

IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision [2023] NZEnvC 123

IN THE MATTER

of an application under s 87G of the Resource Management Act 1991 for a direct referral of an application for resource consent for the construction of a building and associated earthworks at 110 Jervois Quay, Wellington Central

BY

MFC DEVELOPMENT LIMITED
PARTNERSHIP

(ENV-2023-WLG-002)

Applicant

Court: Environment Judge L J Semple sitting alone under s 279(1) of the Act
Hearing: In chambers at Wellington
Last Case Event: Final submissions received 2 June 2023
Date of Decision: 20 June 2023
(On the papers)
Date of Issue: 20 June 2023

DECISION OF THE ENVIRONMENT COURT

- A. The public notice issued by Wellington City Council failed to appropriately describe the location of the activity for which resource consent was sought under s 2AB of the Act, and as such, failed to meet the definition of public notification under s 2AA of the Act.



RE MFC DEVELOPMENT LIMITED PARTNERSHIP

- B. The Court is unable to grant consent under s 104(3) of the Act in circumstances where an application should have been publicly notified and was not.
- C. Leave is reserved for any party to apply for further or other orders, including as to the issue of costs.

REASONS

[1] By Memorandum dated 18 April 2023, four s 274 parties (collectively identified as the Civic Chambers apartment submitters (CCAS)) sought a preliminary determination on two matters:

- (a) The adequacy or otherwise of information regarding a wastewater storage chamber on the site to which the consent application relates; and
- (b) whether the statutory notification requirements had been satisfactorily discharged by Wellington City Council (Council).

[2] By minute dated 3 May 2023 the Court determined that the questions as to adequacy of information could be dealt with during any substantive hearing but that the concerns raised with respect to notification warranted preliminary determination.

[3] Submissions and evidence were received from Council on 10 May and 29 May 2023. CCAS lodged submissions on 23 May 2023, with a reply filed on 2 June 2023. Another s 274 party (Prime Property Group Ltd) provided short submissions supporting the position of CCAS. Similarly, short submissions were received from the applicant supporting the position put forward by the Council.



[4] For completeness, it is noted that although CCAS originally raised issues with both the direct notification and the public notification undertaken, subsequent discussions between CCAS and the Council, meant that it is only the question of public notification that remains at issue.

[5] It is common ground as between the parties including the applicant (which adopts the Council's submissions)¹ that the Court may consider the adequacy of public notice given and if found to be inadequate may require re-notification as a precondition to accepting jurisdiction to determine the consent application.²

[6] CCAS submits that the application must be re-notified because, in contravention of ss 2AA and 2AB of the Act, coupled with Form 12 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003, the Council failed to adequately describe the location of the site in the public notice. CCAS submits that this defect is such that members of the public, at best, would not have been sufficiently alerted to the location so as to be able to determine whether to make further enquiry or, at worst, would have been actively misled as to the location of the proposed development.

[7] CCAS further submits that this issue was compounded by the placement of signs on the site in areas that are less well traversed and/or visible than other locations that may have been chosen and were therefore not "conspicuous" within the provisions of reg 10A of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.

[8] The Council submits that the nominal street address used in the public notice was a legitimate address for the site and that, coupled with the clear link to all details on the website, means that members of the public were well informed as to the activity and location proposed. It submits that the signage was appropriately located but that even if it was not, the requirement for signage is discretionary in

¹ Memorandum of counsel for applicant dated 29 May 2023 at [4].

² Memorandum of counsel for the Council dated 29 May 2023 at [2].

any event, and as such even if it were not sufficiently “conspicuous” that should not impact the Court’s jurisdiction.

[9] The Council further submits that the purpose of notification is relevant and in circumstances where public notification “has been described as being for the Council to receive further information relevant to the issues for determination on the substantive application”, that “purpose will not be advanced by re-notification, since the number of issues raised is already very wide”.

[10] Section 2AA of the Act defines public notification as:

... giving public notice by—

- (a) giving notice of the application or matter in the manner required by section 2AB; and
- (b) giving that notice within the time limit specified by section 95, 169(1), or 190(1); and
- (c) serving notice of the application or matter on every prescribed person.

