BEFORE THE ENVIRONMENT COURT
AT WELLINGTON

Decision No: [2016] NZEnvC 13

ENV-2015-WLG-000095

IN THE MATTER	of an application pursuant to s314 of the Resource Management Act 1991
BETWEEN	PETER and SYLVIA AITCHISON First Applicant
AND	WELLINGTON CITY COUNCIL Second Applicant
AND	HEATHER ANN WALMSLEY First Respondent
AND	DAVID CULLEN WALMSLEY Second Respondent
AND	WALMSLEY ENTERPRISES LIMITED Third Respondent

Court: Environment Judge B P Dwyer
Environment Commissioner I M Buchanan

Counsel/Appearances:
A F D Cameron for P and S Aitchison
K M Anderson and K E Krumdieck for Wellington City Council
T Bennion for H and D Walmsley and Walmsley Enterprises

Heard: At Wellington on 18-22 January 2016

ORAL JUDGMENT OF JUDGE B P DWYER AND

COMMISSIONER I M BUCHANAN

Decision Issued: 22 January 2016 (written record 28 January 2016)

A: Application granted

B: Costs reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Judge Dwyer

[1] This is our decision in these proceedings. As with any oral decision we reserve the right to amend the written record to correct any minor errors which do not alter the rationale for or the outcome of this decision.

[2] We have determined to issue this decision as an oral decision for two reasons:

- Firstly to give our views as speedily as we can consistent with the needs for legal and factual accuracy, with a view to resolving this ongoing dispute;
- Secondly because we are aware that there is a related appeal currently before the High Court. A prompt decision may enable these proceedings to be considered in conjunction with that matter if there is an appeal from our decision. Whether that would be appropriate is entirely a matter for the High Court.

[3] To enable prompt delivery of the decision myself and Commissioner Buchanan have divided responsibilities between us. I will address background matters, legal issues and the matter of exercise of discretion. Commissioner Buchanan will address effects arising from the issues before the Court. We have discussed and are aware of the conclusions which each one of us has reached and we are in agreement about them, so that the oral decision we are now issuing represents our unanimous view.

[4] Peter and Sylvia Aitchison and Wellington City Council apply for enforcement orders against Heather Ann Walmsley, David Cullen Walmsley and Walmsley Enterprises Limited. The orders which we are considering in this decision are those specified in paragraphs 2.1 and 2.2 of the application:

> *2.1 under sections 314(1)(b)(ii) and 17(3)(b) and/or 314(1)(a)(ii) and 17(3)(a) of the RMA (or any other relevant provision thereof), requiring the first, second and third respondents to remove all parts of the play structure and fence that exceed the height of the adjacent plaster wall (excluding the glass balustrade panels) on 11 Maida Vale Road; and*
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> *2.2 under sections 314(1)(b)(ii) and 17(3)(b) and/or 314(1)(a)(ii) and 17(3)(a) of the RMA (or any other relevant provision thereof), requiring*

the first, second and third respondents to remove all remaining parts of the play structure other than any remaining parts of:

2.2.1 posts that are directly affixed to the concrete retaining wall,

2.2.2 rails that are directly affixed to those posts,

2.2.3 boards that are directly affixed to those posts and/or rails, and fixings associated with any of those parts.

[5] The Aitchisons reside in an apartment at 2/11 Maida Vale Road, Roseneath, Wellington (the Aitchison apartment/property). The apartment is on the ground floor of a two apartment complex situated on an elevated north facing site between Oriental Bay to the west and Evans Bay to the east.

[6] Heather and David Walmsley are directors of Walmsley Enterprises Limited which owns a property at 1 Carlton Gore Road immediately to the north of and adjoining the Aitchison property. We will refer to this property as the Walmsley property and generally not distinguish the Walmsleys' respective roles in the events which we describe. As with the Aitchison property, the Walmsley property is elevated and north facing. It is occupied by an old dwelling house which has been rented out for some years but was the Walmsley family home for a long time, having been owned by Mr Walmsley's grandparents and parents.

[7] The land where the two properties sit is on a steep slope which rises up from Oriental Bay. The Aitchison apartment sits above the Walmsley property on the hill. The Walmsley house is situated towards the eastern end of the two properties. The Aitchison property looks over the roof of the Walmsley house in this direction. The western end of the Walmsley property is (or rather was) largely clear of structures and comprises a garden area. The Aitchison apartment and its outdoor living area are positioned in direct line with the Walmsley garden and until recently had an unobstructed view over the top of the garden across Oriental Bay to the City, the wider harbour and their surrounding hills. The absence of structures on the Walmsley garden also meant that in addition to their views, the Aitchisons had an open, unconfined, sunny and private aspect to their property.

