

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2024] NZEnvC 42

IN THE MATTER of the Resource Management Act 1991

AND an application under s316 of the Act

BETWEEN NELSON CITY COUNCIL

(ENV-2023-CHC-128)

Applicant

AND I SENK

First Respondent

AND R NEWEY

Second Respondent

Court: Environment Judge J J M Hassan

Hearing: On the papers in chambers at Christchurch

Last case event: 14 March 2024

Date of Decision: 15 March 2024

Date of Issue: 15 March 2024

DECISION OF THE ENVIRONMENT COURT

A: These enforcement orders ('orders') are made under ss 314(1)(b)(i), 316 and 279(1)(b) RMA:

(1) the location to which these orders apply is the property at 252

NELSON CITY COUNCIL v SENK & NEWEY



St Vincent Street, Nelson (legal description Lot 1 DP15914) ('Property');

- (2) the names and addresses of the persons against whom these orders apply are the following persons and their successors and assignees ('respondents'):
 - (a) Irena Senk, 252 St Vincent Street, Nelson; and
 - (b) Rex Newey, 252 St Vincent Street, Nelson; and
 - (c) their personal representative, successors or assignees.
- (3) 'Building' means the building described in the 27 October 2023 affidavit of Naomi Olive Alderson that accompanied the application for orders and depicted in Exhibit C to that affidavit, and includes the extension as described in paragraph [12] of that affidavit.
- (4) the respondents are hereby ordered that the respondents:
 - (a) within 28 working days of the date that this order is served on them, must move or otherwise ensure that the Building ceases to be located above, on or over or within 1m (measured horizontally) of any Nelson City Council waste water pipe traversing the Property;
 - (b) thereafter must not have the Building on the Property except for insofar as it is used for any purpose that complies with the requirements of the Nelson Resource Management Plan or the RMA.
- (5) the following terms and conditions apply to the orders above:
 - (a) leave is reserved for Nelson City Council to apply for further directions if the orders are not complied with and/or further orders are necessary; and
 - (b) the respondents are jointly and severally liable to pay the Nelson City Council's legal fees of \$5,000 within two months of the issue of these orders. If payment is not made within this timeframe, Nelson City Council is able to recover this sum as a debt due from the respondents.

REASONS

Introduction

[1] On 30 October 2023, Nelson City Council (“Council”) filed an application for enforcement orders against Irena Senk and Rex Newey regarding the use of the property at 252 Vincent Street, Nelson, in breach of the rules of the Nelson Resource Management Plan (‘NRMP’).

Orders sought

[2] The enforcement orders sought were as follows (*sic*):

Orders under section 314(1)(b)(i) of the Act requiring the Respondents, upon 4 weeks upon service of the Order of the Court, to:

- a) Remove the structure located above the Nelson City Council waste water pipe within 4 weeks of service of the Orders of this Court.
- b) If the structure is to be retained for use on the property elsewhere, ensure that the structure complies with the requirements of the NRMP and Resource Management Act 1991.

The location for which this enforcement order is the Property being 252 St Vincent Street Nelson (legal description Lot 1 DP15914).

The names and addresses of the person against whom these orders are sought are:

Irena Senk
252 St Vincent Street
Nelson

Rex Newey
252 St Vincent Street
Nelson

The terms in respect of the orders sought are:

- a) that the orders apply to the personal representatives, successors and assignees of the Respondents;
- b) to the extent that it appears to the Court that the orders sought may need

to be modified or added to, the Applicant seeks such other orders as the Court sees fit;

- c) that leave is reserved for the Applicant to apply for further directions if the orders are not complied with and/or further orders are necessary;
- d) that the Respondents shall pay the legal fees (provided that these are actual and reasonable costs) incurred as a result of the preparation of this application.

The grounds of this application are:

- a) the Respondents in contravention of the rules of the NRMP and section 9 of the RMA;
- b) the Respondents have refused to comply with the relevant rules of the NRMP;
- c) the actions that are required of the Respondents are necessary to ensure compliance with the rules in the NRMP.

AND upon the further grounds appearing in the attached affidavit filed with this application:

- i) Affidavit of Naomi Olive Alderson affirmed 27 October 2023 in support of this application;
- ii) Affidavit of Achini Samarasekara affirmed 27 October 2023 in support of this application;
- iii) List of names and addresses of persons to be served with a copy of this application.

Supporting affidavits

Affidavit of Naomi Olive Alderson

[3] The affidavit of Naomi Olive Alderson, environmental officer, advises that a duty planner requested an investigation of a building in the back yard of 252 St Vincent Street that may have been in use as a residential address.

[4] A Council sewer pipe runs under the section from the south boundary to the north boundary. The pipe is a 150mm diameter concrete spun pipe.

[5] On 20 September 2022, Ms Alderson visited the property. Ms Alderson

advised Ms Senk and Mr Newey that the Building was located over the sewer main in breach of REr.34, and the Building would need to be moved or removed or they would need to apply for resource consent to authorise the Building.