[11] Section 2AB of the Act sets out the manner of such notice as follows:

- (1) If this Act requires a person to give **public notice** of something, the person must:
 - (a) publish on an Internet site to which the public has free access a notice that—
 - (i) includes all the information that is required to be publicly notified; and
 - (ii) is in the prescribed form (if any); and
 - (b) publish a short summary of the notice, along with details of the Internet site where the notice can be accessed, in 1 or more newspapers circulating in the entire area likely to be affected by the matter to which the notice relates.
- (2) The notice and the short summary of the notice must be worded in a way that is clear and concise.

[12] The prescribed form is Form 12 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003. Relevant to this matter, Form 12 requires

the consent authority to (among other things) “describe ... the type, proposed activity, and location of the resource consent”.

[13] The Council’s newspaper and website notices described the site location using one address, 110 Jervois Quay.

[14] The s 274 parties say that, in this case, the requirement to “describe the location” is not met by a simple reference to the nominal street address. Conversely, Council and the applicant argue that the nominal street address is sufficient as “reference to 110 Jervois Quay, Wellington Central is clear and accurate. It is bolstered by the public notice describing the proposal as being “construction of a Central Area Building within a listed Heritage Area””.

[15] Parties noted that there was no (or limited) recent case law setting out what constitutes a satisfactory description as to location and that amendments to the relevant provisions mean that previous case law that has considered this issue (including that referenced by CCAS in its submissions³) is of limited assistance.

[16] That is important because a previous iteration of the relevant test referred to the need to describe the location “as it is commonly known”. This requirement has now been removed and as such, the Council argues that “with the improvements in technology making review of applications significantly more publicly accessible, the legislative framework has deliberately reduced the amount of information to be required in a public notice. As a corollary, it has changed from one where the Courts had to determine how to assess the quality of the content of a public notice, to one where Parliament has prescribed what a public notice must be: clear and concise”.

[17] While I accept that the legislative test has altered and the requirement to include locations as they are “commonly known” has been deleted, the operation of s 2AB of the Act in conjunction with Form 12 still requires that the location of

³ Memorandum of counsel for CCAS dated 22 May 2023 at [13].

the activity be described. As such, the Court may still consider the extent to which the description of the location is adequate. On that basis, I have sought to determine whether on this occasion reference to a singular street address constitutes a sufficient description.

[18] In considering that question, I have found it instructive to consider how the location is described in other documentation related to the application.

[19] The affidavit evidence of Mr O G Lineham referred the Court to the Council's Notification Decision Report which references the site as being "the corner of Jervois Quay and Wakefield Street and has a future nominated address of 110 Jervois Quay. It is located within the former Michael Fowler Centre (MFC) carpark and is currently the site of a temporary building occupied by the Royal New Zealand Ballet".⁴

[20] Counsel for CCAS also referenced the application and accompanying Assessment of Environmental Effects which sets out the following:

The site, with a future nominated street address of 110 Jervois Quay is located within the former Michael Fowler Centre (MFC) carpark and is currently the site of a temporary building occupied by the Royal New Zealand Ballet.⁵

[21] The reference to 110 Jervois Quay above has the following footnote added:

Currently known as 115 Wakefield Street, the nominated street address of 110 Jervois Quay has been allocated pending a future subdivision of the site from the 'parent title'.

[22] Despite the use of 110 Jervois Quay and 115 Wakefield Street, counsel for CCAS advises that the District Plan online version provides that 101 Wakefield

⁴ Section 95A-95F of the Resource Management Act 1991 Notification Decision Report at 1.

⁵ Assessment of Effects on the Environment Proposed Central Area Building Michael Fowler Centre Carpark 110 Jervois Quay at section 2.1.

Street is the correct street address.⁶

[23] The Notice of Motion under s 87G of the Act dated 28 February 2023 describes the location as follows:

The project proposed within the application involves a large development on land adjacent the Michael Fowler Centre that is currently being used for a temporary building tenanted by the Royal New Zealand Ballet and as a car park.⁷

[24] The accompanying affidavit of Ms R M C Luxford states that the “application involves the construction of a nine-level building at 110 Jervois Quay (the Michael Fowler Centre car park site) on the corner of Wakefield Street and Jervois Quay”.⁸

[25] The undated affidavit of Ms A T Jones, accompanying the submissions of counsel for the Council, describes the site as:

...a large property of 3.36ha that encompasses the entire block bounded by Wakefield Street, Harris Street and Jervois Quay... Given the size of the site and the number the buildings and activities that occupy it, the site has a number of street addresses, namely; 109 Wakefield Street, 101 Wakefield Street, 115 Wakefield Street, 121 Wakefield Street, 65 Victoria Street, 110 Jervois Quay, 111 Wakefield Street and 15 Harris Street.⁹

The part of the site subject to this application is located on the southeast corner of the site in an area that was previously occupied by a carpark that was known as the Michael Fowler Carpark. More recently, and currently, the site is occupied by a temporary building that accommodated the Royal New Zealand Ballet ... This part of the site is associated with the address of 110 Jervois Quay...¹⁰

[26] Having carefully considered the evidence before the Court, I am struck by the number of possible street addresses available to the site. In such circumstances describing the location by reference to a singular street address appears to be

⁶ Memorandum of counsel for CCAS dated 22 May 2023 at [34].

⁷ Notice of Motion under s 87G at [2(c)].

⁸ Affidavit dated 24 February 2023 at [4].

⁹ Undated affidavit at [5].

¹⁰ Undated affidavit at [6].

somewhat of a lottery.

[27] Moreover and importantly, I am struck by the consistency with which the location is otherwise described in all documents except the public notice. As set out previously, throughout the various documents related to this application, the 110 Jervois Quay address is invariably coupled with reference to the “Michael Fowler Centre carpark” and the “temporary building occupied by the Royal New Zealand ballet”.

[28] Given the range of street addresses to choose from, and the decision to choose a nominal future address for the site, the use of these additional descriptors makes sense. They are used throughout the application and associated documents to orientate the reader, to describe with some accuracy the location other than by way of a single nominal street address.

[29] I find that the same approach should properly have been taken to describing the location in the public notice. Failure to include some additional descriptor(s) given the plethora of possible options, render this a situation where reference solely to a nominal street address does not adequately describe the location in accordance with the requirements of s 2AB of the Act and Form 12 of the Regulations.

[30] Moreover, I do not find that this deficiency is remedied by reference elsewhere in the notice to “construction of a Central Area Building within a listed Heritage Area” given no further identifying information about the location of the heritage area is provided.

[31] Given that finding, I have not considered further whether popular web based mapping applications such as Apple Maps or Google Maps should be checked for consistency with a street address before that address is used in a public notice. I do note that the use of a nominal future street address is likely to cause an issue with all mapping software including that used by councils for district plan purposes. For that reason, some caution should perhaps be exercised when using

nominal future addresses without further description.

[32] In reaching this determination and deciding what orders should follow, I have given consideration to the prejudice that may arise to any party. While the Court has received no evidence on the implications of re-notification, it can safely be anticipated that there is some cost involved together with the time and cost implications of a delay. Against that I have balanced the possible prejudice to parties who may have submitted on this application but did not do so because the singular street address failed to provide a sufficient description of the location to prompt them to enquire further.

[33] In that regard, I am reminded of the High Court's observation in *Cameron v North Canterbury Hospital Board* that the issue is not one of whether the parties before the Court are prejudiced but rather whether there are parties not before the Court who are prejudiced because of the deficiency in notification.¹¹

[34] I have also had regard to the Council's submissions regarding public notification being for the purpose of informing the decision maker, such that, in this instance, re-notification will not assist given the breadth of issues already traversed in submissions and subsequent s 274 notices.

[35] In regard to both of these matters, I find the comparably more recent comments of Judge Kirkpatrick in *Re Auckland Council* to be pertinent.¹² In that decision his Honour reminded the parties that, while the Environment Court was open to a range of options to ensure appropriate public notification, it remains "concerned to ensure that the purpose of public notification, which is to enable adequate participation by persons who may be affected by a proposal, is maintained".

[36] I find in this instance that the requirements of public notification have not

¹¹ *Cameron v North Canterbury Hospital Board* (1982) 8 NZTPA 356 (HC).

¹² *Re Auckland Council* [2017] NZEnvC 207 at [23].

been met such that the purpose of public notification is maintained. I further find that in such circumstances, even if it were of a mind to, the Court would be unable to grant consent by virtue of s 104(3) of the Act.

Costs

[37] Costs are reserved. Any applications are to be made and responded to in accordance with the Court's Practice Note 2023.¹³


L J Semple
Environment Judge



¹³ Court's Practice Note 2023 at [10.7(n)].