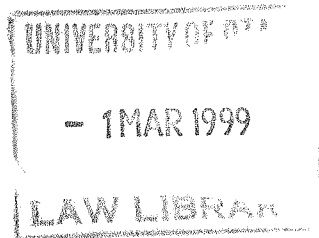


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Decision No. A 13/99

**IN THE MATTER**

of the Resource Management Act 1991

**AND**

**IN THE MATTER**

of an application under section 314 of the Act for an enforcement order

**BETWEEN**

**THOMAS LUKE DONNELLY**

(ENF 149/98)

Applicant

**AND**

**GISBORNE DISTRICT COUNCIL**

Respondent

**BEFORE THE ENVIRONMENT COURT**

Environment Judge R G Whiting sitting alone pursuant to section 279 of the Act

**HEARING** at GISBORNE on 25, 26 & 27 January 1999

**APPEARANCES**

Mr N Weatherhead for the applicant

Mr G R Webb for the respondent

Ms C Heather for the New Zealand Historic Places Trust/Pouhere Taonga

appearing pursuant to section 274 of the Resource Management Act 1991

**DECISION**

**Introduction**

1. In these proceedings Mr Thomas Luke Donnelly a self-employed businessman and resident of Gisborne City ("the applicant") seeks an enforcement order under section 316 of the Resource Management Act 1991 ("the Act"). The order sought is an order prohibiting the Gisborne District Council ("the council") from commencing to demolish the building known as the Peel Street toilets. The Peel Street toilets are located in a prominent position in the centre of Peel Street, a short distance east of the intersection of Peel Street with Gladstone Road. They are situated in the Central Business District ("CBD") of Gisborne City.

2. The grounds advanced by the applicant in support of the enforcement order sought is that demolition of the Peel Street toilets should be prohibited because *"such activity is or is likely to be offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment"* (section 314(1)(a)(ii)).
3. It is common ground that the council's proposed demolition of the building is not an activity constrained by the district plan governing the city. In other words, the plan affords no special protection to the building, such that the applicant is able to seek an order by reference to that part of section 314(1)(a)(i) which speaks of contravention of a rule in a plan or proposed plan.
4. The New Zealand Historic Places Trust/Pouhere Taonga appeared pursuant to the provisions of section 274 of the Act as a body representing some relevant aspect of the public interest, in this case, historic places.

#### Background

5. The factual background to these proceedings is not in dispute. The toilets were constructed in 1921 to a design by the then Borough Engineer, Mr J A McDonald. The architecture of the toilets has been categorised as being "stripped classical" with the underlying style being "Edwardian". According to Mr G R Nicoll a registered architect practising in Gisborne who gave evidence on behalf of the applicant:-

*"The Edwardian-classical style was one 'imported' from England and while eclectic, it was a heavily ornamental style. In particular the tendency to include heavily decorated parapets and pediments worked up from brick walls/columns and solid plaster mouldings have in our earthquake-prone country acted against the style. Consequently the buildings have been overtime progressively stripped of any potential dangerous (through falling of) decoration, hence the term stripped.*

*However, the style still pervades through on the many facades still facing Gisborne's Central Business Area".*

6. The toilets were originally designed with two venting domes, hence the toilets were commonly known as the Taj Mahal. The ventings were removed in or about 1967. Windows to the north and west which were also part of the original design were removed in or about 1972.

7. The Peel Street toilets has served Gisborne's Central Business District for over 70 years. During this period the internal make-up of the toilet block has undergone only minor changes and no major refurbishment has taken place since November 1972 when the interior workings of the toilet block were upgraded and additional plumbing and timber lining works carried out.
8. According to Mr J C N Blackburne, a Gisborne architect and currently chairman of the Gisborne Branch committee of the New Zealand Historic Places Trust the Peel Street toilets are the last known building in New Zealand designed by Mr J A McDonald, who he says was a world recognised engineer.
9. Mr McDonald was born in London on 10 January 1956 and died at Gisborne in 1930. According to his obituary published in the Gisborne Times on 5 June 1930 Mr McDonald studied civil engineering at Kings College, London. Before coming to Gisborne he worked as an engineer in New South Wales, West Australia and Johannesburg. He was Gisborne harbour and port engineer from 1912 to 1917 and Gisborne Borough engineer from 1918 to 1924. He was the designer of the Gisborne Peel Street and Gladstone Road bridges which are all registered as Category 2 structures by the New Zealand Historic Places Trust.
10. According to the witnesses he was a person who made a significant contribution to the transport infrastructure of the growing Gisborne City from 1912 to 1924. His historical contribution to the City of Gisborne was made even more notorious by the fact that he died of his own hand in 1930.
11. As I have previously said the Peel Street toilets are situated in the CBD of Gisborne City. For a number of years the council has been considering proposals to upgrade the CBD. In 1994 the council resolved to establish a design team to work towards development of a revitalisation plan.
12. In March 1995 the council's design team presented concept plans to the council for the Central Business District. These plans included the demolition of the Peel Street toilets. After extensive consultation the council approved the plans. Work was divided into several stages to minimise disruption and to spread payments. Work in the vicinity of the toilets commenced in 1998 and further stages in Peel Street are programmed in March and May of this year. The work includes widening and re-paving the footpaths, new

stormwater mains, raised pedestrian crossings, removal of existing trees and planting of new ones, new angle parking and street furniture. The council is anxious to have the upgrade completed prior to the year 2000 celebrations.