[8] The boundary between the Atichison property and the Walmsleys' garden is about 20 metres or so in length. For much of its distance it is defined by a concrete retaining wall about two metres plus in height. The evidence establishes that the boundary between the two properties in this area is generally along the southeast face (that is, facing the Aitchisons' property) of the retaining wall but at each end the retaining wall is just, but measurably (0.05m) clear of the boundary. This extremely minor separation had a part to play in the dispute now before the Court and we will return to that in due course.

[9] Without being precise, the top of the retaining wall generally appears to coincide with floor level of the Aitchison apartment. A low plaster wall supporting a glass balustrade sits just inside the boundary on the Aitchisons' side enabling the Aitchisons to obtain the benefits of view, aspect and sunlight which we have previously described. We understand that the balustrade was constructed by the developer of the Aitchison apartment in the mid-1990s and replaced an old fence previously on the Walmsleys' land.

[10] We will not detail the full history of interaction between the Walmsleys, the Aitchisons, previous owners of the Aitchison property and the property developer, although we will refer to some aspects of that later in this decision. What is relevant for the purposes of these proceedings is that in late 2014 and early 2015, the Walmsleys erected a structure or structures attached to the retaining wall along their side of the boundary. We have deliberately used the term *structure or structures* as the development along the retaining wall by the Walmsleys was regarded by the Council as three separate structures. At each end of the retaining wall where it is physically clear of the boundary, the Council considered that Walmsleys were entitled to erect a 2 metre high fence on top of the wall, whereas in the middle and longest section of the retaining wall which touches the boundary it was not possible to do so because the point for measuring fence height was at the foot of the wall and a 2 metre high fence on top of the 2 metre plus retaining wall failed to meet District Plan standards.

[11] Advice from the Council to that effect led to the Walmsleys, who were determined to erect some form of barrier along the boundary for the purpose of protecting the privacy of their garden area, investigating what other form of structure might be constructed on top of the retaining wall. They became aware that it was possible to erect a *residential structure* (being a structure used or intended to be used in association with a residential activity) on or close to the boundary in that part of the retaining wall where it was not permissible to erect a fence, because under the Council's District Plan residential structures are subject to different standards than fences. They accordingly decided to erect a play structure in that area and proceeded to do so, having obtained a building permit from the Council for that structure.

[12] The play structure takes the form of an elevated walkway just over 1 metre wide attached by posts to the retaining wall. The walkway varies between about 2.2 and 3 metres or so above ground level on the Walmsley side. Access to the walkway is gained by a steep ladder at one end and egress by a slide at the other end. The walkway is somewhere between 11 and 12 metres in length and is constructed at different levels. It has bubble panels, a sway bridge and a turret tower. The walkway has timber walls or fences along either side. On the Walmsleys' side the timber wall starts at walkway level so that it is possible to stand underneath the walkway in places and use it as a pergola or such. Facing the Aitchisons' property the timber wall extends right down onto the retaining wall.

[13] Additionally, the Walmsleys have constructed timber fences along the top of the retaining wall at each end of the play structure where the Council considered that they were permitted to do so. The fences and play structure walls have all been identically constructed in timber. The only differences between them are that the play structure wall has been built to a height between 2.2 and 2.4 metres above the retaining wall and the two fences at each end are between 1.8 and 2 metres above the retaining wall.

[14] Although for the purpose of application of District Plan rules the Council regarded theses structures as being three separate structures, when viewed from the Aitchisons' side of the boundary, they present as one long, continuous wooden fence

over 20 metres in length (albeit at varying heights). We consider that treating the structures as three separate structures involves a high degree of artificiality. They could just as accurately be described as a fence to which a play structure or walkway has been attached. Notwithstanding that observation, these proceedings have been advanced by the parties on the basis that the structures which we have described are permitted by the rules in the District Plan which they could not be if they were one long, continuous fence.

