

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 228

IN THE MATTER of the Resource Management Act 1991
AND an application for enforcement orders under
ss 314 and 316 of the Act
BETWEEN AUCKLAND COUNCIL
Applicant
(ENV-2018-AKL-000017)
AND CABLE BAY WINES LIMITED
AND MOTUKAHA INVESTMENTS LIMITED
Respondents

Court: Principal Environment Judge L J Newhook
Commissioner I M Buchanan
Commissioner J A Hodges

Hearing: 15 November 2018

Appearances: R E Bartlett QC for Appellants
S F Quinn and K Rogers for Auckland Council
S J Simons, R K Smith and H E Philip for J Loranger, L Niemann,
M Poland and C Poland, s 274 parties
S and S Edwards for themselves, s 274 parties

Date of Decision: 28 November 2018

Date of Issue: 28 NOV 2018

FIRST INTERIM DECISION OF THE ENVIRONMENT COURT MAKING
ENFORCEMENT ORDERS and DIRECTIONS

Introduction

[1] This is a brief first interim decision of the Environment Court making enforcement orders, in circumstances which are described following.

[2] The forthcoming decision trail in this proceeding should be read alongside a decision trail in a proceeding called *Cable Bay Wines Limited & Motukaha Investments*



*Limited v Auckland Council*¹, where consent is indicated for part of a retrospective application for certain structures and activities, and refusal of the balance.

[3] The two proceedings were heard as a set in the first half of November 2018. As with the First Interim Decision on the s 120 RMA proceeding, this First Interim Decision making enforcement orders precedes a fuller decision that will set out the reasons. Each of these first interim decisions has been issued in this way, because they are urgent and attempt to commence regularisation of activities, many of them previously illegal, on the site.

[4] As the other decision recorded, the proceedings concern a piece of land of approximately 10ha near the western end of Waiheke Island, the street address for which is 12 Nick Johnstone Drive, Church Bay, legally described as Lot 21 DP 159304. The land is partly planted in grapevines, contains a large gently-sloping grass area, and has buildings containing an original restaurant, a winery, a tasting room, a small meeting room, staff facilities, and more recently a second restaurant and large kitchen containing a pizza oven. These latter facilities had not been the subject of resource consent; likewise, some outdoor facilities including a bar, tables and chairs, umbrellas, and open-air dining and drinking on the lawn.

[5] The unconsented facilities and activities were the subject of a retrospective resource consent application by the Appellants in April 2017. Examination of the Assessment of Environmental Effects ('AEE') showed us in the s 120 appeal hearing that consent was sought for the following activities:

- (a) The establishment of the additional enclosed restaurant space and pizza kitchen, collectively referred to as The Veranda.
- (b) Use of the lawn for restaurant and outdoor dining purposes.
- (c) Installation of an acoustic wall on the boundary of 85 Church Bay Road.

[6] On 28 February 2018 Auckland Council commenced this proceeding applying for enforcement orders under ss 314(1)(a)(i) and 316 RMA as follows:

Orders requiring the respondent to cease the following activities at 12 Nick

¹ First interim decision no. [2018] NZEnvC 226.



Johnstone Drive, Waiheke Island:

- Use of the existing enclosed veranda area as a restaurant and function facility;
- Use of the outdoor seating bays located directly to the south of the veranda area for restaurant and function guests;
- Use of the lawn area to the south of the restaurant for informal dining; and
- Provision of seating in the restaurant for more than 120 guests at a time.

[7] Consent being indicated in the other proceeding, on conditions still being finalised, for the enclosed veranda area ("The Verandah"), the second and third of the orders applied for are the subject of this decision. In respect of the first of the orders sought, this decision makes interim orders pending further investigations by the three acoustic engineers engaged in the case on behalf of the various parties, after which time we will hear from the parties if necessary, and finalise conditions of consent and finalise enforcement orders.