13. A resume of events leading to the council's decision to demolish the toilets is set out in an affidavit of Mr D L Mountfort (the council's District Planner) sworn on 11 September 1998. He said:-

*"In March 1995 the design team presented an inner city project report to the Council which (inter alia) recommended that the Peel Street toilets be replaced.*

*In May 1996 the Council through its Annual Plan process budgeted \$250,000 for the construction of a new set of public toilets in Bright Street.*

*In November 1996 a report was submitted to Council's Community Development Committee on the state of the toilet block. During discussion on the report several councillors expressed disappointment that the proposal to replace the Peel Street toilets had been accomplished before the 1996/1997 summer holiday period. The committee was advised that construction of the new Bright Street toilets would begin early in 1997.*

*In October 1997 the required building consents were obtained to enable the Peel Street toilet block to be demolished. However demolition was put on hold until the new Bright Street toilets were fully operational.*

*In October 1997 a report was presented to the Council by the Manager:- Engineering and Works concerning tenders that had been received for the new Bright Street toilets and on the negotiations that had taken place with the lowest tenderer.*

*In November 1997 the contract was awarded for the construction of the new Bright Street toilets.*

*In March 1998 the new Bright Street toilets were officially opened.*

*In May 1998 a report was submitted by staff in the Environment and Planning Department of the Council concerning submissions received from the Historic Places Trust about preservation of the Peel Street toilet block and their possible use as another facility.*

*In June 1998 Council resolved to demolish the Peel Street block as part of the Central Business District upgrade and also resolved to construct another set of toilets within the Central Business District.*

*In July 1998 tenders were accepted for the final stage 3 of the Central Business District upgrade. That stage 3 included the Peel Street toilet block being demolished.*

*In August 1998 Council agreed to spend an additional \$28,000 on the new Bright Street toilets for a ladies' rest room and baby feeding facility.*

*At its August meeting the Council received a report on possible sites for another set of toilets in the Central Business District. This report was debated at length. Concern was expressed with regard to the proposed sites and in the interim demolition of the Peel Street toilet block was put on hold until the September meeting of the Council.*

*On 3 September 1998 the Council met and resolved to demolish the Peel Street toilet block and to make efforts to find another suitable site for a toilet block in the Central Business District”.*

14. In 1998 the Gisborne Branch committee of the Historic Places Trust applied to have the building placed on the National Register of Buildings and Structures of Historical and Cultural Heritage Significance. That application was declined. In so declining the New Zealand Historic Places Trust in a facsimile dated 8 September 1998 said:-

*“The architecture is of the stripped classical style but in our professional assessment the toilets have been modified to a degree which has removed most of their architectural merit. The toilets have been substantially altered with the interior having been replaced, the domes removed, and the windows filled in. As such the toilets have limited architectural merit with the loss of the interior being the most significant factor”.*

15. The letter further said:-

*“We do not feel that the Peel Street toilets are of sufficient merit to warrant any Trust action, particularly taking into account the efforts which Gisborne District Council has made to identify and protect other heritage in your city. We are mindful of the ongoing efforts of the Branch committee to have the toilets listed on the District Plan, but the failure to get Council agreement to this listing means that we fear a battle with the Council which would not serve the long term interests of heritage in Gisborne”*

16. But the letter also had this to say:-

*“In terms of historical significance the Trust is concerned that public facilities like these toilets are under-represented on the Trust’s register. However, there are some examples such as the Taj Mahal at the end of Courtenay Place, Wellington, and the Bereford Street toilets – now a restaurant – in Auckland, which have been successfully reused. Unfortunately these successful reuses are outnumbered by the growing loss of historic public facilities as part of urban rejuvenation schemes around the country. No survey of these public facilities has been undertaken, but the threat to the Peel Street toilets is a timely reminder of the ongoing loss of this often unrecognised form of heritage”.*

17. The transitional district plan (which was made operative in 1988) contains a register of buildings considered to have architectural and historic significance. This register was prepared for the council by the Gisborne branch committee of the New Zealand Historic Places Trust. The toilets were not on the register.

18. The Peel Street toilet block is not listed as a heritage item in the Central Business District Schedule of the proposed Gisborne District Combined Regional Land and District Plan (the “proposed plan”). This plan was notified in November 1997. According to Mr Mountfort as part of the work undertaken by council staff prior to notification of the proposed plan

consultants were engaged by the council to ascertain likely heritage status for buildings and units in the area. While the consultant in her initial draft recommended its inclusion it was not included. The branch committee has made a submission on the plan asking for the toilets to be placed on the register. That submission has not yet been considered by the council and it is not expected that the council will consider the submission until towards the end of 1999.

19. Two surveys have been carried out in an endeavour to gauge public opinion relating to the future of the building. The first survey was a survey carried out by a council officer and which was referred to in a report to council dated 8 June 1998. On Thursday 4 June 1998 a survey was distributed to retailers in the two major blocks which are geographically situated in relation to the Peel Street toilets. A total of 69 survey forms were distributed amongst retailers. A deadline of 4pm Monday 8 June 1998 was set for final receipt by council of all the survey forms. Out of the 69 survey forms distributed only 45% were returned from interested retailers. According to the report the following results were obtained from the survey:-
- 61% of respondents believed that the Peel Street toilet block had heritage value.
  - 97% of respondents were aware of the newly constructed Bright Street toilets.
  - 68% of respondents believed that the Peel Street toilets should be retained and fully restored.
  - 75% of retailers were not prepared to pay for restoration works through their commercial rates.
  - Only 14% of retailers thought Council should not pay for restoration and upgrading works.
  - 53% of all retailers believed that the Historic Places Trust should pay towards the restoration of the toilet block.
20. A further survey was prepared for the council by National Research Bureau Limited. An analysis of this survey was completed in January 1999. This survey which was undertaken by a professional agency was much more scientifically based. Five hundred telephone interviews were conducted amongst residents of the Gisborne District. The survey was framed on the basis of the Wards as the elected representatives are associated with a particular Ward. Interviews were conducted in all Wards using quotas for each Ward which were proportionate to the district's population as a whole. All interviews were conducted by telephone with calls being made between

4.30pm and 8.30pm on weekdays and 9.30am and 8.30pm on weekends. A random selection of addresses taken from the relevant pages of the telephone directory was used as the sample source. The survey was conducted within recognised statistical guidelines and its margin of error was plus or minus 6.2%.

