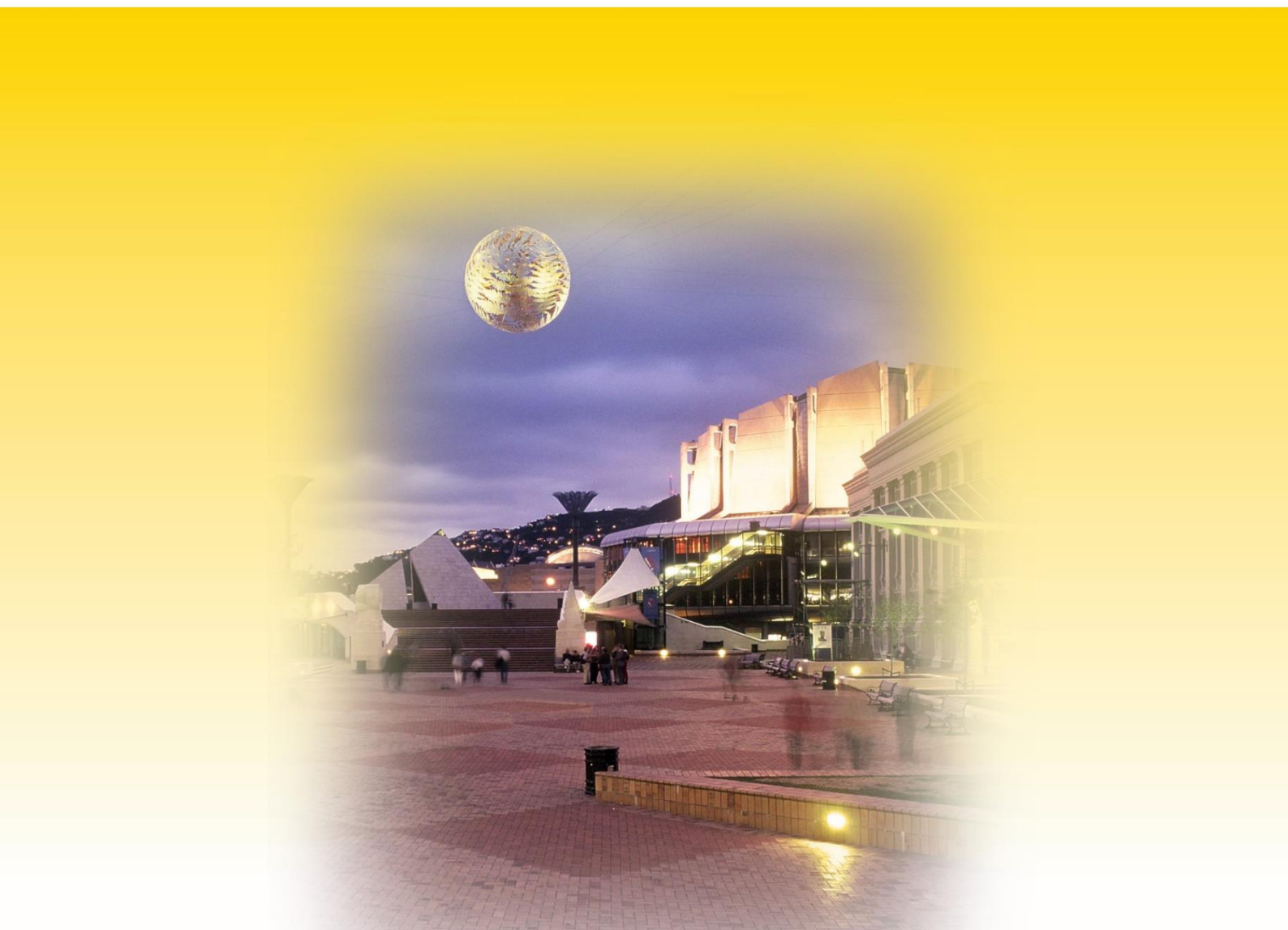


CASE STUDY

ASSESSMENT OF WELLINGTON CITY COUNCIL CONSULTATION PROCESS

AN INITIATIVE UNDER THE INNER-CITY WELLINGTON
DEMOCRATIC RESILIENCE PROJECT (2019–2022)

MAY 2020



*enhancing community well-being
through civic engagement*

INNER-CITY WELLINGTON DEMOCRATIC RESILIENCE PROJECT (2019-2022)

Since its founding in 2008 by Grant Robertson MP and Mark Blumsky MP, Inner-City Wellington (ICW) has served as an interface between the Wellington City Council and the public of Te Aro and Wellington Central.

The ICW **democratic resilience project** seeks to promote stronger local democracy through a more informed and engaged citizenry. The project is a local response to the decline in civic engagement as citizens turn away from the mainstream political process. This is reflected in lower voter turnout and a decline in the levels of membership and activism in suburban-based progressive associations.

The project seeks to promote awareness and action within the local authority of their need to better serve the wellbeing of the people by strengthening the democratic process through more effective, transparent and accountable community engagement.

"A resilient democracy is representative, participative, transparent, non-corrupt, civil and inclusive to and tolerant of a variety of ideas and ideologies, socio-demographic groups and a myriad of other forms of human difference".