Orders now made

[8] Ahead of the detailed reasoning to follow in the next decision, we record that much of the hearing on 15 November involved hot-tubbing and conferencing of acoustic engineer witnesses and planners, and the Court working with the parties and their counsel to shape enforcement orders, some finalised and operative as from 19 November 2018 and succeeding dates, and others to be finalised later with input from the witnesses and parties directed before the conclusion of the hearing.

[9] From 19 November 2018², the respondents are **ORDERED** to:

- (i) Restrict all outdoor eating and drinking to an area of no more than 80m² immediately in southwest of the southwestern façade of the store and original restaurant/function hall which are shown on attached plan AO-1 07/09/2018 (**Attachment A**);

² This date pre-dates this Order by some days. The Court is aware from enquiries to the registry from the respondents' planner on 16 November, that they were fully aware of Orders likely to be made and were taking steps to implement them even then.



- (ii) Limit the provision of tables and chairs in that outdoor dining area to seat no more than 40 patrons, with none permitted to stand to eat or drink, except for those attending a wedding ceremony to the extent provided for in [10] (iii) below. The 40-patron seating area to be clearly marked off and sign-posted generally describing the limitations in this paragraph [9].

[10] From 19 November 2018, the respondents are **ORDERED** to:

- (i) Prevent all patron access to the lawn beyond an area that extends 15m from the southwestern façade of the store and original restaurant/function hall which are shown on Attachment A;
- (ii) Pending implementation of other means of preventing such access by patrons through conditions of consent still being finalised in ENV-2018-AKL-000010, install a fully effective temporary physical barrier and clear and legible signage to define that limit of access by patrons to the lawn area;
- (iii) Restrict any outdoor wedding ceremony to take place only in the area described in [10] (i) above;
- (iv) Restrict any outdoor wedding ceremony to the exchange of vows and the half hour following the exchange of vows;
- (v) Restrict the serving of food and drink to patrons attending an outdoor wedding ceremony to the half hour following the exchange of vows;
- (vi) Not serve any food or drink or allow patrons to consume food or drink in the area described in [10] (i) above except as provided for in [10](v);
- (vii) Prevent the use of any amplified sound during a wedding ceremony until the wedding PA system is connected to the noise limiter and appropriately calibrated to ensure compliance with the noise limits to be provided in conditions of consent in ENV-2018-AKL-000010.

[11] Prior to the finalising of noise mitigation measures through conditions of consent in ENV-2018-AKL-000010 (then to be mirrored in a further set of Enforcement Orders), the respondents are directed to:



- (i) Restrict the use of the Verandah area during daytime³ to casual dining only, with a limit of 100 seated patrons at any one time, and none standing for consumption of food or drink;
- (ii) Restrict the use of the Verandah during night time⁴ to no more than 16 patrons seated for casual dining, and none standing for consumption of food or drink;
- (iii) Keep the drop-down PVC curtains on the southwestern façade of the Verandah lowered at all times;
- (iv) Not allow any functions or weddings to occur in the Verandah;
- (v) Not use any music system in the Verandah at night time (as defined above and in footnote 4);
- (vi) Lower the PVC screens on all facades of the Verandah at night time as defined above.

[12] From 19 November 2018, the respondents are directed to:

- (i) Cease any use of the outdoor bar structure near the Verandah kitchen.
- (ii) Cease any use of the concrete seating bays shown on Attachment A and marked "To be removed".

[13] Before 30 November 2018 Cable Bay is directed to:

- (i) Remove the outdoor bar structure described above;
- (ii) Remove the concrete seating bays shown on Attachment A and marked "To be removed" and any other outdoor furniture except in the outdoor seating area described in paragraph [9] (i) and (ii) above;
- (iii) Remove festoon lights mounted on the exterior of the building.

[14] Before 14 December 2018 Cable Bay is directed to:

- (i) Remove or change marketing material (including website material) that advertises

³ Official sunrise to sunset for Auckland inclusive of daylight saving adjustments.