21. The executive summary of the survey says:--

*"This facility is no longer up to modern standards. 62% of residents would prefer the building to be retained where it is, and the current toilet facilities modernised, while 29% of residents would prefer the building to be demolished with a modern replacement toilet facility built in another location. 5% of residents would prefer the toilets demolished and rebuilt at the same location or in the area. 2% give other preferences, 1% say they don't know, are not worried about it, and/or don't care either way, while 1% don't know or are unaware of this building.*

*With regards to the building, 43% of Gisborne District residents feel the building has historic or heritage value and would like to see it preserved for that reason, while 33% of residents think that it is dated, obsolete and a traffic hazard and would like to see it removed. 23% have no feelings either way, while 1% don't know this building/ are not aware of it.*

22. The appropriate criteria to be used as benchmarks for assessing the reliability of surveys produced to the Environment Court was considered by this Court (differently constituted - Judge Jackson and Commissioners Grigg and Burley) recently in *Shirley Primary School v Christchurch City Council*<sup>1</sup> where the Court said:-

*Evidence of a survey was called for SPS. Speaking of one class of surveys - market surveys - in a 1987 decision of the High Court, Barker J acknowledged that:*

*"It is now well-settled law within New Zealand that market survey evidence is admissible as proving a public state of mind on a specific question or as proving an external fact, namely that a designated opinion is held by the public or class of the public".*

*Judge (sic) Barker referred to the English case of Imperial Group plc v Phillip Morris Ltd in which the Court set out the requirements for the validity of survey evidence:*

1. *The interviewees must be selected so as to represent a relevant cross-section of the public;*
2. *The size must be statistically significant;*
3. *It must be conducted fairly;*
4. *All the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved;*
5. *The totality of the answers given must be disclosed and made available to the defendant;*

<sup>1</sup> Decision No. C136/98.

6. *The questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put;*
7. *The exact answers and not some abbreviated form must be recorded;*
8. *The instructions to the interviewers as to how to carry out the survey must be disclosed; and*
9. *Where the answers are coded for computer input, the coding instructions must be disclosed.*

*Justice Barker considered the above criteria a measuring stick for market survey evidence but was not prepared to say that if evidence fails to meet the criteria it is necessarily inadmissible in New Zealand. In a recent decision of Commerce Commission v Griffins Foods Ltd the Court addressed the issue of admissibility and after considering New Zealand case law held that:*

*"... providing a market research survey is undertaken objectively, and usually by a professional agency, provided such survey is scientifically based, it should, ordinarily be admissible as a basis upon which expert opinion evidence might be called".*

While the psychological and social surveys in this case were not described as "market" surveys, we consider that the same criteria are useful benchmarks for assessing the reliability (or even admissibility) of surveys produced to the Environment Court.

With respect I adopt Judge Jackson's succinct exposition.

### Applicant's Case

23. As previously noted the application is grounded on section 314(1)(a)(ii). It is the applicant's contention that the demolition of the building is likely to be offensive or objectionable to such an extent that it is likely to have an adverse effect on the environment. It was submitted by Mr Weatherhead on behalf of the applicant that the offensiveness or objectionableness that is likely to have an adverse effect on the environment is two-fold:
  1. The architectural and historical heritage of the building is such that if it was demolished this would be irretrievably lost to the Gisborne community.
  2. The loss of public amenity arising from the loss of toilet facilities in the immediate vicinity of the existing toilet block.

### Heritage Issue

24. In support of his contention that the building contained intrinsic merit from an architectural and historical point of view evidence was averred in support of the application by three experienced architects.



25. The first architect to give evidence on behalf of the applicant was Mr J C N Blackburne, architect of Gisborne and currently the chairman of the Gisborne branch committee of the New Zealand Historic Places Trust. He gave evidence not only in his own right but also on behalf of the branch committee. He told the Court that he worked for the branch committee during parts of 1991 and 1992 as a researcher and was responsible for the registration of a number of historic buildings and the compiling of information on a large number of buildings already registered but for which little information existed.
26. Mr Blackburne believed that the toilet building has heritage merit from both an architectural and historic point of view. With regard to the former he, like all the other expert witnesses, identified the architecture of the toilets as being of "stripped classical" style which is a predominant architectural style of Gisborne's CBD buildings. He pointed out that the architectural domes which were an original feature of the Peel Street toilets were removed in or around 1967 and replaced with a new fabric roofing. In addition, the original architectural glass windows which were a feature of the building were also removed in or about 1972. He was of the view that using sound building conservation techniques these items can be reinstated restoring the original exterior appearance of the toilets. He opined that whilst the removal of these decorative items detracted from the original design the architecture of the toilets is still comparative to other buildings listed as heritage items in the schedule to the proposed plan. He pointed out the toilets are located in the middle of a group of buildings that all show similar architectural styles and together form a harmonious streetscape. All of the buildings in the area he said other than the modern Westpac Bank are listed as heritage items in the proposed plan. To remove the toilets would mean the loss of a building that is an integral part of Gisborne's central business built environment he said.
27. According to Mr Blackburne the historical importance of the building stems from the fact that it is the last known building in New Zealand designed by Mr John Alexander McDonald who was a world-recognised engineer. He then referred to the various achievements of Mr McDonald and his historical association with the development of the transport infrastructure during the period of Mr McDonald's working life between 1912 and 1930. In his evidence he said:-

"In the opinion of the Gisborne Branch committee of the NZHPT it would be a tragedy if this building were demolished when it could be restored to its former grandeur, making it a working and useful part of Gisborne's heritage".

28. He also said:-

"A city's history does not reside just in its records and history books. It is found in its literature, its journalism, its photographs, its art and its architecture, and it is the architecture that is its most public face".

29. The next witness to give evidence in support of the application was Mr J Salmond who is a registered architect practising in Devonport. Mr Salmond has been in professional practice as an architect since 1972 and his practice specialises in the conservation of heritage buildings, sites and areas. He is the chairman of the New Zealand Committee of the International Council on Monuments and Sites and is a member of the Association for Preservation Technology International. He is the author of the book "*Old New Zealand Houses 1800-1940*" and a major part of the work of his practice is concerned with the restoration and adaptation of old buildings.