[15] The applications which we are to determine are founded on the provisions of ss17 and 319 of the Resource Management Act, which we now consider. They provide as follows:

> ***17 Duty to avoid, remedy, or mitigate adverse effects***
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> *(1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with-*
>
> *(a) any of sections 10, 10A, 10B and 20A; or*
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> *(b) a national environmental standard, a rule, a resource consent, or a designation.*
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> *(2) The duty referred to in subsection (1) is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty.*
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> *(3) Notwithstanding subsection (2), an enforcement order or abatement notice may be made or served under Part 12 to-*
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> *(a) require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the Environment Court or an enforcement officer, 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 of the environment; or*
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> *(b) require a person to do something that, in the opinion of the Environment Court or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely*

adverse effect on the environment caused by, or on behalf of, that person.

(4) Subsection (3) is subject to section 319(2) (which specifies when an Environment Court shall not make an enforcement order).

319 Decision on application

(1) After considering an application for an enforcement order, the Environment Court may-

(a) except as provided in subsection (2), make any appropriate order under section 314; or

(b) refuse the application.

(2) Except as provided in subsection (3), the Environment Court must not make an enforcement order under section 314(1)(a)(ii), (b)(ii), (c), (d)(iv) or (da) against a person if-

(a) that person is acting in accordance with-

(i) a rule in a plan; or

(ii) a resource consent; or

(iii) a designation; and

(b) the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, or approved the designation, at the time of the approval or granting, as the case may be.

(3) The Environment Court may make an enforcement order if-

(a) the Court considers it appropriate after having regard to the time that has elapsed and any change in circumstances since the approval or granting, as the case may be; or

(b) the person was acting in accordance with a resource consent that has been changed or cancelled under section 314(1)(e).

The following issues relevant to these proceedings arise out of the statutory provisions.

[16] Section 17(1) imposes a duty on persons to avoid, remedy or mitigate adverse effects on the environment even if they are acting in accordance with existing use

rights, national standards, district or regional plan rules, resource consents or designations. In short, the duty exists even if a person is acting *legally* pursuant to the rights or instruments identified. Further, pursuant to s17(3) that duty may be enforced by the issue of enforcement orders or abatement notices.

[17] Section 17(3)(a) enables an enforcement order to be made or abatement notice issued requiring a person to cease doing something which is noxious, dangerous, offensive or objectionable so as to have an adverse effect on the environment. The determinative factor in the Court making an enforcement order requiring a person to cease doing something is a finding that what the person is doing is noxious, dangerous, offensive or objectionable so as to have an adverse effect on the environment. Once that finding is made, then an enforcement order may be made.

[18] Section 17(3)(b) enables an enforcement order to be made requiring a person to do something (as opposed to cease doing something) which is necessary to avoid, remedy or mitigate an adverse effect or likely adverse effect caused by that person. To make an order under this provision it is not necessary for the Court to find that a person's actions are noxious, dangerous, offensive or objectionable. The finding which must be made is that it is necessary to make an order to avoid, remedy or mitigate an adverse actual or likely adverse effect. In other words, it seems to be a lower standard in terms of the adverse effect than the noxious, dangerous, offensive or objectionable standard in s17(3)(a).

[19] We mention that distinction in this case because it will be apparent from consideration of applications 2.1 and 2.2 that although they refer to both s17(3)(a) and 17(3)(b), the orders being sought are in fact orders made under s17(3)(b) to require the Walmsleys to do something, namely to remove parts of the structures we have described. Accordingly we do not need to find the structures' effects to be offensive or objectionable in order to make an order under this provision. Simply that it is necessary to remove them to avoid, remedy or mitigate an adverse effect.

[20] We will in fact make findings on the issues of offensiveness or objectionability in this case for two reasons:

- Firstly for the sake of completeness because these were the topics of quite extensive evidence before us;
- Secondly because we consider that making findings on these issues assists in forming a view as to whether or not is it necessary to order removal of the structures.

We use the words *offensive* and *objectionable* in the meanings identified by the Court in the *Tasman Action Group*[1] case, namely:

> ... *offensive means disgusting, nauseous, repulsive, causing anger or annoyance*...and that... *objectionable means unpleasant, offensive, repugnant.*

There is clearly an overlap between the two concepts and we apply the phrase as a whole.

[21] There is no doubt that Mr and Mrs Aitchison consider the effects of the structures on them as being offensive and objectionable. That is why we are here. However, the test which we must apply is whether the ordinary reasonable person representative of the community at large would find the effects offensive and objectionable and we will address that.

