IN THE ENVIRONMENT COURT
AT WELLINGTON

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

Decision No. [2023] NZEnvC 252

IN THE MATTER	of an appeal under s 358 of the Resource Management Act 1991
BETWEEN	WOODGATE LIMITED
	(ENV-2023-WLG-004)
	Appellant
AND	PALMERSTON NORTH CITY COUNCIL
	Respondent

Court:	Environment Judge L J Semple sitting alone under s 279 of the Act
Hearing:	27 September 2023 at Wellington
Appearances:	G Woollaston for Woodgate Ltd
	N Jessen for the Council
Last case event:	27 September 2023
Date of Decision:	21 November 2023
Date of Issue:	21 November 2023

DECISION OF THE ENVIRONMENT COURT

A. The appeal is refused. The decision of the Palmerston North City Council to return Resource Consent Application RC6923 as incomplete under s 88(3) of the Act is upheld.

B. Costs are reserved. Any application for costs is to be filed within 10 working days and any response within five working days of receipt of any application.

REASONS

Background

[1] The Appellant lodged an application for resource consent (RC6923) with the Palmerston North City Council (the Council) on 13 July 2022. That application sought subdivision and land use consents to construct, maintain and operate a retirement village at 131-153 Pacific Drive, Fitzherbert, Palmerston North City.

[2] By letter dated 9 August 2022, the Council determined the application to be incomplete under s 88(3) of the Act.

[3] The Appellant lodged a Notice of objection under s 357 of the Act on 10 August 2022 and that objection was heard by an Independent Commissioner (Commissioner Schofield) on 7 March 2023.

[4] By decision dated 5 April 2023, Commissioner Schofield dismissed the objection and upheld the original decision that the application was incomplete under s 88(3) of the Act. It is this decision which is the subject of the appeal now before the Court.

The Appeal

[5] The appeal was lodged on 28 April 2023 pursuant to s 358 of the Act and alleges that the "Commissioner misdirected himself as to the data threshold to be met under 88(3), and as to the appropriateness of aggregating minor data elements/deficiencies, each of which were amenable to being … within a s 92 request for information process, to form a view that the totality of the application was

insufficient for s 88(3) purposes".[1]

The Law

[6] Section 88 relevantly provides:

> (2) An application must—
>
> (a) be made in the prescribed form and manner; and
>
> (b) include the information relating to the activity, including an assessment of the activity's effects on the environment, that is required by Schedule 4.
>
> (c) *Repealed.*
>
> …
>
> (3) A consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not—
>
> (a) include the information prescribed by regulations; or
>
> (b) include the information required by subsection (2)(b)
>
> …
>
> (3A) The consent authority must immediately return an incomplete application to the applicant, with written reasons for the determination.

[7] Schedule 4 provides that an application must include the following matters relevant to this appeal:

- an assessment of the activity against the matters set out in Part 2;
- an assessment of the activity against any relevant provisions of a document referred to in s 104(1)(b);
- an assessment of the effects of the activity in "such detail as corresponds with the scale and significance of the effects that the activity may have on the environment" and including the information required by cl 6; and addressing the matters specified in cl 7.

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1 Opening submissions of Counsel for the Appellant at [6].

[8] Clause 6 requires, relevant to this appeal:

- an assessment of the actual or potential effect on the environment of the activity;
- if the activity includes the discharge of any contaminant, a description of—
  - the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and
  - any possible alternative methods of discharge, including discharge into any other receiving environment;
- a description of the mitigation measures (including safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect.

[9] Relevant to this matter, cl 7 provides that an assessment must address any discharge of contaminants into the environment, and options for the treatment and disposal of contaminants and any risk to the neighbourhood, wider community or the environment through natural hazards.