30. While Mr Salmond accepted that the building did not have national significance - and hence the reason for the Historic Places Trust not placing it on its register - as an architectural feature at the junction of Peel Street and Gladstone Road it has very considerable local significance. He pointed out that public facilities of this type are a decreasing phenomenon in the streets of New Zealand towns, and the Peel Street building is a particularly good example of the type. He said:-

"While it is not 'great' architecture, the building has very great 'street presence' and is well-proportioned. In my opinion, the reinstatement of altered or missing architectural features can be readily achieved using recognised building conservation principles, resulting in the recovery of the building's intrinsic architectural character".

31. Finally, Mr G R Nicoll of Gisborne, registered architect, gave evidence. He has been a registered architect in New Zealand since 1981 and has been the principal of his own practice since 1985. He was a member of the Gisborne branch committee of the New Zealand Historic Places Trust for approximately 14 years of which just over 4 years were as chairman. He is no longer on the local branch committee.

32. Mr Nicoll was of the view that the building has intrinsic architectural value. It contributed to the streetscape and its removal "*would whittle away the visual history, we as a community use to have a sense of belonging and place*".
33. He considered that with modern sympathetic materials, the exterior can be renovated to its original appearance.
34. Mr Weatherhead in his final submissions also relied on a considerable amount of other evidence in support of his contention. He referred in particular to the retail survey. He submitted that these surveys indicated that a significant proportion of the residence and retailers of Gisborne considered the building had heritage merit and that it should accordingly be retained and restored. He also pointed to the evidence of the consultants' preliminary recommendation that the building be included in the proposed plan's register.

#### Public Amenity Loss

35. Mr Donnelly in his affidavit dated 9 October 1998 expressed his belief that as a resident of Gisborne City there was a significant degree of public concern about the demolition of the toilets and that although there are new toilets in Bright Street, the Peel Street toilets are effectively in the centre of town. It was his understanding that general concern was that if they were demolished people would not necessarily go to the Bright Street toilets and that there was concern that people would not be able to relieve themselves. He said:-

*"It is my understanding that the toilets are used extensively. Their demolition and the lack of any replacement facility would create difficulties for people in the CBD who wish to relieve themselves. I believe that the problems will be particularly acute in the evening and at night time when patrons of licensed bars, cafes, etc are moving around and wish to relieve themselves. I believe that people will be forced to relieve themselves in doorways, alleyways and that is going to be very detrimental to our inner city. It is expected that significant numbers of visitors will be in Gisborne over the next two years for the Millenium celebrations. The absence of the Peel Street toilets could create real problems when visitor numbers are high".*

36. The concerns of the applicant were also echoed to some extent by Mr G R Nicoll and in a more general way by Mr J Salmond. These concerns were addressed only in general terms. On the other hand the evidence satisfies me that the council has made extensive specific inquiries and undergone consultation as to the placement of such a facility in the CBD. I am satisfied that they have and still are considering all options. Accordingly I

find that lack of public amenity is not an issue. It is the heritage value, or lack of, that is the main issue in this case.

### Council's Case

37. For the council Mr Webb inter alia submitted that on the evidence the demolition of the building would not give rise to offensive or objectionable elements. The building had little or no "architectural" or "historic" merit and there would be an insignificant loss of amenity value arising from the loss of a public facility. Even if there was any adverse effect on its environment this would be more than off-set or out-weighed by the benefits that would accrue following its demolition.

38. Mr Webb's submissions to a degree reflected the evidence of Mr Mountfort. Mr Mountfort was of the view that the building is not worthy of preservation and to support this view he pointed to the refusal of the New Zealand Historic Places Trust to place the building on its national register. After referring to the facsimile declining the request by the Gisborne Branch committee of the New Zealand Historic Places Trust dated 8 September 1998 (to which we have already made reference<sup>2</sup>). He said:-

"In my opinion the supposed heritage values of the building have been considered on a number of occasions by relevant experts and have not been upheld".

39. Mr Mountfort told us the Council objected to not demolishing the Peel Street toilets building for the following reasons:-

*"There are concerns from the Council traffic engineer as to the siting of toilet units in the middle of a busy transport area. Safety issues arise with traffic flow considerations as ingress and egress from the toilet block is straight into vehicle lanes.*

*The Peel Street proposal is that the toilet block, street centred angle parking and the trees will be removed. The existing footpath will be widened and angle parking installed. This means that the existing vehicular carriage way will be slightly narrower but there will be more parking spaces available and greater consideration given to pedestrian traffic. Tenders have been let for the stage 3 development and it is anticipated that initial work on stormwater drains in Peel Street will begin on 30 October 1998. If the work does not proceed then it will be necessary for the contractor to return alter and there will be additional re-establishment costs involved. This stage (for which tenders have been let) requires the demolition of the toilet block to provide adequate vehicle lane widths.*

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<sup>2</sup> Page 5.

*The cost to restore the Peel Street toilets is estimated at \$113,553<sup>3</sup>. The Council does not believe such expenditure is justified when there are new and adequate public conveniences located nearby.*

40. To support its contention that the building is of little heritage value the council called Mr R S Daniels a registered architect employed by Opus International Consultants Limited in Hastings. Mr Daniels graduated in 1987 and told the Court that he has an interest in the history of architecture and is active in working to preserve good examples of historic architecture. Since graduating he has been involved in several renovations or reuse projects for older buildings. He is a vice-president of the Art Deco Trust in Napier which is an incorporated society working to preserve the historic architecture of Napier and Hastings. Mr Daniels had this to say:-

"The style of the building is typical of its time, being classically derived in proportion and massing but simplified in architectural detail from a traditional classical design. The pilasters, horizontal mouldings and varying wall finishes are used to give proportion to the walls and to enliven what would otherwise be a very plain building. The domes and windows would have further enlivened the building, the domes are reminiscent of Edward Lutyens designs for New Delhi colonial buildings, but on a much more modest scale. This style is sometimes described as "stripped classical", "free style classical" or "Edwardian commercial". The Peel Street toilets are not an outstanding example of this style, but they are pleasant in design and are in keeping with many of the contemporaneous buildings nearby, and the predominant architectural style in Gisborne. In cities with a great consistency of architectural styles, such as "Art Deco Napier" I consider that even modest examples of that style should be retained as they form part of a homogenous whole. Gisborne in my opinion has a greater variety of differing architectural styles in the CBD, so it may not be so critical to preserve every last example of Edwardian building".