⁴ Official sunset to sunrise for Auckland inclusive of daylight saving adjustments.



activities that are required by these Orders to be limited, controlled or removed;

- (ii) Install a lockable security gate at the top of the southern steps leading to the loading bay, and keep it locked at all times except when in use by staff;
- (iii) Install a lockable security gate across the access driveway to 85 Church Bay Road in a location to be agreed with the leaseholders. (Note: This Order is subject to the leaseholders' confirmation to the respondents and the Court that the gate is required; any dispute about positioning of it will be resolved by the Court);
- (iv) Install effective acoustic absorption insulation in the roof of the Verandah under direction by the parties' acoustic engineers, any dispute about same to be resolved by the Court;

[15] Prior to 20 December 2018⁵ the respondents are directed to connect the amplified sound system in the restaurant to the noise limiter described in the joint witness statements of the 3 acoustic engineers in ENV-2018-AKL-000010, and calibrate it to ensure compliance with the noise standards to be set in conditions of consent in that proceeding.

[16] Prior to 1 October 2019 Cable Bay is to obtain all necessary regulatory approvals and complete all noise mitigation work on the Verandah as required by conditions of consent in ENV-2018-AKL-000010.

[17] The respondents are forthwith directed to provide reliable emergency contact details for complaints, to the residents of 85 Church Bay Road, 125 Church Bay Road and 20 Nick Johnstone Drive and to the Auckland Council.

Directions for acoustic testing and design

[18] The Court intends that the above orders limiting operations in The Verandah shall as soon as possible be replaced by detailed decisions for control of noise, attenuation, monitoring and enforcement, which will substantially mirror conditions of consent that are yet to be framed in the other proceeding, for those purposes.

[19] The three acoustic engineer witnesses in both proceedings provided the Court

⁵ Or such later date as the conditions anticipated in this paragraph [15] are determined; pending which the provisions of paragraph [11] of these Orders shall remain in force.



with very considerable assistance through several conferencing sessions and helpful joint witness statements. The last of those occurred towards the end of the hearing and resulted in recommendations by them for some test methodology for work that they will undertake over a period of four weeks. The Court is keen for that work to commence as early as possible. We have accordingly considered the recommendations, modified them slightly, and now make them the subject of **DIRECTIONS** to the parties and the witnesses. They are **Attachment B** to this decision.