[22] The Court of Appeal in *Watercare Services Limited v Minhinnick*[2] identified a four step process to be undertaken in determining issues of the kind before us in these proceedings:

- The first is a determination as to whether or not the assertion that the subject matter is offensive or objectionable is honestly made. It is undoubtedly made honestly by the Aitchisons and the Walmsleys accept that;
- The second is a determination as to whether in the opinion of the Court, the subject matter is likely to be offensive or objectionable. As we have noted we do not consider the test is in fact as stringent as that, however we will make a finding in that regard at the conclusion of our assessment of effects;

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[1] *Tasman Action Group Inc v Inglis Horticulture Ltd* Decision No. C126/2007.
[2] [1998] 1 NZLR 294; [1998] NZRMA 113; (1997) 3 ELRNZ 511.

- The third is a determination as to whether any offensive or objectionable aspect is of such extent that it is likely to have an adverse effect on the environment. Again we will decide that at the conclusion of our assessment of effects;
- The fourth and final step is a determination as to whether or not the Court should exercise its discretion to make the enforcement orders sought. In undertaking that step we will consider the issue of whether or not we have jurisdiction to make the orders having regard to the provisions of s319(2).

[23] Steps 2 and 3 involving consideration of effects will be addressed by Commissioner Buchanan. Before he does so I record that our assessment in that regard will be undertaken without regard to the permitted baseline. That is for the obvious reason that we are by definition in these proceedings under s17 dealing with the effects of a permitted activity. If the effects of a permitted activity were to be taken out of consideration by applying the permitted baseline, no application under s17(3) in respect of an activity undertaken in accordance with a rule in a district plan could ever succeed.

[24] We will consider the actual effects of the Walmsley structures as we find them to be. All the parties agreed that to be the proper approach. We record that approach is consistent with that adopted by the Court in the *Hill Park Residents*[3] case.

Commissioner Buchanan

What are the effects of the activity?

[25] All parties relied on expert planners for the assessment of the effects of the fence/play structure (the structure), Mr A A Aburn for the Aitchisons, Mr W D Ulusele for the Council and Mr I T Leary for the Walmsleys. We also heard from environmental psychologist, Dr T Milfont for the Aitchisons and urban designer, Dr M T Gjerde for the Council.

[3] *Hill Park Residents Association Inc v Auckland Regional Council* Decision No. A 30/2003.

[26] Mr Aitchison provided us with an insight into the effects of the structure from his and his wife's perspective as residents of 2/11 Maida Vale Road.

[27] Much of the evidence on effects focused on residential amenity and the changes to that amenity since construction of the structure. By contrast, much of the hearing related to effects dealt with residual amenity available to the Aitchisons and whether or not this constituted continuing reasonable access to that amenity. Our examination focuses on the differences between before and after construction, that is the adverse effects.

[28] It was common ground that the residential amenity being affected primarily related to dominance of an overbearing structure, privacy, views and shading. These were identified and agreed in the Agreed Statement of Expert Planning Witnesses. A minor matter of wind effects was raised at the hearing but not pursued through expert evidence and not covered in this examination.

[29] We consider each of these effects in turn.

Dominance

[30] Mr Aburn described the loss of residential amenity resulting directly from the extent and dominance of the structure as *in itself ... a severe effect.* The overbearing nature of the structure along the full length of the terrace gave rise to consequential effects on views, privacy and shading and completely separated the Aitchisons from the wider environment in his opinion. This was reinforced by Mr Ulusele's opinion that the play structure and fence dominate the outdoor and adjacent indoor living areas of the Aitchison property. The adverse effect of this was in his opinion, severe. He stated that the visual domination of the structure is such that it is *difficult to conceive a structure of similar scale that would create more severe effects in this regard.*

[31] Mr Leary did not consider the effects of the bulk and location of the structure as being severe, although he did acknowledge that they were more than minor. In his opinion a structure of this nature might otherwise be entirely normal and

commonplace in other residential properties throughout the City. It is not particularly overbearing other than being located immediately on the boundary, in his opinion.

[32] With the benefit of our site visit, viewing the structure from inside the Aitchison house and from the patio, we agree with Mr Aburn and Mr Ulusele that the structure dominates the present outlook from the Aitchison property. On entering the living area from the internal access lift the eye is immediately drawn to what appears to be a rather incongruent structure in this setting, totally dominating the outlook from inside the house. This would be the case irrespective of whether or not we knew what views existed beyond the structure. Moving outside, we got a strong sense of enclosure from the proximity of the structure and the narrow width of the patio.