The location of the Peel Street toilets is unfortunate and possibly determined by economy rather than aesthetics. In my opinion the presence of the substantial toilets in the middle of the street blocks views up and down Peel Street which detracts from the vistas available, and views across the road to buildings on the far side. While the style of the toilets is compatible with the surrounding buildings, I believe that their removal would have a net benefit to the streetscape by increasing the openness of the street, and allowing the various amenities proposed for the CBD upgrade in that block to be better implemented. The function of the public toilets is one, which I would have thought better accommodated conveniently but discretely off the main streets, rather than given one of the most prominent locations smack bang in the centre of the road.

In my opinion the Peel Street toilets as they stand to day are of little architectural merit, but are not unpleasant in design. However any aesthetic loss to the city caused by their demolition would be more than compensated for by opening up views along the street, and allowing the designs for the CBD upgrade to be applied to that part of Peel Street without the significant alteration that would be required to incorporate the toilets into the upgrade.

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<sup>3</sup> The estimated cost of restoration could be as much as \$253,775 according to updated figures produced by Mr D I A Ironside whose evidence we discuss later in this decision.

41. When he was cross-examined by Mr Weatherhead, Mr Daniels opined that as the building's architectural merit was limited it was not worthy of preservation having regard to the number of buildings in Gisborne of a similar architectural style. If the percentage of remaining buildings of that style was much lower he conceded that he would be inclined generally to advocate the retention of the public toilets. When he was cross-examined on the historical significance of the building he said he was not in a position to comment because of his lack of knowledge of the history of Gisborne City.
42. Mr R A Ironside a registered architect and presently the Architectural Manager of the East Coast Office of Opus International Consultants gave evidence. Opus International Consultants won the tenders and were commissioned to design and implement the upgrading of the CBD. Mr Ironside is the principle looking after the project. He told us that the design work for the CBD project has focused on producing a pedestrian friendly environment, while maximising parking availability in the streets. This included widening footpaths, partly to allow flexibility for outdoor seating, but also to produce a sense of spaciousness for pedestrians avoiding the dominance of motor vehicles. The removal of the trees along the centre of Peel Street and the toilet block are intended to promote openness and enhance the wide streets which Gisborne has in the CBD. This in turn, he said, provides wider footpaths enabling use by cafes and other activities without impinging on pedestrian access.
43. Mr Ironside opined that the retention of the Peel Street toilets would be contrary to the objective of the design work for the CBD project in two respects. First, from a traffic safety point of view, the building being situated in the centre of the road will have people exiting and entering straight on to the carriage way. Secondly, a generally unsafe environment of the existing building outside business hours where there is possibility for people to conceal themselves.
44. In the course of cross-examination Mr Ironside accepted that in the event of the building being retained he could redesign the carriage way by eliminating a number of carparks. While there is a problem in pedestrians safely crossing the roads he felt he could nevertheless make it work. It was something he had not specifically put his mind to.

45. Mr Ironside also produced updated estimates of costs for upgrading the existing building. The estimates of costs was split into three options:

- Option 1 – this is to refurbish the exterior of the building to its original appearance including the domes and side windows. The upgrade of the interior has been estimated using more modern materials.
- Option 2 – the original toilets were not well-lit by natural light thus the extensive modifications made removing the domes. This option replaces the domes in the glazed form which is considered desirable.
- Option 3 – until the advent of the New Zealand Building Code the toilets were considered an earthquake risk and required strengthening. It is understood the building code is presently being reviewed and may be changed to require such upgrades. The option 3 price is an estimate of possible remedial work and should be added to either option 1 or 2.

46. The estimates have been prepared by a quantity surveyor employed by Opus International Consultants Limited using the elemental estimating method and the estimates are as follows:-

Summary of Upgrade Options

Preliminary budget estimates for the proposed upgrade are based on copies of the original drawings together with discussions with the Architect & Engineer based on a modern standard of fitout.

<u>OPTION</u>	<u>ESTIMATE TOTAL EXCL GST</u>
1. Building upgrade with ventilation domes as per original (Excluding structural upgrade)	\$173,150.00
2. Building upgrade with glazed ventilation domes (Excluding structural upgrade)	\$190,775.00
3. Building structural upgrade option comply with the new section 66 of the Building Act currently being reviewed	\$ 63,000.00

47. The issues of traffic safety particularly the safety to pedestrians was addressed in the evidence of Mr BJ Harrison employed as the roading professional services engineer by the council. As the Peel Street toilets are located in the centre of the Peel Street carriage way near to the Gladstone Road intersection, to gain access to the toilets patrons must cross either the north-east bound or south-west bound traffic lane in Peel Street. Mr Harrison believed that the existing situation is intrinsically unsafe even though there are no reported accidents in the area of the toilets in the Land Transport Safety Authority's database for the last 5 years. The proposal to demolish the

existing toilet block, remove the existing trees in the centre of the road, remove the central carparks between the trees, provide angle parking adjacent to the kerb on each side of the road and provide raised crossing points at the Gladstone Road/Peel Street intersection and mid block in Peel Street to slow traffic would overcome his concerns. He considered that in order to retain the building it would need to be modified to improve pedestrian safety. Further pedestrian access to the building will have to be provided resulting in three raised crossings in very close proximity to each other which he felt would cause increased inconvenience to motorists. These modifications would result in a reduction in approximately sixteen carparking spaces which he felt also to be undesirable.