[6] Ms Alderson's affidavit sets out the steps taken to encourage compliance with the NRMP and RMA:

- (a) on 17 October 2022, on behalf of the Council, Ms Alderson sent an email to Mr Newey with a direction to either apply for resource consent to authorise the Building, or to move/remove the Building by 17 November 2022. This was not complied with;
- (b) on 25 November 2022, the Council issued an abatement notice to Ms Senk requiring her to apply for resource consent or move/remove the Building by 23 December 2022. The abatement notice was not complied with;
- (c) on 15 February 2023, the abatement notice deadline was updated to 8 March 2023;
- (d) on 9 March 2023, Ms Alderson contacted Mr Davies of 4 Jenner Road who advised that the Building had not been moved or removed. No resource consent application had been received to authorise the Building;
- (e) on 16 March 2023, the Council issued an infringement notice for breach of the abatement notice as issued. The abatement notice deadline was updated to 17 April 2023;
- (f) on 13 April 2023 the abatement notice deadline was updated to 28 April 2023 following a request from Ms Senk for more time to comply;
- (g) on 24 April 2023, the Council received a resource consent application to authorise the Building. On 4 May 2023, a Council planning officer emailed Ms Senk advising that the consent application was incomplete;
- (h) on 15 May 2023, the abatement notice deadline was updated to

15 June 2023;

- (i) on 18 May 2023, Ms Senk requested a hearing under s21(6) of the Summary Proceedings Act 1957 in relation to the infringement notice issued on 16 March 2023. On 19 May 2023, the infringement notice was put on hold and it was not sent to the courts for collection;
- (j) on 15 June 2023, Ms Alderson visited the property to determine whether the abatement notice had been complied with. The Building had not been moved or removed. No further resource consent applications to authorise the Building had been received by the Council; and
- (k) on 10 August 2023, the infringement notice issued on 16 March 2023 was cancelled. The abatement notice issued on 25 November 2022 and the subsequent notices with extensions to the compliance deadline were also cancelled under s325A RMA. These actions were taken as the Council determined that the most appropriate way to achieve compliance with the NRMP was to apply for enforcement orders.

Affidavit of Achini Samarasekara

[7] The affidavit of Achini Samarasekara, consents planning officer, explains rule REr.34 and how the rule has been breached at 252 St Vincent Street:

Residential rule REr.34 Building over or alongside drains (piped or open) and water mains

Residential rule REr.34 Building over or alongside drains (piped or open) and water mains of the NRMP states the following:

- REr.34.1.(a): Structures closer than 3m to a piped drain or watermain are permitted provided that for drains or watermains less than or equal to 300mm diameter any structure must be located no closer than 1m measured horizontally from the near side of any public unsleeved water main or common private or public sewer or stormwater drain; and
- REr.34.1.(c): For drains 150mm or less in diameter any structure may be

located within 1m or directly over a common private or public drain if the diameter of the pipe is 150mm or less; providing that:

- i. The length of pipe or drain built over is no more than 6m in length; and
 - ii. There are no changes in direction or junctions in the portion of the drain built over; and
 - iii. The length of drain built over is re-laid using a continuous length of pipe without joints, sleeved inside a 225mm diameter class 4 concrete pipe; and
 - iv. There is a minimum 6m clear length and 3m clear width and 1.8m clear height at one end of the sleeve to allow replacement of the pipe; and
 - v. The pipes are not water mains or pressurised pipelines;
- REr.34.1.(e): In all cases, any structure located within 3m, measured horizontally, from the near side of the pipe or drain must have the base of the foundations deeper than a line drawn at 30-degrees from the horizontal from the invert (bottom) or the pipe or drain (or between 30-45-degrees if the design has been certified by a suitably qualified engineer).

Breach of Residential rule REr.34 at 252 St Vincent Street

The sleepout meets the definition of a ‘structure’ as defined in Chapter 2 Meaning of Words of the NRMP as “any building, equipment, device or other facility made by people and which is fixed to land, and includes any raft.”

The construction of the sleepout in the backyard of 252 St Vincent Street (described above in Statement 11) breaches REr.34- specifically, clauses REr.34.1.(a), REr.34.1.(c), REr.34.1.(d) of the NRMP as the structure is located over the 150mm diameter Council wastewater pipe.

A resource consent is required to authorise the structure or the structure needs to be removed in order to comply with Rule REr.34.

Case management directions and responses

[8] On 7 November 2023, the court issued directions regarding service and for filing of notices and affidavits of opposition.

