

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 30

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s 120 of the Act
BETWEEN	CHRIS ROBERTSON AND SERGIO SALIS (ENV-2016-CHC-031) Appellants
AND	DUNEDIN CITY COUNCIL Respondent
AND	FILLEUL APARTMENTS JV LIMITED Applicant

Court: Environment Judge J R Jackson
Environment Commissioner W R Howie
Environment Commissioner I M Buchanan

Hearing: in Dunedin on 29 and 30 November 2016
(Final submissions received 21 December 2016)

Appearances: L A Andersen for C Robertson and S Salis
R J Brooking for Dunedin City Council
S M Chadwick for Filleul Apartments JV Limited

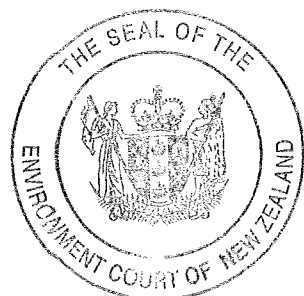
Date of Decision: 2 March 2017

Date of Issue: 2 March 2017

DECISION

A: Under section 290 of the Resource Management Act 1991 the Environment Court:

- (1) confirms the decision of the Dunedin City Council; and
- (2) grants resource consent for the construction and operation of a four storey residential apartment building at 97 Filleul Street, Dunedin, subject to the conditions set out in the Council's case:



- (a) as proposed to be amended in the submissions of Ms Brooking dated 14 December 2016; and
- (b) as added to by paragraph [53] of the Reasons below.

- B: By Monday 3 April 2017 the Council is to lodge agreed conditions in compliance with Order A with the Registrar for issue, or each party must lodge a memorandum as to why there is disagreement.
- C: Costs are reserved.

Table of Contents

1.	Introduction	[1]
1.1	The issue	[1]
1.2	The proposal	[7]
1.3	Status of the proposed activity	[9]
1.4	The matters to be considered	[22]
1.5	The environment	[27]
2.	The statutory instruments and the permitted baseline	[30]
2.1	The City Plan	[30]
2.2	Second Generation District Plan ("2GP")	[36]
2.3	The permitted baseline	[39]
3.	What are the likely (and less likely) effects of the proposal?	[42]
3.1	Effects on the Vero building and land	[42]
3.2	Other effects during construction (noise, vibration and dust)	[55]
3.3	Effects on the Vero building's tenants	[59]
3.4	Effects on the streetscape	[66]
3.5	Effects on other neighbours	[68]
4.	Evaluation	[69]
4.1	Absence of a design plan	[69]
4.2	The Council's decision	[72]
4.3	Implementing the objectives and policies of the City Plan	[73]
4.4	Other matters	[78]
5.	Result	[81]

REASONS

Introduction

1.1 The issue

- [1] The issue in this appeal is whether consent should be granted to construct and use a non-complying apartment building at 97 Filleul Street, Dunedin.



[2] The background to the application is that Filleul Apartments JV Limited ("FAJV") wishes to build a four storey residential apartment building on its hillside property being Lots 8 and 9 Deposited Plan 1119 held in computer freehold registers OT98/82 and OT98/83 ("the site"). The proposed apartment building will contain 15 one bedroom and 10 two bedroom apartments.

[3] FAJV's application for resource consent was made in July 2012 and was given reference number LUC-2012-468 by the Council. The application was then put "on hold" at the applicant's request for four years due to FAJV's perception of an unfavourable financial climate. We record some doubt about the legality of applications being delayed in that way. Consent authorities have an obligation¹ to process them in a timely way. Amongst other things, not dealing with an application promptly may unfairly affect priority as between applications.

[4] Amendments to the application were lodged in February 2016. Limited notification followed.

[5] The FAJV proposal includes excavation up to the boundary with 34 London Street. There are retaining walls, supporting the appellants' property, on or adjacent to the common boundary. A submission opposing the development was lodged by Messrs C Robertson and S Salis who own Vero House at 34 London Street, Dunedin. Vero House is adjacent to and uphill of the site, and Messrs Robertson and Salis operate a specialist dental practice from its ground floor. They have a number of concerns about the proposal, including the risk of damage to the Vero building and/or car parks from excavation on the boundary² and the loss of natural light to their premises.

[6] On 21 April 2016 the Council granted consents to FAJV subject to extensive conditions. As submitters on the original proposal, Messrs Robertson and Salis appealed to the Environment Court on 12 May 2016.

1.2 The proposal

[7] The proposed apartment building would have two blocks linked by a centralised courtyard accommodating stairwells and a lift. The floor configuration is proposed to be³:

¹ Section 21 RMA.

² S Salis affidavit dated 15 November 2016.

³ N R Bryce evidence-in-chief para 9 [Environment Court document 4].