[33] From the evidence and from our site visit, we conclude that the structure is indeed dominant and overbearing from within the Aitchison property and that this constitutes a severe adverse effect of itself.

Privacy

[34] The play structure component includes a walkway that offers an unimpeded view directly into the internal and external living spaces of the Aitchison apartment from very close proximity. In Mr Ulusele's opinion, this may affect both the way the outdoor spaces are utilised and feelings related to safety and privacy within the dwelling. This was categorised by Dr Milfont as a violation of privacy and personal space for the Aitchisons that was having an effect on their health and wellbeing. Both Mr Aburn and Mr Ulusele considered there to be significant and severe adverse effect on privacy from the presence of the play structure.

[35] Mr Leary considered the adverse privacy effects *on balance* to be minor or more than minor, but not severe. Responding to questions in cross-examination, Mr Leary confirmed his earlier position expressed in the joint statement that the privacy effects were minor. The balance of effects was achieved by considering the adverse

effects alongside the positive effects of privacy provided to both properties by the structure.

[36] Again, with the benefit of our site visit, we agree with the Applicants' experts that the presence of the walkway at the top of the play structure has a significant effect on the privacy previously experienced by the Aitchisons, particularly when within the dwelling. To suggest, as Mr Leary did when questioned on this, that people could simply put up curtains was not helpful in dissuading us from this conclusion.

View

[37] We will not dwell on this to any great extent as it was common ground between the experts that the structure had a significant and severe adverse effect on views from the Aitchison property. Previously there were panoramic views of Wellington City and harbour and the western hills through to the Hutt Valley when sitting or standing at most parts of the front of the property. This is now reduced to standing only views from the eastern end of the patio of the Hutt Valley, western hills and part of the Port area of the harbour. Only the sky is visible from seated positions that previously enjoyed the full panorama.

[38] The views available from the Aitchison property prior to construction of the structure made a significant contribution to the overall residential amenity of the property. Retention of some residual secondary views to the northeast from a standing position only has not diminished the severity of the effect of the almost complete loss of the primary views over the City and harbour.

[39] Mr Cameron submitted that this loss of view was a primary cause of a significant reduction in the economic value of the property, perhaps to the extent of 50 percent. No expert evidence was called on this. Mr Bennion acknowledged that there may be some loss of value but was not prepared to quantify this. We accept Mr Bennion's submission in this regard, noting that one of the outcomes of the severe adverse effect on views from the property will be a diminution of the value of that

property. The extent of this reduction is not able to be quantified from the evidence available to us.

[40] We accept the evidence from all parties that the structure has a significant and severe adverse effect on views from the Aitchison property.

Shading

[41] Mr Leary and Dr Gjerde presented complementary evidence from computer simulations of the effect of shading from the structure on the Aitchison property. There is no need here to delve into the technical intricacies of the methods employed to show the extent of the shading that occurred as the experts agreed that their results were essentially the same. Where they disagreed was on the severity of the effect of that shading.

[42] Dr Gjerde relied on the numerical guidelines provided in the Residential Design Guide in the District Plan, suggesting three hours of continuous sunlight over a substantial portion of the patio at its surface on the shortest day of the year was the appropriate standard to be met. His analysis showed that only one hour (maybe one and a half hours) of sunlight would be experienced over a substantial portion of the patio at this time. Dr Gjerde's opinion was that the structure was having an unacceptable and significant adverse effect on the sunlight values previously available to the Aitchisons.

[43] Mr Leary took a different approach. In his opinion, if the Design Guide numerical standard was reached there was no need for further assessment. If however, this was not being achieved this acted as a trigger for further site specific analysis to determine the actual loss of sunlight being experienced.

[44] Mr Leary consequently based his analysis on the availability of sunlight at 1 metre above the patio surface at representative points on the basis that most use of the patio would be made from a sitting position. In his opinion, the standard should relate to the availability of sunlight on the upper body of a seated person. Using this approach he determined that the structure did not reduce the available sunlight to

below the Design Guide suggestions. Consequently the structure was not having a severe adverse effect on sunlight loss, although the effect may be more than minor.