[9] On 10 November 2023, the court updated the directions as follows:

- (1) The applicant is directed to serve an electronic copy of the enforcement order (and all directions) via email to the respondents by **Tuesday 14 November 2023** and a hard copy of the same to the applicant's last known place of address (the applicant advising this to be 252 St Vincent Street, Nelson);
- (2) Any respondent(s) who wish(es) to oppose the applications must lodge and serve:
 - (a) a notice of opposition specifying grounds and an address for service;
and
 - (b) any affidavits stating the evidence relied on in support of (a)

– by **Wednesday 6 December 2023**
- (3) Any affidavits in reply from the applicants(s) shall be lodged and served by **Friday 15 December 2023**.

[10] By memorandum of counsel dated 16 November 2023, counsel for the applicant reported on steps taken to effect service of the proceedings. The memorandum was accompanied by an affidavit of Council officer, Ms Alderson¹ who attended to service.

[11] The memorandum and affidavit reported that two copies of the relevant documents were placed at the front door of 252 St Vincent Street, being the last known place of address of the respondents. The relevant documents included the application and notice of application, supporting affidavits and the court's directions. Subsequently one set of the court's directions was discovered not to have been served and Ms Alderson attended to that on 16 December 2023.

[12] Ms Alderson also emailed the documents to the respondents individually, but her affidavit set out that the email to Mr Newey was unable to be delivered. The 'bounce back' response signalled that non-delivery was due to the email recipient exceeding their inbox size limit.

¹ Affidavit of Naomi Olive Alderson, affirmed 16 November 2023.

[13] The court issued a Minute dated 20 November 2023 directing:

Accordingly, on the request of the applicant, being satisfied that there has been sufficient adherence to the RMA's service requirements, and in view of the difficulty in going further not being due to any fault on the part of the applicant, I waive the additional service requirements previously specified in the court's directions.

[14] No notice of opposition and/or supporting affidavit or other response from or on behalf of the respondents has been filed.

[15] On 13 March 2024, the court provided to the parties by Minute draft enforcement orders, making some technical drafting refinements to what the Council had proposed. The Minute granted leave to the parties to provide comment on technical and minor drafting correction matters. The only response was the filing of a memorandum for the Council. It invited the court to make further clarifying refinements to two aspects:

- (a) order A(3) to the effect that the 'Building' is clarified to encompass the extension as described in paragraph [12] of Ms Alderson's affidavit; and
- (b) order A(5)(b) to clarify the requirements concerning the payment of Council costs, including in crystallising the amount to be paid.

[16] The respondents did not provide any response to the court's Minute. Hence, the position is that the application for orders is effectively unopposed.

Legal framework

[17] Section 316 RMA provides relevantly:

- (1) Any person may at any time apply to the Environment in the prescribed form for an enforcement order of a kind specified in paragraphs (a) to (d) of section 314(1), or in section 314(2).

...

- (2) Any person who applies for an enforcement order under any provision of this section may request that the enforcement order be made on any terms and conditions permitted by section 314(3) or 314(4).

[18] Section 314 RMA provides relevantly:

- (1) An enforcement order is an order made under section 319 by the Environment Court that may do any 1 or more of the following:

...

- (b) require a person to do something that, in the opinion of the court, is necessary in order to—

- (i) ensure compliance by or on behalf of that person within this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or

...

Evaluation

[19] An Environment Court Judge sitting alone may make an order that is not opposed.²

[20] I am satisfied that there is jurisdictional scope for the making of the orders under s314(1)(b) RMA and it is appropriate and necessary to do so to ensure compliance with a rule in a plan, namely REr.34 of the NRMP. The affidavits filed by the Council establish that the sleepout at 252 Vincent Street, Nelson, is located over the 150mm diameter Council wastewater pipe, in breach of REr.34 NRMP. To comply with REr.34 the structure needs consent (there is no consent) or it needs to be moved/removed. I accept that the actions that are required of the respondents in the proposed orders are necessary to ensure compliance with the rules in the NRMP.

² RMA, s279(1)(b).

[21] Plain and longstanding breach of the RMA is in itself clear justification for orders. The respondents have failed to address the compliance concerns for a long period of time despite regular advice and attempts to ensure compliance. Furthermore, it is plainly a matter of public interest to ensure compliance in these matters, given that they impact the capacity of the Council to access, service and maintain important community infrastructure. In light of the costs burden that would otherwise be borne by ratepayers, it is also appropriate and in accordance with the RMA that the orders include payment of the sum specified for the Council's legal costs in regard to the application. In particular, that is in a context of repeated attempts by the Council to request and then order the illegal actions to be rectified, and the respondents' ongoing failures to do so.

[22] The refinements made to the draft order sought in the application are appropriate. Those include the further refinement made to order A(4). Although the Council did not offer this refinement in response to the court's Minute, it is to more clearly express the Council's intention in this order.

[23] The respondents are further reminded that s338(1)(a) prescribes that any person who contravenes, or permits contravention of, an enforcement order commits an offence against the RMA.

Orders

[24] These enforcement orders ('orders') are therefore made in the terms specified in 'A:' to this determination.



J J M Hassan
Environment Judge