- (a) The Lower Ground Level (Level 1) of the apartment complex is designed to accommodate 10 car parks and a number of storage lockers available [for] use by the owner-occupiers of the apartments. Vehicle entry to the basement level car parks is to be provided off Filleul Street. Five apartments will be located on the basement level of the apartment complex. There is also a legal pedestrian access to George Street via Cambria Place from this level ...
- (b) The Ground Floor (Level 2) accommodates 10 single bedroom apartments ...
- (c) The First Floor (Level 3) and Second Floor (Level 4) accommodates 10 split level maisonette, two bedroom apartments. Within each apartment, living areas ... are located on the First Floor (Level 3) and bedrooms are located on the Second Floor (Level 4) ...

[8] Balconies for each apartment will give occupants a functional outdoor area. The central courtyard on the ground floor (Level 2) will provide open space amenity and pedestrian access from Filleul Street. The building will be a maximum of 15 metres above ground level. No verandah is proposed on the street frontage (the significance of this will be identified shortly).

1.3 Status of the proposed activity

[9] That the application is for a "Residential Activity" under the operative district plan (called the Dunedin City District Plan, and abbreviated here to "the City Plan") was accepted by the Council's Hearing Committee⁴. Under the Council's proposed City Plan ("the 2GP") the activity is permitted so no resource consent is necessary under that plan⁵.

[10] One matter we can clear away immediately. The notice of appeal claims that the Council erred by not considering the application as a Commercial Residential Activity which the City Plan defines as follows⁶:

... a building or group of buildings used for the accommodation of people and which are or can be let on a daily tariff, including boarding houses for 6 guests or more, and home stays for 6 guests or more.

⁴ Council's decision para 27.

⁵ N R Bryce evidence-in-chief para 44 [Environment Court document 4].

⁶ Definitions 3.8 City Plan.



[11] Resource consent was not sought for a Commercial Residential Activity and Mr N J Lyons, one of the principals of FAJV confirmed that was not being sought. He acknowledged in cross-examination⁷ that at an early stage of the development of the proposal he had discussed it with an adjacent motelier but that option has not been pursued. In any event, the issue is irrelevant because further consent for a commercial residential activity would be required. The remainder of this decision is written on the basis that the only consent we can consider granting is for a residential activity.

[12] The site is in a "Central Activity" zone in the City Plan. Residential activities are permitted in the Central Activity Zone under Rule 9.5.1 subject to compliance with the permitted activity conditions outlined in Rule 9.5.2. The site is not subject to any hazards, designations, or townscape and landscape overlays.

[13] The planners have confirmed in their joint statement that FAJV's proposal is a non-complying activity because three, possibly four, rules are breached⁸:

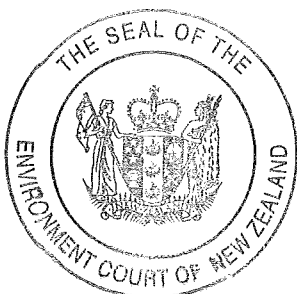
- Rule 9.5.2(ii)(a) requires structures to be a minimum height of 9 metres and a maximum of 11 metres;
- Rule 9.5.2(iii) requires verandahs to be provided on identified sites. They are to be 3 metres in width, of solid construction and continuous with any adjacent verandah;
- Rule 17.7 as to the scale of earthworks; and
- Rule 9.5.2(i): No front or side yards are permitted.

Height Limits

[14] The City Plan specifies both minimum and maximum height limits. The minimum height limit is 9 metres, meaning that the plan anticipates that the site will be developed with a (minimum height) building of at least two or three storeys⁹. The proposal fails to comply with the 9 metre minimum height limit in the area of the open space courtyard between the two blocks.

[15] The extent of non-compliance with the maximum 11 metre height limit varies. Some parts of the proposed apartment building comply. At its greatest extent at the

⁷ Transcript page 6 lines 18-20.
⁸ Planners JWS para 22 [Environment Court document 17].
⁹ The City Plan does not specify a minimum floor to ceiling height standard, so the buildings can be either two or three storeys in height.



southeast corner of the site the proposal would exceed the maximum height limit by four metres.

Verandah Requirement

[16] Rule 9.5.2(iii) requires sites identified on the City Plan Map 35A to provide a verandah. The proposal does not include a verandah and therefore falls to be considered as a non-complying activity under Rule 9.5.4.

[17] This infringement is largely technical because Filleul Street is not a high pedestrian area and there are no existing verandahs along the eastern side of Filleul Street for a distance of over 200 metres from the site.

Earthwork Breaches

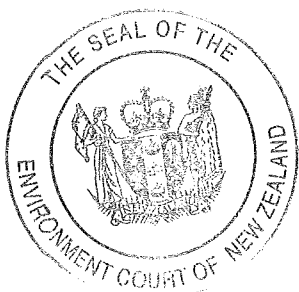
[18] Earthworks are necessary to establish the building platform, and these do not comply with either Rule 17.7.3(ii) Scale Thresholds or Rule 17.7.4(iii) for depth of cuts to accommodate new retaining structures. The maximum depth of cut will be in the 3.76 metre range and the maximum volume of earthworks anticipated will be about 150 cubic metres.