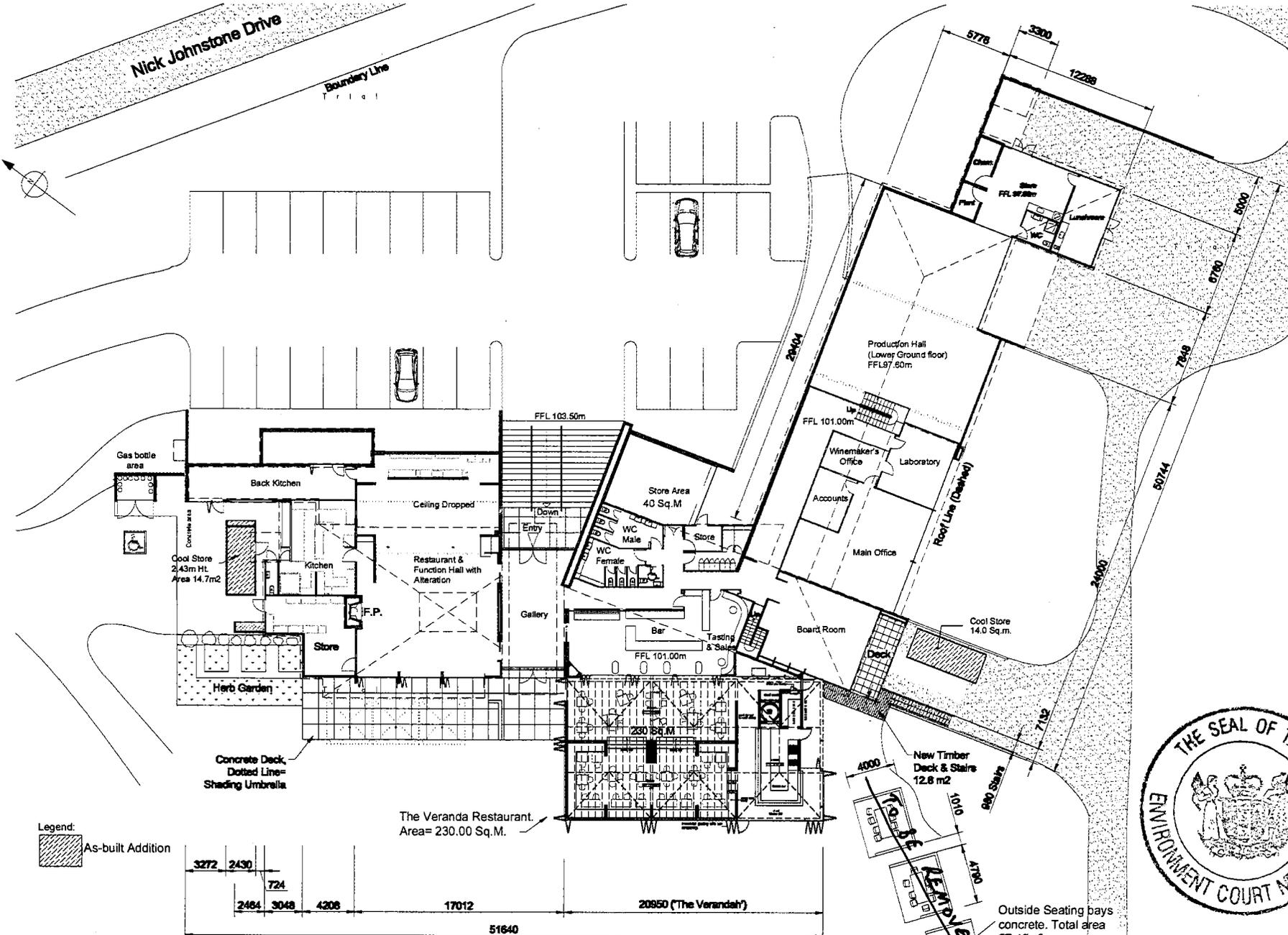
[20] Leave is granted for the engineers to approach the Court through the parties, with urgency if necessary, if the directions need to be added to or modified in any way.

For the court:



L J Newhook
Principal Environment Judge





Legend:
 As-built Addition



Attachment A.

The As-built structure for Cable Bay Winery
 Date: 07/09/2018
 Prepared by: Andrew Rosales

Situation and Floor Plan
 Scale: 1:300 in AS

A0-1

Attachment B

TEST METHODOLOGY

TEST 1

Name: Patron Noise Measurement within the Verandah

Purpose: To measure the reverberant noise level generated by different sized groups of patrons in the Verandah and to establish the relationship between patron numbers and noise level

Method:

1. As soon as practicable after the installation of the sound absorbing ceiling within the Verandah, the Respondents shall engage an appropriately qualified acoustic engineer (probably Mr Ibbotson) to install a noise Logger ("the Logger") within the Verandah.
2. The Logger microphone position shall be agreed up by the 3 expert acoustic engineers ("the engineers") and is intended to be representative of the reverberant noise level that will arise within the Verandah
3. The Logger shall continuously measure the noise level at a maximum time increment of 5 minutes. The Logger shall also record the following broadband parameters: L_{Aeq} , L_{A10} , L_{A90} , L_{A95} , L_{AFMAX} . The measurements shall establish what the representative octave band L_{eq} levels are during occupancy.
4. The Logger shall remain in place for a period of at least a month with the removal date to be agreed by the experts and once sufficient data has been obtained to enable reliable conclusions to be drawn to the satisfaction of all engineers.
5. The Respondents shall install a time-lapse camera to accurately count the number of patrons in this space every hour of operation (on the hour) for the duration that the Logger is installed and the Verandah is occupied. The camera shall be installed by an independent specialist experienced in the supply, installation and analysis of results of such equipment in a location determined by him or her to capture all seating locations in the area, including the bar area. The specialist shall provide the acoustic experts with results from the camera at appropriate intervals agreed among them and shall certify that the results are an accurate record of numbers using the Verandah. The records shall include the time and date of each count along with the count data.