[10] As the High Court sets out in *Aspros v Wellington City Council*, s 88(3) provides the Council with a discretion to determine whether an application is complete, an exercise which the Court refers to as "an administrative decision to be made in light of that particular application" and which must be made bearing in mind the requirement that "the material provided under section 88(2) … should be proportionate to the potential effects of the activity".[2]

[11] Determining whether the material is proportionate to the potential effect is "to be reasonably and objectively assessed; it is not merely what an applicant considers is appropriate".[3] Moreover, "both the local authority and other persons who may be affected should be given enough information to assess for themselves the potential

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2 *Aspros v Wellington City Council* [2019] NZHC 1684, (2019) 21 ELRNZ 276 at [29] and [31].

3 *Mawhinney v Auckland Council* [2017] NZEnvC 162 at [53] (*Mawhinney*).

effects of the proposal".[4]

The Court's powers on appeal

[12] The relatively recent decision of the Court in *Country Lifestyles Ltd v Auckland Council,* traverses the scope of the Court's powers on appeal under s 358 of the Act, specifically the extent to which the Court can, and should, conduct a de novo determination of a s 88(3) decision of the Council on appeal.[5]

[13] In *Mawhinney* the Court noted that the decision making power in s 358 of the Act:[6]

> … occurs in a suite of miscellaneous provisions in Part 14 including section 357 and sections 357A to 357D RMA. These all relate to objection and appeals for various procedures. Their place in the scheme of the RMA suggests a relatively quick review for error rather than a comprehensive view of the merits (which does not make much sense in relation to a procedural error anyway).

[14] Put another way:[7]

> We consider it is likely that Parliament did not intend the Environment Court to substitute its judgment on all the procedural issues which are the subject of section 357 objections, to be subject to a full "de novo" assessment by the Environment Court. We consider the "review" type tests and an ultimate "fairness and reasonable" assessment are likely all that is required in most circumstances under section 357.

[15] "Most circumstances" does not, of course, mean all. The Court accepted in *Mawhinney* that some circumstances may call for a different approach and made reference to the decision in *Far East Investments Ltd v Auckland City Council* where the Court determined that it had "the same power and discretion to impose a condition for a financial contribution of land as the primary consent authority had".[8] Moreover the Court in *Mawhinney*, despite contending a "fair and reasonable" assessment was all that was required, conducted a *de novo* assessment in accordance with the parties'

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4 *Mawhinney* at [55].

5 *Country Lifestyles Ltd v Auckland Council* [2022] NZEnvC 247 (*Country Lifestyles*).

6 *Mawhinney* at [101].

7 *Mawhinney* at [104].

8 F*ar East Investments Ltd v Auckland City Council* A048/01 at [41].

preference.

[16] Conversely, in *Country Lifestyles*, the Court determined that "a 'fresh view' of the Council's decision under s 88(3)" was neither helpful nor appropriate and as such adopted a fair and reasonable test.

[17] In this case, Counsel for both the Appellant and Respondent identified that a fair and reasonable test was appropriate, and no evidence was adduced on which the Court could conduct its own *de novo* assessment. As such, the Court limits itself to an assessment as to whether the decision of Commissioner Schofield was fair and reasonable.

The Commissioner's Decision

[18] The decision records, in full, the matters identified by the Council as being in insufficient detail such that the application was determined to be incomplete under s 88(3). As recorded in the decision at paragraphs [34] and [35], the matters identified by the Council contain a mix of major and minor deficiencies.

[19] Acknowledging that some matters were of a minor nature and may have been "rectifiable through the further information process following formal receipt of the resource consent application",[9] the Commissioner determined that there were a "number of … matters … of more than minor importance".[10]

[20] In particular, the decision identifies the "relatively large-scale level of earthworks" requiring a "high standard of geotechnical compliance", which the Council identified could not be adequately assessed without the provision of additional information. This included matters identified in the Applicant's peer review report relating to pre-earthworks testing and reporting for areas where earthworks had previously been undertaken. The absence of a natural hazards assessment for fault rupture, settlement, liquefaction and slope stability as required by sch 4, cl (7) is

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9 Decision at [35].

10 Decision at [34].

also identified as a significant information deficit.