[19] Earthworks are a restricted discretionary activity¹⁰ pursuant to Rule 17.7.5(ii). The Council's discretion under this rule is restricted to:

- (a) adverse effects on the amenity of neighbouring properties;
- (b) effects on visual amenity and landscape;
- (c) effects on any archaeological site and/or any cultural site;
- (d) effects on the transportation network, caused by the transport of excavated material or fill;
- (e) effects from the release of sediment beyond site boundaries, including transport of sediment by stormwater systems; and
- (f) cumulative effects relating to any of these matters.

[20] As the earthworks were not granted an earthworks permit prior to 1 July 2010 and do not form part of a project that was granted building consent on or after 1 July 2010, the Council's discretion will also extend to the following matters:

¹⁰ Page 17:32 City Plan.



- (a) design and engineering of retaining structures and earthworks;
- (b) effects on the stability of land and buildings;
- (c) effects on the surface flow of water and on flood risk;
- (d) effects on underground utilities.

No Front or Side Yard Setbacks

[21] Rule 9.5.2(i) requires that no front yards or side yards are permitted. The appellants suggest it may be necessary to set back any building from the northern boundary in order to accommodate an existing retaining structure owned by the appellants that is encroaching into the applicant's site. Any setback resulting from the retaining structure would cause a breach of Rule 9.5.2(i) and therefore would be considered as a non-complying activity under Rule 9.5.4.

1.4 The matters to be considered

[22] Because the proposal is for a non-complying activity, the court may grant resource consent only if one of the thresholds in section 104D(1) of the Resource Management Act 1991 ("RMA") is met. The court must be satisfied that either¹¹:

- (a) the adverse effects of the activity on the environment will be minor; or
- (b) the application is for an activity that will not be contrary to the objectives and policies of both the relevant plan and the relevant proposed plan.

We do not need to consider these in detail because the planning witnesses all agree that the proposal passes the second threshold.

[23] In its substantive consideration the court must, "subject to Part 2 of the Act", have regard to (relevantly)¹²:

- (a) any actual and potential effects on the environment of allowing the activity;
- and



¹¹ Section 104D(1) RMA.
¹² Section 104(1) RMA.

- (b) any relevant provisions of ... a regional policy statement and a plan or proposed plan

...

In fact there is no ambiguity, incompleteness or illegality in the district plan which necessitates resort to Part 2 of the Act.

[24] When forming an opinion for the purposes of section 104(1)(a), a consent authority may disregard an adverse effect of the activity on the environment if "... the plan permits an activity with that effect"¹³. This is known as the 'permitted baseline'. A potentially important consideration in this proceeding is that FAJV identified a clearly credible baseline in this case in the form of a building which could be constructed as a permitted activity¹⁴ and which would, in its experts' opinions, have significantly more adverse effects than its proposal.

[25] The court must also have regard to¹⁵ the Council's decision.

[26] Finally, the court has a discretion to have regard to¹⁶ any other matter the court considers relevant and reasonably necessary to determine the application.

1.5 The environment

[27] From its higher boundary along Filleul Street the site slopes generally from northeast to southwest. At the southeastern end of the site there is a pedestrian access way called Cambria Place. The site falls from street level to the rear of the site by three metres and its surface is irregular in nature.

[28] The site contains an existing two storey building located on Lot 8. This building is to be demolished¹⁷ (a permitted activity). The part of Lot 8 on the Filleul Street frontage has been excavated to create a hard surfaced car park area and the whole of Lot 9 is currently used for car parking.

[29] Immediately uphill of the site is the appellants' property, Vero House, at 34

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Section 104(2) RMA.
D A Sycamore evidence-in-chief para 43 [Environment Court document 7].
Section 290A RMA.
Section 104(1)(c) RMA.
D A Sycamore evidence-in-chief para 24 [Environment Court document 7].



London Street. Downhill is the Bracken Restaurant within a protected heritage building at 95 Filleul Street.

2. The statutory instruments and the permitted baseline

2.1 The City Plan

[30] Four chapters in the City Plan contain relevant objectives and policies:

- 4 – Sustainability
- 9 – Zones Activity
- 20 – Transportation
- 21 – Environmental Issues

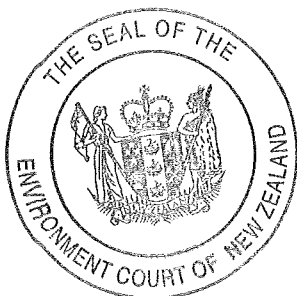
We briefly outline the provisions of each.

Sustainability

[31] Objective 4.2.1 is simply to enhance the amenity values of Dunedin. The implementing policy¹⁸ largely repeats that. The second relevant objective is to “sustainably manage infrastructure”¹⁹. It has its own policies but they are largely superseded by the more specific policies in Chapters 9, 20 and 21 to which we now turn.

Central activity

[32] The first relevant objective is to provide for²⁰ a wide range of activities in the Central Activity Zone, and to enhance the amenities of the area. In fact the activities considered as appropriate do not include “residential”. The omission makes the next relevant objective even more so: it is²¹ to “avoid, remedy or mitigate” the adverse effects of activities undertaken in the “Inner City Area and Local Activity Zone”.