[45] What we are being asked to determine here is whether the Design Guide provides a quasi standard related to sunlight loss or acts merely as a trigger for further analysis. As indicated by Mr Leary, both approaches are regularly used in analysis of development proposals and both are accepted. This does not help us in determining the severity of the effect on sunlight loss in this case.

[46] As the Design Guide provides just that, a guide, we fall back onto the assessment of those directly affected, the Aitchisons. Mr Aitchison told us that the loss of sunlight for both outdoor and indoor living spaces was *profound* and *greatly affects the extent of natural light and sunlight available during the winter months.* We accept Mr Aitchison's evidence on this (supported by the expert evidence of Dr Gjerde) that the structure is having a significant adverse effect on sunlight amenity of this property.

Overall

[47] From this examination of the evidence on the components of residential amenity impacted by the development on the boundary of 2/11 Maida Vale Road, we can only conclude that the combined adverse effects on dominance, privacy, views and shading are severe. This was acknowledged by the experts for all parties with only Mr Leary qualifying this to be primarily due to the adverse effects on views.

[48] We find that there are significant and severe adverse effects on the residential amenity of 2/11 Maida Vale Road resulting from the placement of the fence/play structure at the boundary with 1 Carlton Gore Road by the Walmsleys.

[49] Turning now to the matter of whether the structure is offensive or objectionable to a degree that it has an adverse effect on the environment.

[50] We have already described the effects that contribute to our finding that the overall adverse effects on residential amenity are severe. It remains to add

consideration of the evidence of Dr Milfont on the less tangible (but nevertheless equally important in this context) effects on the health and wellbeing of the Aitchisons. Dr Milfont described the play structure as imposing *an undesirable and unexpected physical setting* resulting in the Aitchisons feeling an overwhelming sense of confinement and claustrophobia to the extent that they feel they have to escape by avoiding the property to reside elsewhere whenever possible. They have a strong desire to avoid this intrusion on their personal space.

[51] The extent, height and location of the structure that removed much of their view and imposed on their privacy and personal space were considered by Dr Milfont as a territorial violation related to dominance.

[52] Mr Aitchison confirmed that the structure not only had an effect on their amenity but also on their ability to live in and enjoy their property. He described how this resulted in stress to both him and his wife to the extent that their general health has deteriorated. We have no reason to believe otherwise. To the Aitchisons, the structure imposed on their property is indeed offensive and objectionable.

[53] Dr Milfont described his reaction to first viewing the structure as *frightening*. Mr Aburn was *shocked* at the extent of imposition on the Aitchisons' amenity describing it as *grossly offensive* in separating the property from the wider environment.

[54] The Court is required to take an objective view in deciding this matter by considering it from the perspective of an ordinary person, representative of the community at large. We have assessed the evidence and found the effects on residential amenity to be severe. We have considered the personal effects on the Aitchisons and the professional opinions of their experts. Finally, we have taken the opportunity to visit the site.

[55] Having regard to the process set out in *Watercare Services* we find that:

- Firstly, the actions which are the subject matter of these proceedings are offensive or objectionable;

- Secondly, the offensive or objectionable aspect is of such an extent that it has an adverse effect on the environment.

Judge Dwyer

[56] Those findings as to effect now bring us to determine the question as to whether or not we can and should exercise our discretion to make the orders sought. That in itself is a two step process, firstly involving determination of a jurisdictional issue and then consideration of the application on its merits assuming the jurisdictional test is met.

[57] The jurisdictional issue arises pursuant to the provisions of s319(2)(b) which we have cited previously. The parties have asked us to assume that in erecting these structures the Walmsleys were acting in accordance with rules in the District Plan. In that situation, s319(2)(b) prohibits us from making an enforcement order if the adverse effects which we have identified were *expressly recognised* by the person who approved those rules, that person being the Council.

[58] There was considerable debate between the parties as to the meaning of the expression *expressly recognised.* The Walmsleys' planning witness, Mr Leary, made the observation that it would be an absurdity if the expression meant that the Council had to consider the effects of their District Plan on every property in the City when bringing down rules or standards and we concur with that. The Council clearly cannot assess impacts of effects on every single property in the City when formulating its District Plan. However, s319(2)(b) is not directed at properties. It is directed at adverse effects. The District Plan sets standards to control various effects across the District. What ss17 and 319 do is recognise that on occasions application of the standards may lead to adverse effects in particular situations which were not expressly recognised when the standards were brought down and enable those outcomes to be addressed.