#### The New Zealand Historic Places Trust Position

48. The New Zealand Historic Places Trust/Pouhere Taonga ("the trust") joined the proceedings by virtue of section 274 of the Resource Management Act 1991 as a body representing some relevant aspect of the public interest, in this case Historic Places. Ms Heather made submissions on behalf of the trust and she explained to the Court that the purpose of her submissions on behalf of the Head Office of the trust was to clarify any perceived contradiction which may arise as a result of the Gisborne branch committee of the trust supporting the retention of the Peel Street toilets while the Head Office declined to include them on its register.
49. Ms Heather then briefly outlined the statutory responsibilities of the trust which include: the trust is a body corporate created by statute, and is responsible for the administration of the Historic Places Act 1993; the purpose of the Act is "*to provide the identification, protection, preservation, and conservation of historical and cultural heritage of New Zealand*"; as part of the fulfilment of the statutory purpose the trust was required to establish and maintain a register of historic places - section 22(2).
50. Ms Heather explained that the resources available to the trust limit the extent that the trust can meet its responsibilities. As a national body, the trust must establish strategic priorities on a nationwide scale. The trust's branch committees have a smaller jurisdiction, namely the region for which they are set up. Accordingly, a failure to register a building at the request of a branch committee should not be taken as acquiesce to its demolition contrary to the wishes of a branch committee. She submitted that the Head Office of the trust



is of the view that the scale of involvement by the trust should indicate a scale of significance. The involvement of the branch committee can therefore be seen as indicating a place of some heritage value on a regional level that warrants consideration when determining the fate of that place. This case is that type of case she said.

#### Bases for Decision

51. The applicant for an enforcement order has the burden of proof. While the burden is the civil one, on the balance of probabilities, regard must be had to the seriousness of the matter at hand<sup>4</sup>.

52. As I have previously said these proceedings have been brought under section 314(1)(a)(ii) which says:

***“An enforcement order is an order made under section 319 by the Environment Court that may do any one or more of the following:***

(a) ***Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the Court, —***

(ii) ***Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment”.***

53. The four adjectives used in the section provide various degrees of effects. Mr Weatherhead relied on the adjectives “offensive” and/or “objectionable”.

54. The first point to make is that whether anything done or to be done is “offensive” or “objectionable” to the extent required in the section is a matter for “the opinion of the Court”. Such an assessment must be an objective one, judicially determined on the evidence and representative of the community as a whole. Principal Environment Court Judge Sheppard in *Minhinnick v Watercare Services Limited*<sup>5</sup> said:

***“Accordingly I apply the whole phrase (Section 322) to the circumstances, and to consider whether reasonable, ordinary persons, representative of the community at large, would find the work offensive or objectionable to such an extent as to have an adverse effect on the environment”***<sup>6</sup>.

<sup>4</sup> *Christchurch City Council v Ivory* (1994) NZRMA 442; *Marlborough District Council v New Zealand Rail Limited and Seashuttles Limited* (1995) NZRMA.

<sup>5</sup> 1997 NZRMA 289.

<sup>6</sup> *Ibid* p.310.

Judge Sheppard assumed that the reasonable, ordinary person would be informed.

55. Greg J said in *Zdrahal v Wellington City Council*<sup>7</sup>:

*"There can be no doubt that the test must be an objective one. It is not enough that a neighbour or other person within the relevant environment considers the activity or matter to be offensive and objectionable. It is not enough that the Tribunal itself might think the matter was objectionable. The test is one upon which decisions upon different regulatory regimes are apposite. In Flint v Hellaby Peach Products Ltd [1974] 1 NZLR 718, a case under the Food and Drug Act 1969 about a foreign body in food, Wilson J, at p.721, concluded that the meaning of "offensive" in that Act or in that part of the Act that was relevant, meant "disgusting", "nauseous" or "repulsive". He then went on to say at p.721:*

*"I cannot believe that Parliament intended that the guilt or innocence of the seller of food containing an extraneous thing should depend on the sensitivity of the buyer or user. The correct test, I am satisfied, is whether or not an ordinary person, neither hypersensitive or insensitive, would find the extraneous thing to be disgusting, nauseous or repulsive".*

*More recently in Ceramalus v Police (1991) 7 CRNZ 678 the question was whether the presence of a nudist at a beach in the vicinity of others behaved in an offensive or disorderly manner. Tompkins J at pp.682-683, identified, from the authorities which he had referred to, three principles as follows:*

*"First, the test is objective. So the Court must consider whether the behaviour would be regarded as offensive in the mind of a reasonable man. It is not necessary for the Court to prove that persons present found the behaviour to be offensive. It is sufficient if the Court considers it would be so regarded by persons whose views are representative of the community: Rogers {Rogers v Police (High Court, Auckland, M873/75, 6 August 1975, Wilson J) at p.2 of the unreported decision, O'Connor v Police [1972] NZLR 379 AT P.381. It includes conduct that is calculated to annoy or "... offence to other people, even if that result is not actually intended: Denis v Mertin [1943] SASR 144, Napier CJ at p.145.*

*In applying the objective test, the Court has regard to current community attitudes*<sup>8</sup>.

56. Tipping J delivering the judgment of the Court of Appeal in *Watercare Services v Minhinnick*<sup>9</sup> said:

*"The first point to make is that it is clear the assessment whether something is noxious, dangerous, offensive or objectionable is an objective one. The bona fide assertion of the person seeking an enforcement order that the matter in question is offensive or objectionable is not enough. There must be some external standard against which that assertion can be measured. Part of the difficulty arises from the conjunction of the four concepts involved. Whether something is noxious or dangerous will seldom logically depend on the identity of the person potentially suffering harm. Whether something is offensive usually involves consideration of the person or group against whom the question should be measured.*

*The more this is so when the question is whether something is objectionable. What is objectionable to one person may not be to another. Obviously the subject matter said to be offensive or objectionable will be relevant to the inquiry. It is important to note that section 314(1)(a) directs that whether something is offensive or*

<sup>7</sup> [1995] 1 NZLR 700

<sup>8</sup> Ibid p.709.

<sup>9</sup> 1998 1 NZLR 294.