¹⁸ Policy 4.3.9 City Plan.
¹⁹ Objective 4.2.3 City Plan.
²⁰ Objective 9.2.1 City Plan.
²¹ Objective 9.2.3 City Plan.

[33] Two other relevant objectives are to ensure that the Central Activity Zone develops as a “people place”²² – which certainly encourages residential activity – and to avoid²³ conflict between pedestrian and vehicle use in the zone.

Transportation

[34] Objective 20.2.1 is to avoid, remedy or mitigate adverse effects arising from (relevantly) the establishment and use of the transportation network. Objective 20.2.2 is the converse: to undertake land use activities in a manner which avoids, remedies or mitigates effects on the transportation network.

Environmental issues

[35] In Chapter 21 the relevant provisions are to ensure that noise²⁴ associated with the development of resources and the carrying out of activities does not affect amenity values; ensure²⁵ that the finishing of structures, the construction of signs and the shielding of light sources avoids, remedies or mitigates nuisance glare. The implementing policy²⁶ is to protect people from noise and glare which could impact upon their health, safety and amenity.

2.2 Second Generation District Plan (“2GP”)

[36] The Proposed 2GP was notified on 26 September 2015. The site is zoned Central Business District in the 2GP. A new rule proposes to allow development on the site of up to 16 metres in height as a permitted activity.

[37] The relevant rules of the 2GP have not been given legal effect and are subject to submissions that were heard in August 2016. A final decision will not be issued until later this year.

[38] Under the 2GP, the maximum height limit for the site is to be lifted to 16 metres. Following submissions this height limit continues to be recommended in the section 42A report presented at the Commercial and Mixed Use Zone hearing held in August

²² Objective 9.2.5 City Plan.
²³ Objective 9.2.6 City Plan.
²⁴ Objective 21.2.2 City Plan.
²⁵ Objective 21.2.3 City Plan.
²⁶ Policy 21.3.3 City Plan.



last year. At 15 metres the current proposal sits below the new 16 metre height limit²⁷.

2.3 The permitted baseline

[39] The parameters of a permitted baseline building on the site were agreed by the planning witnesses in their joint statement as follows:

- (a) all buildings need to be erected to a minimum height of 9 metres from existing ground levels and a maximum of 11 metres;
- (b) there should be full site coverage since no front or side yard setbacks are permitted;
- (c) the site requires a verandah to be erected along its frontage;
- (d) up to 100 cubic metres of earthworks can be undertaken (in any two year period) and cuts of up to 1.5 metres in height are permitted;
- (e) buildings to be used for residential activities do not need to contain on site car parking or any amenity space; and
- (f) there are no minimum or maximum floor sizes for habitable rooms and there are no minimum or maximum floor to ceiling height standards²⁸.

[40] The application of the permitted baseline depends on whether a permitted baseline building is sufficiently provided for in the City Plan²⁹. The power in section 104(2) RMA to disregard adverse effects that are permitted by a city plan is discretionary and a decision whether or not to do so must be made deliberately, in a reasoned way and for the purpose for which the power was conferred: *Living Earth Limited v Auckland Regional Council*³⁰.

[41] Mr Andersen tried to establish that the permitted baseline could not be constructed because a (very small) side yard between the proposed building and the higher land on 34 London Street would be required in order to ensure that there was no risk of damage to the latter property during construction. That argument fails on two points: the first is that the test is not "no risk of damage" but "minimal probability of more than minimal damage". Second, as we explain later we are satisfied that both the permitted baseline, building (notionally) and the proposed building (in reality) could be constructed with minimal risk to 34 London Street.

²⁷ Discussed in D A Sycamore evidence-in-chief para 97 [Environment Court document 7].
²⁸ Planners JWS para 23 [Environment Court document 17].
²⁹ *Empire Entertainment Limited v Auckland City Council* [2010] NZRMA 525 (HC) at [57].
³⁰ *Living Earth Limited v Auckland Regional Council* Decision A126/06 (EC).



3. What are the likely (and less likely) effects of the proposal?

3.1 Effects on the Vero building and land

Temporary construction effects (earthworks)

[42] Construction of the basement floor level of the proposed building requires the excavation of some 150 cubic metres of material from the northwestern corner of the site and along much of the northern boundary with the neighbouring site at 34 London Street and along some of the Filleul Street western boundary. The landform has been previously excavated and existing retaining walls occur on the road boundary and along the northern boundary. They take different forms. A modest block wall retains the road boundary. Two reinforced massive concrete walls retain some of the northern boundary and a timber post and railing wall retains the eastern end of the northern boundary. Most of those existing retaining walls are located within the development site³¹.

[43] The construction options referred to were:

- Option 1: temporary sheet pile retaining located in the neighbouring driveway;
- Option 2: build the new retaining wall in front of the existing wall; and
- Option 3: tie back the existing walls and progressively excavate for the new wall.

