Christine McMillan, 15 October 2026, under "Heritage NZ Pouhere Taonga".

⁵⁶Brief of evidence of Andrew Barsby, 18 September 2026, at [17], [23]–[24].

accepts the building is deteriorating. The NZHP addendum records that continued deterioration will increase both the complexity and the cost of any future remediation, and HNZPT acknowledges that if the building's future remains unresolved, "continued deterioration and ultimate loss is likely".⁵⁷ The applicant does not say deterioration justifies demolition — Ms Irvine and Ms Skuse are right that poor condition does not diminish heritage value. The point is narrower: refusing consent would not secure protection either. It would leave a deteriorating shell, a cordoned street, and owners without the means to change either.

Mitigation and offsetting

54. The applicant offers, and Ms Skuse recommends, a comprehensive mitigation package: building recording to HNZPT Level II (exterior) and Level III (interior, from existing records); demolition, vibration, temporary protection and archaeological management plans with HNZPT input; salvage and reuse of significant fabric; a permanent interpretation panel; interpretation and salvaged materials in any replacement building; a vacant site management plan; and a covenant under s 108(2)(d), registered on the title before demolition starts, binding all successors to the design and certification conditions.⁵⁸
55. The covenant is the key element. It addresses the reason the original s 42A recommended decline — no certainty about what replaces the building — by ensuring that, whoever builds on the site, the design will be assessed against the Heritage Guidelines and certified by heritage professionals before a building consent can be lodged. Ms Skuse describes it as "a robust and enforceable framework" materially stronger than what was before Council at the time of her original report.⁵⁹ Those measures fall to be considered under s 104(1)(ab) as well as s 104(1)(a).
56. In some earlier cases the concern about a vacant site has been met by a condition that demolition not proceed until consent for a replacement building has been obtained.⁶⁰ That mechanism is not available to an owner whose only realistic course is to sell the cleared site, and imposing it would be refusal by another name. The covenant and vacant site management plan are the proportionate equivalent: they bind whoever builds, and they manage the interval.

Positive effects

57. The positive effects are real and immediate: removing a dangerous and now unsightly structure from a central-city corner; reopening the Dee Street footpath, pedestrian crossing and kerbside parking that have been obstructed since 2023; restoring accessible passage for people with mobility restrictions; and enabling redevelopment of a prominent corner site that the Business 1 provisions identify for active use. The

⁵⁷NZHP Addendum to HIA (May 2026), as quoted in the s 42A report at p 10; HNZPT email of 3 June 2026.

⁵⁸Resource Management Act 1991, s 108(2)(d) and s 109.

⁵⁹Addendum to s 42A report at [6]–[8], [66]–[68].

⁶⁰*A A McFarlane Family Trust v Christchurch City Council* ENC Christchurch C46/99, [1999] NZRMA 365.

original s 42A report accepted the safety and access benefits; the addendum now recognises the redevelopment benefit as well.

Precedent and plan integrity

58. The original s 42A report expressed concern that granting consent "solely because of adverse safety effects" would set a precedent for the district's 180 listed heritage items.⁶¹ The addendum does not repeat that concern. This application does not rest on safety alone. It rests on a combination of circumstances that is genuinely unusual: an accidental fire; a Building Act notice; near-total loss of the interior; three years of documented investigation, marketing and funding attempts; seven costed options; an owner without the means to fund retention; HNZPT's acceptance; and a registered covenant securing the redevelopment outcome. An owner who neglects a heritage building, or who simply prefers to redevelop, will not be able to point to this decision. In *View West*, the Environment Court described its case as "one of those rare cases" where demolition of a scheduled heritage building was appropriate, the significant factors being a building that had been dangerous for six years and no neglect by its owner.⁶² The same is true here.

OBJECTIVES AND POLICIES

59. I do not repeat the detailed analysis in the planning evidence, but highlight the following.
- (a) The heritage provisions are not all one way. HH-P5(1) (safety) is met. HH-P5(2) is met on a proper reading of "reasonable". HH-P3 (avoid, remedy *or mitigate*) is engaged and addressed by the mitigation package. HH-P8 (collaboration) is met by the owners' engagement with HNZPT and Council throughout. Ms Skuse accepts that HH-P4 and HH-P6 remain in tension, but that the covenant offers a defensible approach to integration.⁶³
 - (b) The Business 1 provisions point toward consent. BUS1Z-P14 requires buildings in the CBD to be "sound, well-maintained and tidy in appearance" — this building cannot be. BUS1Z-P15(1) encourages owners to *consider* restoration and adaptive re-use in preference to demolition — they have; P15(2) and (3) then provide for management of the cleared site and encourage its prompt redevelopment, which the vacant site management plan and covenant secure. BUS1Z-P16(3) requires corner buildings to address the corner, which the design condition requires.
 - (c) Ms Skuse correctly identifies that the Business 1 zone requires a balance between heritage protection (BUS1Z-O4, P22) and the primacy, viability and revitalisation of the CBD (BUS1Z-O1, O3, O5). Where a heritage building is no longer capable of contributing to those outcomes and all reasonable

⁶¹s 42A report, section 12.1.