[59] In our view consideration of adverse effects in this context requires regard to be had not just to the type of effects but also to their degree or severity. We ask the question whether the District Plan has expressly recognised the types of effects

which are generated by this structure and the severity of those effects in this situation.

[60] Mr Ulusele provided evidence as to the provisions of the District Plan and the process associated with DP72 which was a full review of the Residential Chapters of the District Plan, including the provisions relevant in this case. He concluded:

> *There is no evidence in the decision of the hearing Committee that they considered that the type of effects seen here would result from PC72. There is no recognition that its provisions might result in a severe loss of residential amenity.*

We accept his evidence in that regard.

[61] Nor did we see anything in the evidence we considered which led us to draw any implication that the Council must have expressly recognised the type and degree of effects experienced in this case. The effects which we have described have been brought about by a combination of factors:

- Difficult definitions in the District Plan;
- Different standards being applicable to fences and other residential structures;
- The dual activity fence/residential structure erected on or near the boundary;
- The particular topography of the sites;
- The presence of a large retaining wall partly on and partly off the boundary.

It is difficult to see how this combination of factors could have been foreseen and expressly recognised when bringing down the rules and standards we are discussing.

[62] We hold that s319(2) does not restrain the Court from making the enforcement orders sought in these proceedings. That finding brings us to determine whether or not we should exercise our discretion to do so.

[63] We commence our discussion in that regard by observing that there is an unusual aspect of ss17 and 319. In our view it is a fundamental assumption of resource management practice and law that persons undertaking activities pursuant to any of the mechanisms identified in s17(1)(a) and (b) should be able to do so with

certainty. Mr Walmsley made that point forcefully on more than one occasion in response to questions from Mr Cameron. Unfortunately he was wrong in asserting that in exercising his rights he could disregard the effects of his legal activities on his neighbours.

[64] Sections 17 and 319 enable persons adversely affected by otherwise legal activities to challenge their effects on them and indeed to challenge the very continuation of those activities. We consider that applications of this kind need to be approached cautiously having regard to the need for certainty which we have identified. However we also recognise that Parliament has deliberately made provision to enable the Court (through enforcement orders) and local authorities (through abatement notices) to avoid, remedy or mitigate adverse effects of lawfully undertaken activities. We will endeavour to give appropriate recognition to both of those matters in this case.

[65] We have had regard to the fact that the Walmsleys' desire to erect a barrier between their property and the Aitchisons arises from their reasonable need for privacy in the garden area of their property. Although they do not live there, they visit on occasions to enjoy the view and amenity. We were not told how often. There is a vague possibility that they may return to live permanently. The Walmsleys' right to privacy in their garden is no less important than that of the Aitchisons in their apartment.

[66] We recognise that the need for privacy in the garden area arises, at least in part, because in about 1995 a fence which Mr Walmsley described as a three quarter high evolved fence with layers of trellising and plants was removed from the boundary without the Walmsleys' authority. That was done by the builder of the Aitchisons' apartment who replaced the old fence with the plaster wall and glass balustrade which we have described. This enabled direct views from what is now the Aitchison apartment down into the Walmsleys' garden. In short, at least some of the amenity attaching to the apartment was gained at the expense of the Walmsleys' privacy. However nothing in the evidence which we heard suggested that the old

fence had adverse effects on the Aitchisons' apartment even remotely approaching those which arise from the current structure which we have described.

[67] In undertaking our considerations we requested information as to the range of structures which might reasonably be expected to be established on the Walmsley garden. We did so in part because of our concerns about the obvious artificiality of the play structure and a wish to understand what adverse effects might be experienced in the Aitchison apartment from permitted developments which might happen on the Walmsley property, such as construction of home extensions or the like as compared to the play structure.

[68] We accept the evidence of Mr Leary and of Mr B A Welsh (the Walmsleys' architect) that it is possible to erect such a structure on the Walmsley property although we do not accept their evidence as to precisely what form that structure might take. At the Court's request Mr Welsh produced concept plans of what might be achieved. However the uncertainties about actual dimensions and appearance of such buildings left us unable to make any meaningful comparison between the effects of what might be built as of right and the present fence/play structure.

[69] Even giving the greatest weight possible to the Walmsleys' undisputed right to privacy and recognising that Aitchisons' amenity could be adversely affected by other developments on the Walmsley property, we consider that a number of factors support the making of orders in this case.