[44] The proposed development requires the excavation of up to 2 metres in the northwestern corner adjacent to the street and to the neighbouring property at 34 London Street. The developer proposes to replace the existing retaining walls with new ones located on the northern and western boundaries. We were not provided with the designs for these new walls nor with the details of the proposed construction methodology. However, in a joint witness statement the professional engineers for the applicant and the City Council, Messrs S Macknight and L Paterson, respectively agreed that “any of these retaining wall options could safely be engineered” and that “normal approval of the engineering behind the retaining wall and foundation options would be anticipated through the building consent process”.

³¹ N J Lyons evidence-in-chief, Figure E [Environment Court document 2].



[45] Excavation on the Filleul Street boundary including the block wall is reasonably straight forward.

[46] Excavation on the northern boundary is rather more complicated. There is a gap between the two reinforced massive concrete walls, with rusting steel reinforcing showing. The foundations of the walls are unknown and the proposed excavation will undermine them. Further to the east the timber retaining wall is thought to have poles that are 1.2 metres into the ground and it too is to be replaced.

[47] The appellants strongly opposed any incursion into their property and so would not agree to either construction options 1 or 3 which involved some intrusion across the boundary. Option 2 was not favoured by the applicant as it reduced the area available in the basement floor.

[48] In cross-examination of FAJV's principal Mr Lyons by Mr Andersen, the following exchange occurred³²:

- Q. ... Would a design for this property be able to be done that would result in zero effect on the appellant's property, no interference with access, no slumping, no risk?
- A. No risk?
- Q. Yes.
- A. No.
- Q. So essentially whatever design there is, there's risk?
- A. Yes.

[49] The evidence for the appellants was that it is not possible to have a zero-risk design that will not damage the appellants' land apart from Option 2³³ in which the existing retaining walls are not removed. The case for the appellants was³⁴ that unless Option 2 is adopted there is the likelihood of adverse effects on the appellants' land from removal and replacement of the retaining walls. Mr Andersen submitted:

It is not acceptable for the applicant to inflict adverse effects on the appellants' land on the basis that the adverse effects are temporary and will be remedied by the applicant unless the appellants agree to accept that risk. The appellants have not agreed to accept any risk of damage to their land.

³² Transcript page 72 lines 19-26.

³³ L M Paterson, Transcript page 74 lines 15-16.

³⁴ L A Andersen final submissions para 1.2 [Environment Court document 20].



[50] The probability of slumping was assessed by Mr L M Paterson, a geotechnical engineer called for the Council, as 100% for 100 millimetres (horizontally) and between 5% and 10% for one metre³⁵. While we are grateful for his extempore opinion (given in response to a question from the court), we find that oversimplifies the position a little in that the probability of even a small failure on any part of the appellants' land varies depending on where along the boundary is being considered.

[51] A professional engineer, Mr L M Robinson, was called by the appellants and he, while not disputing that the three options could provide an engineering solution, acknowledged each had disadvantages for the parties. He suggested a further construction option that would not intrude into the appellants' property and would allow the construction of the retaining wall on the boundary. The methodology involved bracing the existing walls from the applicant's property and then sequentially removing a section of the existing retaining wall, replacing it with a precast section of a new wall temporarily braced from the applicant's property and progressively constructing the foundation for the new wall. All three professional engineers agreed this fourth construction option was practicable.

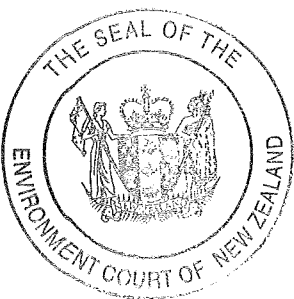
[52] We accept that the engineering design for the retaining walls must be undertaken by a professional engineer experienced in the work and (importantly) that details will be checked by the City Council when exercising its responsibilities under the Building Act 2004.

[53] We also find that a method of construction that allows a new wall to be constructed on the northern boundary without intruding into the neighbouring property at 34 London Street is practicable. To ensure that a condition prohibiting any significant effect on, intrusion into or reliance on the neighbouring property at 34 London Street would be appropriate. Similarly, the construction methodology for the retaining wall on the western boundary with Filleul Street must prevent disturbance to services in the footpath and provide for reinstatement of any damage to the footpath.

Permanent effects

[54] The three engineers who gave expert evidence – Messrs L M Robinson,

³⁵ Transcript page 78 line 31 to page 79 line 3.



G C Fisher and S J Macknight – confirmed that there are likely to be no long term effects on the appellants' property. It does not matter where the wall is located in relation to the boundary or what construction method is used³⁶.

3.2 Other effects during construction (noise, vibration and dust)

[55] There is also the potential for other 'nuisance' effects – noise, vibration and dust – during construction. In relation to those issues, the three planning witnesses – Mr N R Bryce for FAJV, Mr D A Sycamore for the Council, and Mr C S Anderson for the appellants – agreed that construction activities should be managed through a Construction Management Plan ("CMP").

