



Obstructed view review

An obstructed view

→ Apartment dwellers lose judicial review over blocked view of Westhaven Marina and harbour.



WRITTEN BY MARIA COLE

Introduction

In *Wynyard Quarter Residents Association Incorporated v Auckland Council and Orams Group Limited*,¹ a group of apartment owners filed judicial review proceedings seeking to overturn an Auckland Council decision to grant resource consent on a non-notified basis for a development which the owners argued had cost some of them their harbour views.

Background

Overview

Wynyard Quarter Residents Association Inc (the **Association**)

is an incorporated society whose members include owners of apartments in a complex in the Wynyard Quarter area, which is located by the harbour in downtown central Auckland. The complex is known as 30 Madden and comprises 150 apartments.

Orams Group Ltd (**Orams**) has operated commercial marine businesses in the area since 1987. Its premises are on the waterfront on the other side of the street from the 30 Madden complex. The business operation is known as the Orams Marine Village. It offers dry stack storage for boats, premises for servicing and refitting

¹ *Wynyard Quarter Residents Association Incorporated v Auckland Council and Orams Group Limited* [2023] NZHC 1938.

super yachts, and is home to more than 30 specialist marine businesses.

In November 2018, Orams applied to the Auckland Council for consents to redevelop the land on which it was operating its businesses. This involved demolishing several existing buildings and erecting five new buildings, two of which required resource consent as they were 'over height'. Zoning in the area only permits buildings to a height of 18 metres and Orams wanted to build two to a height of 25 metres. One of the over-height buildings (**Building 1A**) was to be situated directly across the road from 30 Madden, and the second (**Building 2**) comprising two large boatsheds to be used as a haul-out facility with a 620 tonne travel lift was further down the road.

When Orams applied for the consents, 30 Madden had not been built but had been consented. The main developer of 30 Madden was a Council-controlled company, Eke Panuku Development Auckland Ltd (**Panuku**). Panuku owned the land on which 30 Madden was to be built and had entered into an agreement with a third party, Willis Bond Ltd (**Willis Bond**) to complete the development works. A lot of the 30 Madden apartments were sold to purchasers before completion of the complex. Panuku was also the owner of the land on which the Orams Marine Village

operated and it also entered into an agreement with Orams for development of the site.

To notify or not: the law

The Resource Management Act 1991 provides for whether an application for planning consent should be notified.² There are two forms of notification: public and limited. Each involves application of various steps. If public notification is not given, whether to give limited notification is assessed and one of the steps requires any affected person to be notified. A person will be an *affected person* if the consenting authority decides that the activity's adverse effects on the person are minor or more than minor (but not less than minor).

Resource consent granted on non-notified basis

The Council appointed a Commissioner to decide Orams' application. Orams had obtained reports in support of its application, which included an Assessment of Environmental Effects report (**AEE report**) of its proposal. Annexed to this report was an assessment prepared by a firm of environmental consultants which summarised the likely visual effects of Building 2 if it was built to the proposed over-height specifications.

Based upon the consultant's summary, the AEE report stated that Building 2 would:

have less than minor adverse effects on

the cityscape and will contribute to a built form within the Wynyard Precinct that has a positive contribution to the City's skyline as well as being appropriate within the context of the emerging development of Wynyard Precinct.

In 2019, the Commissioner decided Orams' application for resource consent did not need to be notified, either publicly or on a limited basis, and granted the application. Orams accordingly commenced works.

Impact of the works on owners of 30 Madden

In 2022, residents at 30 Madden realised how much the buildings being erected by Orams were over height. This resulted in the Association raising concerns with Orams in July 2022 and then, in November 2022, it filed the proceedings for judicial review of the Commissioner's decision that the resource consent application could proceed on a non-notified basis.³

The Association's complaint was the Commissioner had failed to *identify and consider the reduction in visual amenity value* which the future residents of the 30 Madden complex would suffer due to the building works. It said this issue was clearly raised in the AEE report. It wanted the Commissioner's decision to be set aside as flawed and an order requiring the Council to

² Sections 95 to 95G.

³ *Wynyard Quarter Residents Association*, above n 1.

reconsider the decision to allow the resource consent application to proceed on a non-notified basis.

Judicial Review and the Court's discretion to grant relief

The Court had little difficulty concluding the Commissioner's decision making process was flawed, noting among other issues:

there is nothing in the Commissioner's decision to suggest he turned his mind to the loss of visual amenity value that occupiers of apartments to be built in the vicinity of Building 2 would be likely to suffer through reduction or loss of their views.

But that was not the end of the matter. Having found the decision making process was flawed, the Court then turned to the issue of whether it should exercise its discretion to set the decision aside. The Judge noted the Court will generally grant relief where reviewable error has been shown but that *it has the discretion to decline relief where there are good reasons for doing so*. Unhappily for the Association, his Honour considered there were several reasons justifying the Court exercising its discretion not to grant relief.

Impacts of the delay in the challenge

The impacts of the Association's delay in indicating it would challenge the consent and then in issuing the proceedings were traversed. The Court noted that Building 2 was now complete and fully operational and considered

that to set aside the resource consent at this late stage would cause *major prejudice* to Orams. This was because Building 2 could not operate as intended unless it retained its present height.

This led to a consideration of the utility of granting relief. As reducing the height of the building was not a viable option for Orams, his Honour considered:

there is little or no prospect the notification process would result in the Council requiring Orams to reduce the height of Building 2 to a compliant level. This factor calls into question the utility of requiring the Council to reconsider the issue of notification.

His Honour then looked at the number of units that had lost their views and found they were likely to comprise a relatively small number of units.

Remember Willis Bond and Panuku?

It turned out that Willis Bond had already negotiated mutually beneficial concessions with Orams and Panuku back in 2019 that were for the direct benefit of the residents in Madden 30, and

these negotiations were known to the Association. In 2018, Willis Bond was concerned that Orams' proposed development would impact views from units within 30 Madden. It lodged an objection to the proposed height limits for both Building 1A and Building 2.

Panuku had then facilitated negotiations between Orams and Willis Bond about the height of these buildings, which resulted in Willis Bond withdrawing its objection to the proposed height of Building 2 in return for Orams agreeing to reduce the height of Building 1A to 18 metres. Panuku had also added a sweetener and agreed to *reconsider the value to be placed on land Willis Bond was to acquire for the second stage of its development at 30 Madden*.

Conclusion

The end result was the Court found that the time for any challenge to the height of Building 2 had expired and that the current residents of 30 Madden are effectively bound by the decisions made by their predecessor in title in 2019. Timely and knowing pursuit of their rights was essential, but lacking in this instance, hence no relief.

About the author:

Maria Cole works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, including working with BDT. She was previously a civil litigation barrister for over a decade. During that time she worked on several multi-million dollar development disputes and was involved in arbitrations and mediations.