*objectionable depends on "the opinion" of the Environment Court". That formation of opinion must of course be done judicially after considering all relevant evidence tendered and after a correct appraisal of all relevant matters of law ...<sup>10</sup>*

57. And again:

*"The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole"<sup>11</sup>.*

58. According to Tipping J the inquiry as to whether an activity is offensive or objectionable to the necessary extent involves four steps:

- "1. Whether the assertion of the applicant seeking the enforcement order that the subject matter is noxious, dangerous, offensive or objectionable is an assertion honestly made.*
- 2. If so, whether in the opinion of the Court the subject matter is or is likely to be noxious, dangerous, offensive or objectionable.*
- 3. If so, whether in the opinion of the Court any noxious, dangerous, offensive or objectionable aspect found to exist is of such an extent that it is likely to have an adverse effect on the environment.*
- 4. If so, whether in all the circumstances the Court's discretion should be exercised in favour of making the enforcement order sought or otherwise".*

59. The first step requires a consideration of the evidence to determine whether there is a sufficient evidential foundation upon which the applicant can genuinely found the assertion required by the section.

60. I propose to treat steps 2 and 3 compositely as whether "anything done or to be done" is "offensive" or "objectionable" within the meaning of those words as used in the context of the Act must necessarily depend on whether it has an effect on the environment.

61. It is necessary to consider what is meant by "offensive" and "objectionable" for the purpose of section 314. In the absence of any definition of the words in the Act I turn to the dictionary. The Oxford Shorter English Dictionary<sup>12</sup> defines the different shades and nuances of meaning of "offensive" as:

- "1. Of or pertaining to attack; attacking; aggressive; serving or intended for attack; having the function of or aimed at attacking an opponent.*
- 2. Hurtful, harmful, injurious.*
- 3. Causing offence; giving or liable to give offence; displeasing; annoying; insulting; disgusting, noxious.*

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<sup>10</sup> Ibid p.304

<sup>11</sup> Ibid p.305.

<sup>12</sup> 3<sup>rd</sup> Edition 1993.

The word "objectionable" is defined as:

***"Open to objection; undesirable, unpleasant, offensive, disapproved of".***

62. Given the wide range of the dictionary definitions it is necessary to define the words in the context and in the light of the purpose of the Act. Cook P (as he then was) in *McKenzie v Attorney-General*<sup>13</sup> said:

***"But in the end the issue, like most issues of statutory interpretation, is the natural and ordinary meaning of the words of the Act, read in their context and in the light of the purpose of the Act"***<sup>14</sup>.

63. The single purpose of the Act is set out in section 5. It is to promote the sustainable management of natural and physical resources. Sustainable management is defined as *"managing the use, development, and protection of natural and physical resources which enables peoples and communities"* to provide for their needs including social, economic and cultural wellbeing while inter alia:

***"Avoiding, remedying, or mitigating any adverse effects of activities on the environment " (section 5(2)(c)).***

64. The control of adverse effects is a theme that is continued on through various provisions of the Act. It is mentioned quite specifically in section 314. The extended meaning in the Act given to the words "environment", "effect", "natural and physical resources" and "amenity values" are extremely wide. When considering the effects on the environment one has to consider not only the natural and physical resources but also the people and communities. Environment, in its definition in the Act, includes people and the social, economic, aesthetic and cultural conditions which affect people. Our heritage values are clearly part of that environment. This is recognised by section 7(e) of the Act which requires the Court to have particular regard to:

***"Recognition and protection of the heritage values of sites, buildings, places, or areas".***

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<sup>13</sup> 1992 2 NZLR 14.

<sup>14</sup> Ibid p.17.

65. Section 7(e) is supplemented by the provisions of Part VIII, which enables heritage orders to be created.
66. I accordingly have no hesitation in concluding that to destroy a building which has significant heritage value or merit because of its special architectural and historical attributes could be offensive and objectionable to the community in that it is either undesirable, displeasing, annoying or open to objection and that such offence and objection could have an adverse effect on the environment contrary to the single purpose of the Act as set out in section 5.
67. The fourth step requires the Court, if having found that the proposed activity is or is likely to be offensive or objectionable to such an extent that it is likely to have an adverse effect on the environment, to consider whether in all the circumstances it should exercise its discretion in favour of making the enforcement order sought. This involves an evaluation of all the circumstances including the extent of adverse effects on the environment; the positive effects on the environment that will flow from the proposed activity; the extent of consultation; whether any steps can be taken to avoid, remedy or mitigate any adverse effects<sup>15</sup>. All relevant matters need to be weighed in exercising a judgment. I think it is important to note that Parliament has not imposed any threshold test in subparagraph (ii) about the level of adverse effects for the Court to have jurisdiction to entertain an application for an enforcement order.

#### Evaluation

68. I first need to consider whether the applicant is genuine. Mr Webb invited me to draw the inference from the evidence that the applicant was politically motivated. The applicant was a candidate for Mayor at the last Mayoral election. Mr Webb also submitted that the applicant is not personally affected and knows nothing of heritage matters. As to the first point, for me to find that the applicant was politically motivated would require me to speculate.

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<sup>15</sup> *Minhinick p.300.*

69. The evidence does no more than establish that Mr Donnelly stood for Mayor at the last elections, was soundly beaten and that he advocated the retention of the Peel Street toilets. While standing for Mayor may make him in a sense a "political person" it would be wrong for me to conclude on the evidence that politics was the spring board for this application. Even if there was some political motivation, provided the application was founded on resource management grounds the Court would be required to entertain the application.
70. As to the second point Mr Donnelly as a resident of Gisborne and a member of its community is as much affected as any other member of the community and while he may not be an expert on architectural and historical issues he called expert witnesses to address those issues. I find on the evidence that there is an evidential foundation for the application and that it is genuinely made.
71. I now turn to whether in my opinion the proposed demolition is or is likely to be "offensive" or "objectionable" to such an extent that it is likely to have an adverse effect on the environment. I am mindful that I must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole.
72. Of the four architects who gave expert evidence Mr Daniels alone opined that the building was not of sufficient architectural merit to warrant its preservation. Mr Salmond accepted the building could not be said to be of "great" architecture but considered it to be a building that has very great "street presence" and "is well proportioned". He considered it had very considerable local significance and was worthy of preservation. It has as he said been an architectural feature at the junction of Peel Street and Gladstone Road for more than 70 years. I was impressed with Mr Salmond as a witness. His evidence was complimented by his very considerable experience in conservation and heritage issues. If Mr Salmond had been the only witness for the applicant I would have been inclined to prefer his evidence to that of Mr Daniels.