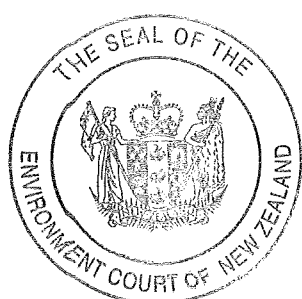
[56] To minimise impact on adjoining properties associated with demolition and construction activities, the CMP proposes to manage all relevant construction related activities, including start times and delivery times. An amended CMP was attached to Mr Bryce's rebuttal evidence³⁷. The CMP provides considerable information about the construction methodology including sequencing, circulation of a construction plan to interested parties, confining hours of operation and outlining relevant information concerning the earthworks, and construction required. Measures are proposed to manage traffic. These include offering replacement parks to any persons currently using neighbouring properties for car parking.

[57] Particular provision is made for the restaurant at 95 Filleul Street – including sharing of information and due consideration of effects on the restaurant and its outdoor courtyard during construction. It specifically seeks to limit any construction related disturbances on the Bracken Restaurant which occupies 95 Filleul Street to the south of the site by ensuring that deliveries to the site, will be restricted so as to avoid conflicting directly with the Bracken Restaurant's lunch-time business operations. The CMP also seeks to ensure that the site manager will engage directly with the Bracken's owner view to limit any disruptions on that existing business. Provision is to be made for a temporary loading zone for deliveries to the restaurant.

[58] As for the vibrations during foundation work, the applicant's geotechnical report

³⁶ Transcript page 113 lines 1-3 per Mr Robinson; Transcript page 69 lines 11-12 and 19-20 per Mr Paterson; Transcript page 11 lines 6-11 per Mr Macknight; JWS (1) para 24.

³⁷ N R Bryce, rebuttal Annexure 1 [Environment Court document 4A].



includes recommendations of limits to be complied with during construction³⁸. The CMP states that recommendation will be met by the applicant. Further under proposed Condition 16 the applicant must comply with the construction noise limits specified in New Zealand Standard 6803:1999.

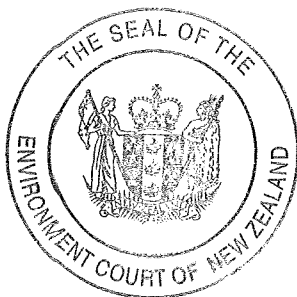
3.3 Effects on Vero building's tenants

[59] Under the operative City Plan, a permitted building on the site must be a minimum of 9 metres high and built up to the common boundary with 34 London Street. At a height of 9 metres any proposed building is well above the ground floor windows of the surgeries. With some extra height up to the maximum permitted height limit of 11 metres, there would be some additional lack of solar access but in Mr Christos' opinion "... at 9 metres I think it is fair to say the damage would already be done [by the permitted baseline]."³⁹

[60] Further, as Ms Chadwick submitted, and we find, it is likely the proposed development will confer distinct advantages to the appellant compared with the permitted baseline. These are⁴⁰:

- (a) The substantial break in the form of the building which reduces the overall height and bulk, allowing considerably more continued access to light and views for 34 London Street when compared to the type of solid 11 metre high box which would be permitted by the District Plan;
- (b) The substantial break in the building immediately adjacent to Mr Salis' specialist office which maintains his access to natural light⁴¹;
- (c) No windows on the northern wall facing the Appellants' property, which means that no residences will overlook the Appellants' dental practices or other tenanted offices;
- (d) A comprehensive construction management plan which goes above and beyond dealing with actual construction effects and seeks to provide as much information and comfort as possible to the neighbouring land owners, including making provision for ongoing consultation;
- (e) The offer to paint the wall facing the Appellants a colour of their choice to increase light access.

³⁸ Geosolve Report at section 6.6.
³⁹ Transcript page 56 lines 15-19.
⁴⁰ S M Chadwick closing submissions para 19.
⁴¹ Transcript page 97 lines 27-30 per Mr Salis.



[61] Applying the permitted baseline test, the effects of any additional height on the appellants will in Mr Bryce's opinion result in less than minor effects⁴². The planner, Mr Anderson did not assess this in his evidence on the effects on the specialist dental practices.

[62] Counsel (Mr Andersen) submitted⁴³ that two sets of effects are more than minor and should lead the court to disregard the baseline:

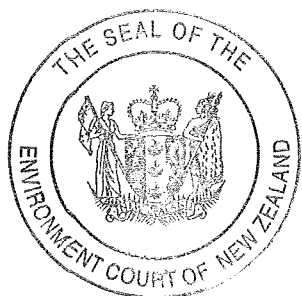
- the lack of residential amenity for the apartments which were acknowledged by Nigel Bryce to be "probably similar" to motel units in the amenities provided⁴⁴;
- the adverse effects of having insufficient car parking to meet tenants' needs without any provision for alternative modes of transport such as a secure unit for bicycle storage for each unit⁴⁵.

[63] We do not accept these submissions. On the evidence before us the amenities will be adequate. We agree the proposed parking is very cramped and that bicycle storage is not provided. However, residents of inner-city do keep cycles inside their apartments so the problems are not insuperable.