[70] The first of those factors is the extreme nature of the adverse effects in their totality which we have found to be offensive and objectionable. Indeed, effects arising from the dominance of the structure and loss of privacy are so severe that they each individually fall into that category. We have not put loss of views on its own into the offensive and objectionable category. We recognise that the District Plan does not guarantee views and there is ongoing potential for views from the Aitchison property to be diminished by other permitted development on the Walmsley property, although it seems inconceivable that such diminution could be to

the extent caused by these structures. In any event it was agreed by all of the witnesses that the loss of view is severe as compared to what they had previously.

[71] Mr Aburn, who has some 40 years' experience dealing with property and planning matters in Wellington and is highly familiar with the nature and effects of development in the City, described the effects of the Walmsley structures as grossly offensive. We accept that view and we concur with it. We repeat our earlier observation that this is a higher level of adverse effect than is required to trigger an order under s17(3)(b).

[72] The second factor is the artificiality of the situation of the play structure. We consider that construction of the play structure was a contrivance undertaken to get around rules which prevented the construction of a fence along the middle section of the retaining wall. We reached that conclusion for three reasons:

- Firstly, the Walmsleys' ongoing endeavour over a number of years to establish a fence on the retaining wall. They have taken down two previous fences under threat of Council or legal action. The current structure is just another means to the same end;
- Secondly, accepting that a play structure would be built on a property where the Walmsleys do not live to provide for children who do not live there either and who visit only occasionally at best, requires the Court to display a greater degree of naivety than it is prepared to do;
- Finally, the Walmsley's architect (Mr Welsh) acknowledged that the play structure was a contrivance.

[73] The third factor is the deliberate refusal on the Walmsleys' part to consider avoidance, remedy or mitigation of adverse effects of the structures on the Aitchisons. Mr Walmsley said in so many words that he was not obliged to have regard to effects of the structure on the Aitchisons and did not do so. As part of Court proceedings in 2011, he swore an affidavit acknowledging that an earlier and lower fence which he had erected on the retaining wall had caused distress to the Aitchisons and adverse effect to their property. As we observed previously, Mr

Walmsley was wrong in his understanding that he did not have to have regard to effects of the structures on the Aitchisons.

[74] Mr Ulusele observed that the play structure had been designed and located in a manner which maximised its adverse effects rather (we say) than avoiding, remedying or mitigating those effects and we accept his observation in that regard. Dr Milfont's characterisation of construction of the structure as antisocial behaviour because it lacks consideration for health and wellbeing of others was confirmed by Mr Walmsley's own evidence.

[75] The fourth factor which we have considered is mentioned somewhat tentatively and was not conclusive in our finding. PC72 which contains the District Plan provisions under consideration in this case was notified in 2009. In making a decision on PC72, the Council hearings Committee specifically recommended that an investigation should be undertaken of recession plane requirements in the Residential area. We think that signals recognition at that time that there were shortcomings in the rules which needed rectification. To date that has not been done. We cannot say to what extent a plan change relating to these matters might have avoided the situation with which we are faced.

[76] Mr Bennion suggested in his submissions for the Walmleys that the Court might consider some lesser form of relief, such as ordering amendments to the structures or restricting their use. We do not accept that proposition. It is not our function to redesign the structure or its mode of use to enable the Walmsleys to comply with their duty to avoid, remedy or mitigate adverse effects on their neighbours.

[77] Having regard to all of the various matters above, we determine that the Applicants have established by an overwhelming margin that it is appropriate and necessary to make the orders sought in Paragraphs 2.1 and 2.2 of their application and we hereby do so. We record that we would have reached this conclusion even if we did not find the adverse effects to be offensive or objectionable. On whatever basis the effects are looked at, they are severe.

[78] The Applicants are requested to file an enforcement order in these terms for execution under seal by the Court and service on the Respondents. The order should provide for a period of one month from today within which the structures are to be removed.

[79] The remaining applications stand adjourned for further consideration if need be on conclusion of proceedings currently before the High Court.

Costs

[80] Costs are reserved in favour of both Applicants, again to be finalised on conclusion of the proceedings before the High Court. At that time the Applicants are directed to file a memorandum with a proposed timetable for resolution of costs.

DATED at Wellington this day of January 2016.

B P Dwyer
Environment Judge

I M Buchanan
Environment Commissioner