73. More importantly not only was Mr Salmond's evidence supported by the evidence of Mr Nicoll and Mr Blackburne but both of these witnesses added a further dimension namely the historical significance of the building. Mr Daniels quite properly and candidly said he could not take that into account as he lacked the requisite knowledge.
74. Based on the expert evidence I am of the view that the building has significant heritage value because of its architectural and historical connections and to demolish it would have an adverse effect on the community. The issue is whether such a view would be representative of the community or to use Judge Sheppard's word in *Minhnick* the view of a reasonably ordinary person who is well informed and representative of the community at large<sup>16</sup>.
75. Mr Weatherhead in his final submissions referred me at some length and in some detail to the survey prepared for the Gisborne District Council by the National Research Bureau Limited. I have already made reference to that survey and its finding that of those polled 43% felt the building had historic or heritage value and would like to see it preserved for that reason while 33% of the residents think that it is dated obsolete and a traffic hazard and would like to see it removed. Twenty-three percent had no feelings either way. Clearly a significant proportion of the community consider the building to have sufficient heritage value to warrant its preservation. However that is not the end of the matter for as Judge Bollard said in *Otorohonga Heritage Group v Otorohonga District Council*<sup>17</sup>:

*"I am inclined to the view that it is not sufficient simply to show that what is done or to be done, is, or will be, offensive or objectionable in the minds of those comprising a significant cross section of "reasonable people" in the community, when another substantial sector of equally "reasonable people" is prepared to endorse the action or proposed action".*

The results of the survey are one of the matters which I take into account.

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<sup>16</sup> Ibid p.310.

<sup>17</sup> Decision No. A83/94.

76. Judge Bollard in *Otorohonga Heritage Group* considered that it would be artificial to separate the demolition work from the end sort to be achieved by the demolition, namely removal of what exists from the site. In other words, he considered one should take a holistic view and in doing so it is necessary to weigh the effect likely to flow from the old building's loss against the benefit likely to be derived from its demolition and in this case the plans to upgrade the CBD. In this regard I am mindful of the evidence of Mr Ironside to the effect that in his view it would be possible to alter the design of the proposed upgrade to accommodate the toilets albeit at some extra cost. I do not accept that the traffic safety feature is an issue in this case. There had been no reported accidents over the last 5 years nor has there been any anecdotal evidence of any accident having occurred to a pedestrian in the vicinity of the Peel Street toilets. Further the proposed upgrade is designed to be pedestrian friendly and is designed in such a way that it will reduce the speed of vehicles. The design itself appears to be a tool aimed at increasing the awareness of pedestrian usage and safety to the driver of the motor car.
77. In my view an informed member of the community would take a number of the matters into account. These in my view would include:
- First the toilets were designed by Mr McDonald in 1920 and Mr McDonald's historical links to the city.
  - The design is "stripped classical" with an Edwardian influence which reflects a predominant architectural style in the city.
  - While the building is not included as a heritage item in the proposed district plan the local branch committee of the Historic Places Trust have filed a submission for it to be included and that submission has yet to be heard by the Council's hearing committee.
  - The surveys carried out show that a significant number of the city's residents consider the building to have architectural merit and worthy of preservation.
  - The preservation of the building will compromise the proposed upgrade of the CBD requiring modification to that proposal resulting in less carparking spaces.
  - The presentation of the building and its continued use as a toilet facility or otherwise will have some effect on traffic safety.



78. These are matters which an ordinary reasonable person as a representative of the community at large would take into account. He or she would also take account of the fact that in the event of the building being demolished any heritage connection with the past will be irretrievably severed. Such a person must make a value judgment based on the many matters that need to be considered. Such a person would in my view be of the opinion that to demolish this building would be offensive to the extent that it would have an adverse effect on the environment.

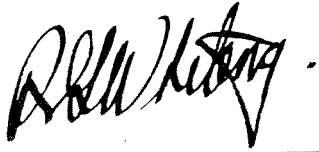
#### Discretion

79. Finally it is necessary for me to exercise my discretion and in doing so I have regard to all of the evidence that was presented and in particular those parts of the evidence to which I have made reference. Again in exercising my discretion I must look at the matter holistically. To demolish this building would mean that its heritage value as reflected in its architectural style and its historical perspective will be lost forever to the community. I take into account the fact that the proposed upgrade of the Central Business District can in the view of Mr Ironside be amended to accommodate the building. The extra cost and inconvenience and the minimal effect on traffic safety which may result do not in my view outweigh the irretrievable loss which is likely to occur in the event of the building being demolished. The benefits that might possibly accrue following its demolition do not in my judgment justify its demolition.
80. In coming to this decision I am mindful that this Court cannot direct the Council to restore the building to its former architectural state. However I am also mindful of Mr Mountfort's evidence to the effect that the Council will likely have regard to the wishes of the residents as expressed in the survey conducted by National Research Bureau Limited. Wishes which reflect the ever increasing awareness and appreciation of the need to protect and restore those remaining buildings which reflect the cultural values of our communities.

Determination

81. I accordingly make an enforcement order as sought pursuant to section 314(1)(a)(ii) of the Act prohibiting the Gisborne District Council from commencing to demolish the building known as the Peel Street toilets situated near the intersection of Peel Street and Gladstone Road Gisborne.
82. Costs are reserved.

DATED at AUCKLAND this *12<sup>th</sup>* day of *February* 1999.



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R Gordon Whiting  
Environment Judge