Light

[64] The appellants established their dental practices on the ground floor of 34 London Street since the City Plan became operative. If the matter of light was important to their practices we accept the submission that a due diligence investigation of the extent of development permitted on the neighbouring property would have revealed the potential problem. In effect they were on notice that any permitted baseline building would result in a wall facing the windows of their practices.

[65] In any event the driveway on the appellants' land will continue to provide a gap of 3 metres (approximately) between the dental practices and the new building. FAJV has offered to paint the northern wall in a suitably reflective colour to enhance light access to the dental practices.



⁴² N R Bryce evidence-in-chief paras 77-79 [Environment Court document 4].
⁴³ L A Andersen final submissions para 3.3 [Environment Court document 20].
⁴⁴ Transcript page 30 lines 4-9.
⁴⁵ Transcript page 123 lines 7-23.

3.4 Effects on the streetscape

[66] The City Plan provides that a building on this site should include a verandah over the footpath⁴⁶. There are no other nearby verandahs on this side of Filleul Street which demonstrates that development along this street has not proceeded as originally envisaged in 2004 when the City Plan was notified. We accept that a verandah on the proposed building would be out of place, and would serve little purpose since it would not link to verandahs on adjoining buildings⁴⁷ and adjoining sites. Further verandahs are unlikely to be developed in the foreseeable future of the street.

[67] Because of the steep slope of Filleul Street, a verandah would need to step downhill. That would detract from the design of the proposed development and would be impractical⁴⁸ in the opinion of the urban designer called for the Council, Mr P P Christos. There was no expert evidence to the contrary so we accept Mr Christos' opinion.

3.5 Effects on other neighbours

[68] The effects of noise and vibration during construction are of concern to the adjacent restaurant business. We consider the proposed conditions are what they could reasonably expect by way of mitigation.

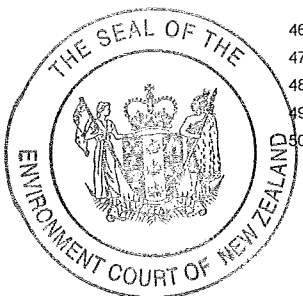
4. Evaluation

4.1 Absence of a design plan

[69] The earthworks are Discretionary Activities (Restricted) under Rule 17.7.5(ii). The two relevant discretions under the rule are:

- (a) Adverse effects on the amenity of neighbouring properties;
- ...
- (g) Design and engineering of retaining structures and earthworks.

[70] Mr Andersen submitted⁴⁹ that FAJV has not produced a design plan for the earthworks. The drawings for which consent is sought are "conceptual" only⁵⁰. They



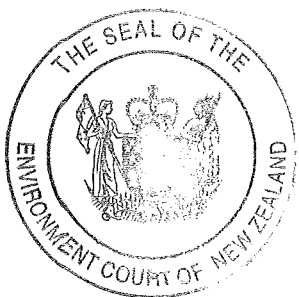
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Rule 9.5.2(iii) City Plan.
P P Christos evidence-in-chief para 15 [Environment Court document 6].
P P Christos evidence-in-chief para 4 [Environment Court document 6].
L A Andersen final submissions para 3.3 [Environment Court document 20].
Transcript page 8 line 31 and page 10 lines 20-26.

do not specify or limit the excavation activities or the retaining wall. The only limit is that they must be wholly on the applicant's land. He submitted that the effects on the appellants' property cannot be identified until the court has more details of the design and engineering of the retaining structures and earthworks to be able to consider the effects under Rule 17.7.5. The planning experts called by the applicant and the Council say that this assessment is not able to be carried out without the provision of detailed plans:

- Mr Bryce accepted that the court was not in a position to determine the design of the retaining structures⁵¹ and that the rule required the court to consider the design and engineering of the retaining structures and earthworks⁵²;
- Mr Sycamore acknowledged⁵³ that adverse effects cannot be assessed without the design; and
- Mr L Paterson acknowledged⁵⁴ that it is not possible to accurately assess the risks without some plans.

[71] While we have careful regard to what these witnesses said, the question of adequacy of the design of the walls for the purpose of considering FAJVL's application, is ultimately an issue for the engineering witnesses and of proportionality for the court to decide. We have recorded that none of them had concerns. The question is: does the court have sufficient information to be able to determine the relevant effects of the application?⁵⁵ In this case we find that there is sufficient information on which the engineers can base their opinions and we in turn can rely on those. Further, we accept the submissions of counsel for the City and for FAJV that the City Plan's discretion rather duplicates the requirements of the Building Act 2004, so we place little weight on the absence of designs for the retaining structures.



⁵¹ Transcript page 36 lines 19-21.
⁵² Transcript page 37 lines 1-33.
⁵³ Transcript page 61 lines 32-34.
⁵⁴ Transcript page 76 lines 25-26.
⁵⁵ See section 104(6) RMA.

4.2 The Council's decision

[72] The Council Committee noted⁵⁶:

... that the retaining walls were not directly aligned with the surveyed boundary and significant parts of the wall appear to be on the applicant's property. On that basis the blocking position of the submitters in relation to a replacement wall appeared ... to be unreasonable. If appropriate precautions are in place a well-designed and appropriately engineered replacement wall on the boundary would appear to be of benefit to all parties.