[21] Further, the decision notes the development could be expected to have "significant stormwater management effects, not only from stormwater generated within the site through new impervious surfaces, but from that received from off-site, from the existing residential development upstream from the site. In this respect, I find that the resource consent application contained significant information shortcomings in addition to many minor matters".

[22] These matters are identified in the Council's letter and require among other things "a comprehensive Stormwater Management Plan (SMP) prepared by a chartered professional stormwater engineer".

[23] In answer to questions from the Court, Counsel for the Appellant acknowledged that the "least adequate element" was stormwater. Counsel also confirmed that the Appellant was aware that the "extent and adequacy of compaction had been of concern to the Council" and there "should have been liquefaction advice included". Counsel also accepted the Appellant was aware that it was a "complex site".

[24] From the information provided, it was not possible for the scale and significance of the potential effects of the proposal in relation to stormwater discharge and geotechnical and natural hazard risk, to be adequately determined. As such, the application failed to meet the requirements of s 88 and sch 4 of the Act.

[25] The Appellant argued at both the objection hearing and before this Court, that if such information gaps existed, the Applicant ought to have been afforded the opportunity to address those deficiencies via a s 92 process, rather than having the application returned under s 88(3).

[26] I agree with Commissioner Schofield's observation that "the Council is not obliged to proactively pursue information inadequacies". As the Court noted in *Country Lifestyles* "[i]f the application does not contain the fundamental information, it

is not appropriate to fill the gaps with a request for further information".[11] The gaps in this instance were fundamental.

[27] Having considered the decision, I am satisfied that Commissioner Schofield correctly categorised the deficiencies in stormwater, geotechnical and natural hazard assessment as significant information gaps which warranted the return of the application under s 88(3). The decision to decline the objection was therefore fair and reasonable in the circumstances.

[28] There is, however, one area of the decision on which I want to make some further comment. Counsel for the Council submitted that "it is appropriate and indeed correct for its letter of determination of 9 August 2022 to identify all matters in respect of which deficiencies were identified"[12] and that "it should not be required to 'filter out' all those identified deficiencies that might in other circumstances be excused as merely matters of detail".[13] Commissioner Schofield appears to accept this submission saying at paragraph [33] of the decision "it is appropriate for the Council to identify all information required to assist in the processing of a resource consent application, including minor matters".

[29] While there may be some efficacy or helpfulness in advising an applicant of all matters that have been identified on a review of the application, a determination under s 88(3) should refer clearly to the matters on which that determination has been made.

[30] As the Court addressed in *Aspros v Wellington City Council*:[14]

> The information at the time the application is made must conform with the requirements of sch 4, in order for the application to be accepted as complete. At the time of the decision to refuse or grant the application, however, the question then arises whether the Council had adequate information to make its decision. This second inquiry has no place in the s 88 consideration of completeness of the application.

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11 *Country Lifestyles* at [76].

12 Opening submissions at [25].

13 Opening submissions at [23].

14 *Aspros v Wellington City Council* [2019] NZHC 1684, (2019) 21 ELRNZ 276 at [30].

[31] In this instance, the Council accepts that its letter of 9 August 2022 contains matters that render the application incomplete under s 88, matters that could be resolved by an information request under s 92 and matters which go to whether consent should be granted under s 104. As such, it is difficult, if not impossible, to discern the relevant considerations under s88 from those matters which "have no place in the s 88 consideration of completeness".

[32] While in this instance the decision clearly identifies the major deficiencies related to stormwater, geotechnical and natural hazard assessment as the grounds for a return of the application under s 88(3), the same cannot be said for the original determination letter of 9 August 2022. That is a matter the Council are invited to reflect on in future decisions.

Determination

[33] I am satisfied that the decision reached by Commissioner Schofield to decline the objection was fair and reasonable. The application is incomplete pursuant to s 88(3).

Costs

[34] Costs are reserved. Any application for costs is to be filed within 10 working days and any response within five working days of receipt of any application.

L J Semple
Environment Judge