⁶² *View West*, above, at [135]–[136]. The activity there was discretionary, not non-complying.

⁶³Addendum to s 42A report at [6]–[8], [66]–[68].

alternatives have been investigated, she considers the broader Business 1 objectives carry significant weight.⁶⁴ Counsel respectfully agrees.

- (d) Regional Policy Statement Policy HH.2 expressly makes financial cost and technical feasibility relevant on a case-by-case basis. Ms McMillan also identifies the urban chapter of the RPS, omitted from the original s 42A assessment, as supporting city-centre revitalisation.

CONDITIONS

60. The applicant accepts the conditions in Appendix A to the s 42A addendum in principle, including the vacant site management plan, contaminated land conditions and covenant. There are some drafting points to be resolved before the conditions are imposed:

- (a) **Condition 1** ties the consent to the application "generally". The AEE describes the concept design and a rebuild in places. Now that the concept design is withdrawn, condition 1 should specify the application documents relied on and expressly exclude the BI Architects concept plans, so that a future owner is not argued to be bound to (or entitled to rely on) them through condition 1.
- (b) **Condition 28 and condition 29 do not quite align.** Condition 28 (as it appears in Appendix A) requires a replacement building to be in general accordance with the Heritage Guidelines and the Business 1 policies, and to provide an expressed corner treatment. Condition 29 requires the heritage architect to confirm the design achieves "the design parameters in condition 28" — but condition 28 contains no parameters beyond the corner treatment. I think this has arisen as a result of amendments to conditions proposed by the applicant, that have since been amended. A minor amendment to the last sentence of condition 29 would fix this - "The detailed design must be accompanied by an assessment by a suitably qualified heritage architect confirming that the detailed design ~~achieved the design parameters~~ is consistent with condition 28 above.
- (c) **Cross-references.** Condition 30 refers to salvage "under condition 33"; condition 32 (the covenant) refers to conditions 28–31; the soil contamination conditions carry duplicated numbering (35/31, 37/32, 38/33) and an orphaned condition 36 and 39. These need renumbering and checking.
- (d) **Condition 27 and condition 31** overlap. Condition 27 ("contributes positively to the streetscape") is aspirational and uncertain; its content is better delivered through the vacant site management plan in condition 31. Condition 27 can be deleted.

⁶⁴Addendum to s 42A report at [6]–[8], [66]–[68].

- (e) **Salvage and recording (conditions 2, 4 and 33).** The salvage list in condition 33 includes interior items (pressed tin ceilings, Spey Street staircase, leadlight windows) in parts of the building that cannot currently be entered safely under the Dangerous and Insanitary Building notice. The Note to Commissioner on condition 2 recognises this. The conditions should make clear that salvage of interior fabric is required only so far as it can be safely accessed during demolition, as determined by the demolition contractor's engineer. The Environment Court took the same approach in *View West*, conditioning salvage so far as it could be achieved safely under an engineer's supervision.⁶⁵
- (f) **The covenant (condition 32).** The applicant promoted this and accepts it must be registered before demolition. It should be expressed to cease to apply once a replacement building has been certified under condition 29 and the interpretation requirements in condition 30 met, so that the title is not encumbered indefinitely.
- (g) **The Archaeological Authority** advice note should be retained. The site is pre-1900 and an authority under the Heritage New Zealand Pouhere Taonga Act 2014 is required in any event.

PART 2

1. If the Commissioner considers it necessary to refer to Part 2, it does not lead to a different result.⁶⁶ The building's protection is a matter of national importance under s 6(f), but protection is from *inappropriate* development. Demolition is not inappropriate where the building is fire-ruined, every reasonable means of retaining it has been explored and found beyond reach, its loss is otherwise inevitable through decay, and the loss is mitigated and the site's future secured by enforceable conditions. Granting consent enables people and the community to provide for their health and safety (removing a dangerous building) and their economic and social wellbeing (releasing a central-city corner for redevelopment), and is an efficient use of the land (s 7(b)) that, under the conditions, maintains and enhances amenity values (s 7(c)).

CONCLUSION

2. Heritage protection depends on owners being able to look after their buildings. When a fire takes that ability away, the District Plan does not require an owner to keep spending money it does not have on ever more detailed investigations of measures that would only delay the inevitable. It requires the owner to investigate and evaluate all reasonable alternatives, with professional advice proportionate to the loss, and allows those alternatives to be discounted for reasons of cost, safety and feasibility. That is precisely what these owners have done.

⁶⁵ *View West*, above, at [126], [137] and [140].

⁶⁶ Part 2 of the RMA, ss 5, 6(f) and 7(b) and (c).

3. The applicant respectfully asks the Commissioner to grant consent, subject to the conditions in Appendix A to the s 42A addendum as amended in accordance with these submissions.

Dated 15 October 2026

A handwritten signature in black ink, appearing to read 'Clare Lenihan', written in a cursive style.

Clare Lenihan

Counsel for 104 Dee Street Partnership