We accept that but make it clear that the retaining structures should be wholly on the applicant's property.

4.3 Implementing the objectives and policies of the City Plan

[73] In considering the objective⁵⁷ of enhancing the amenity values of the city, Mr Sycamore for the Council, considered that⁵⁸:

... the extra height of the proposed residential development will not adversely affect the amenity values of Filleul Street or the sealed carpark to the rear. The Appellants' building, Vero House is to the north of the subject site and elevated in terms of the subject site given it exceeds the maximum height provisions for the zone.

Mr Sycamore went on to say that:

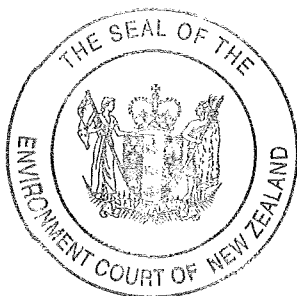
The proposed development will provide parking although it is not required to by the District Plan, which will help mitigate any adverse effects due to increased traffic.

[74] As for the policy⁵⁹ of promoting the renovation and redevelopment of those sites where there is under-utilisation of urban service infrastructure, Mr Sycamore wrote that⁶⁰:

The proposal will redevelop a commercial site on the periphery of the CBD which is currently under-utilised. The existing building on the site is arguably in decline. The proposed residential development is considered to be **consistent** with this policy.

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Council decision para 13.
Objective 4.2.1 City Plan.
D A Sycamore evidence-in-chief para 93 [Environment Court document 7].
Policy 4.3.3 City Plan.
Policy 4.3.3 City Plan.



[75] Policy 9.3.3 is to enhance amenity values in the Central Activity Zone and both Mr Sycamore and Mr Bryce considered the proposal would give effect to that policy. In response to the appellants' concerns about the impact on the amenity with respect to the specialty dental practice, in Mr Sycamore's opinion⁶¹ the effects are no more than minor and will be similar to that of the permitted baseline. We prefer that evidence.

[76] The development of a new residential complex will help ensure the receiving environment comprising Filleul and George Streets will continue to be a "people place"⁶². The proposal would achieve this objective by increasing the local population.

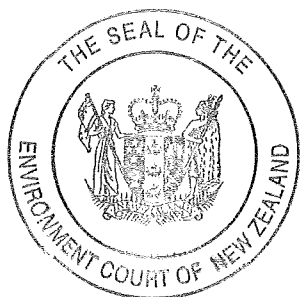
[77] The Council's Transportation Planner, Mr G C Fisher assessed the proposal. He concluded the effects of vehicle movements on unrelated parties is expected to be less than minor and the siting of the vehicle entrance into the basement car parking is most consistent with the transportation guidelines. The proposal achieves these objectives and policies.⁶³

4.4 Other matters

[78] One consideration for us to bear in mind is that the RMA is not a 'risk free' statute as the Environment Court has been saying for many years: *Shirley Primary School v Christchurch City Council*⁶⁴.

[79] In this case the major danger from the appellants' point of view is that their building would be damaged. While the probability of such an event seems small its consequences would be great. Thus the risk is not insignificant. To cover that risk the Council has imposed a condition⁶⁵ that public liability insurance be obtained. In the circumstances we consider that is adequate when combined with the condition covering the potential for minor (temporary) damage during construction.

[80] We also bear in mind that the Court of Appeal stated in *MacLaurin v Hexton Holdings Limited*: "What consent authorities are concerned with is the proposed activity's effects, not the nature of the applicant's legal rights or interest in the particular



⁶¹ D A Sycamore evidence-in-chief page 18 [Environment Court document 7].

⁶² D A Sycamore evidence-in-chief page 18 [Environment Court document 7].

⁶³ G C Fisher evidence-in-chief para 20 [Environment Court document 8].

⁶⁴ *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 at 97.

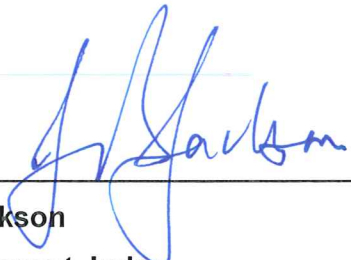
⁶⁵ N R Bryce rebuttal Annexure 1 Condition 33.

land”⁶⁶. Even less are consent authorities concerned with whether applicants for land use consents have a privilege authorising them to go on to a neighbour’s land. Invariably authorities proceed on the basis no such privilege exists unless clear written evidence of it is produced.

5. Result

[81] Weighing all the relevant considerations including the amendments to conditions proposed by Ms Brooking, counsel for the City Council, we conclude that the objectives and policies of the City Plan would be better achieved by granting (subject to the proposed conditions) than refusing consent and will make orders accordingly.

For the court:



J R Jackson
Environment Judge



⁶⁶ [2008] NZCA 570 (2008) 10 NZCPR1 para 47; followed in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 paras [32]-[35], and *Project Management Limited v Marlborough District Council* C41/2009 (EC) paras 10-13.