6. The Respondents must also provide the engineers a log of the table booking sheet for the Verandah for every day that the Logger is in place.

TEST 2

Name: Sound Insulation Testing

Purpose: To establish the noise level difference in each whole octave band between the source (Verandah) and the receivers (85 Church Bay Road, 20 Nick Johnstone Drive, 125 Church Bay Road).

Method:

1. Noise measurements will be scheduled for a morning where wind conditions are forecast to be negligible and without precipitation, with all three engineers in attendance. It is desirable to have an easterly wind drift rather than any other direction.
2. Using test loudspeaker(s), a diffuse uniform sound field will be established in the Verandah and bar. The source test track will be repeatable and will not fluctuate noticeably with time. The noise level used shall have sufficient low frequency sound level as witnessed by all experts.
3. The Logger shall measure at 1 second time increments during the sound insulation testing procedure.
4. The internal A-weighted and individual octave band levels will be established using a time and space average within the Verandah and bar. The time and space average will occur over the entire Verandah and bar area (but shall not include the atrium). This level shall be compared with the noise level measured at the Logger position inside and the difference recorded for later use. The difference must be to the satisfaction of all engineers.
5. The internal level above must be recorded for three scenarios:
 - a. With the Verandah blinds and all external doors to the Verandah façade fixed closed.
 - b. As above but with the Verandah blinds on the north-western façade all fully open.
 - c. With the Verandah blinds all fully open.
6. The external noise level shall be measured at the three receiver locations (85 Church Bay Road, 20 Nick Johnstone Drive, 125 Church Bay Road). The measurement location at each receiver shall be at or within the notional boundary of the dwelling at locations to be agreed by the engineers.

Noise level measurements and subjective observations shall be made within the dwelling at 85 Church Bay Road. These measurements shall be taken in at least one



room of the dwelling. The room used for measurement shall be on the northern facade. Measurements shall be taken with all openable windows 100mm ajar, along with a second set of measurements with all doors and windows wide open. A background and ambient measurement shall also be taken in the room when the source is not present.

8. The external noise level at the above locations shall be measured for the three scenarios in 5 above.
9. Immediately prior to or immediately after the external noise levels have been measured, a background and ambient noise measurement must be taken to confirm the level of residual noise in the measurement.
10. Notice shall be given to neighbours the day prior to the sound insulation testing being undertaken.
11. There shall be no extraneous noise generated within the Respondents property which could interfere with the sound insulation testing.
12. All testing at the receiving locations is conditional on access being granted to the various measurement positions.

ANALYSIS

Purpose:

The objective of this entire testing regime is to determine a maximum number of patrons within the Verandah to ensure compliance with noise limits to be set in conditions of consent and enforcement orders.

Method:

1. The results from Tests 1 and 2 will be combined to inform the analysis.
2. The experts will prepare the analysis including demonstration of the internal noise levels versus patron number relationship.
3. The experts will provide the Court with a detailed summary of all measurements and testing along with their recommendation on the appropriate cap on patron numbers to result in compliance with daytime and night-time noise limits agreed among them before the conclusion of the hearing as follows:



Time frame	LAeq	Leq @63Hz 1/1 octave band	Leq @ 125 Hz 1/1 octave band	LAmx
7am to 10pm Monday to Saturday and Sunday 9am to 6pm	42 dB	50 dB	50 dB	NA
At all other times including all day on Christmas Day, Good Friday and Easter Sunday	32 dB	40 dB	45 dB	65 dB

Directions sought by the engineers, and now made by the Court:

1. The engineers require that the absorption in the Verandah is installed prior to testing.
2. The experts require accurate records on an hourly basis as to the occupancy of the Verandah.
3. The engineers require external access to the properties at 85 Church Bay Road, 20 Nick Johnstone Drive, 125 Church Bay Road and internal access to the room at 85 Church Bay Road.
4. The engineers require access to the Respondents' building at 7am on the day of testing and the full assistance of staff.
5. The engineers require that the residences will remain as quiet as directed by the experts whilst measurements are being undertaken.