Dr Simon Chapple PhD

Director,
Institute for Governance and Policy Studies
Victoria University of Wellington

OVERVIEW

Whilst this case study is an assessment of the Wellington City Council's (WCC) consultation process concerning the removal of an encumbrance from a small inner-city Public Park, it in fact highlights multiple critical systemic weaknesses in the democratic resilience of the Council as a whole - weaknesses which would be significantly magnified when major projects were put out for public consultation.

It also remains of concern to Inner-City Wellington (ICW) that a developer may pay money to the Council to have an encumbrance removed from a park that was designated exclusively for public use. Land that was sold to the developer with this **public good** encumbrance attached.

A 1988 report by the Controller and Auditor-General (Public Consultation and Decision) made it clear that decision-makers must act in accordance with the principles of procedural fairness and natural justice, with decisions made free from bias and predetermination. In this case study, Inner-City Wellington draws attention to the failure of the Council to approach the consultation process in accordance with these principles.

Over the past few years public confidence in local government has been steadily declining as disillusionment with the WCC consultation process grows and, unless the council is willing to recognise that 'fair and just' consultation is a requirement to achieve a sense of community ownership and engagement, they will continue to generate hostile and litigious relationships with the public.

In view of this situation Inner-City Wellington suggests that the Wellington City Council may wish to consider strengthening its democratic resilience by:

- 1. Holding its statutory purpose at the forefront of all its processes, policies, decisions and actions. In so doing it should constantly strive "to enable democratic local decision-making and action by, and on behalf of, communities".**
- 2. Addressing the issues highlighted in this Case Study**
- 3. Committing to greater resourcing, recognition and support for suburban-based progressive associations and thereby strengthen their voice and their capacity to interact with the Wellington City Council.**

INTRODUCTION

The purpose of this Case Study is to describe a specific issue, REMOVAL OF ENCUMBRANCE AT 79 DIXON STREET, as a means of highlighting where there were options for a better democratic process focussed on the wellbeing of the Wellington City Community now and in future. It is not an attempt to change the outcome of this process. Rather we seek to see what lessons can be drawn from it to improve consultation and our collective democratic resilience in future.

THE LAW

This request for discharge of the encumbrance was subject to s138 Local Government Act 2002 Consultation Process and Section 82 which sets out the Principles of Consultation. A higher order requirement under the same Act sets out that the Purpose of the WCC is to enable democratic local decision making and action by, and on behalf of, the Wellington City Community and to promote the social, economic, environmental and cultural well-being of the Wellington City Community in the present and for the future. (see Appendix 1 – for legislation details)

WCC DECISION MAKING and PROCESS OF CONSULTATION

79 Dixon St was part of a larger privately owned property which was once in Council ownership.

1996: The council sold the property with a registered Encumbrance which required the owner to maintain a public garden and seating on the land.

2014: Victoria Street Transformation Project

- The Transformation Project Update of September 14, 2014 (which was later included as an Appendix to the application for Resource Consent for the proposed building of an apartment block including use of 79 Dixon Street) made no mention of the encumbrance. Furthermore, the plan showed the pocket park, which is the site of the encumbrance, as a building.
- the prospect of encumbrance removal should have been raised as soon as known – i.e. as part of the Victoria St redesign.
 - Section 138 of the Local Government Act (2002) - A local authority proposing to sell or otherwise dispose of a park or part of a park must consult on the proposal before it sells or disposes of, or agrees to sell or dispose of, the park or part of the park.
park - means land acquired or used principally for community, recreational, environmental, cultural, or spiritual purposes.
 - **There was NO public consultation in 2014 in relation to the encumbrance being lifted in the future, nor does it seem the issue was raised with Council.**

2016: Application for discharge of encumbrance heard at a public excluded meeting.

- On 11 February 2016 The Environment Committee in a public-excluded meeting discussed a proposal from the owners (Willis and Bond) to discharge the encumbrance.
- On 27 February 2016 in another public excluded meeting, the committee determined that, if no submissions opposing the proposed discharge of the encumbrance were received, and urban design issues were satisfactorily resolved, the encumbrance could be discharged.

There was NO public consultation in 2016

NOTE: A discussion document presented to the public-excluded Environment Committee meeting in 2016 stated:

1. that the owners of the land have agreed to pay Council a significant sum for the discharge of the encumbrance. The figure was agreed between the parties via a valuation mediation process.
2. that, if the encumbrance were to remain in place, Willis Bond suggested it could build in the airspace above the garden and seating area.
3. that the Victoria Street Transformation project (VTM) 2014 was designed and executed on the basis that the land would be redeveloped, and a building constructed onsite.

- **In September 2016 the formal application for Resource Consent was filed.**

In relation to LOCATION, there is no mention of the Encumbrance and the application notes that no additional consents are required.

It is only in Annex 1 that there is reference, under INTERESTS that we see "Encumbrance to WCC 25.11.1996 at 11.16am".

However, under COMPLETENESS the application states "No other land use consents are required". Pre-application meetings during 2016 with WCC staff are noted, but there is no mention there of the Encumbrance.

- **December 2016 - Resource consent was granted** with no comment on the Encumbrance.

2019: A Public excluded meeting refers discharge of encumbrance to consultation with a recommendation that the encumbrance be discharged subject to results of consultation

- **On 27 February 2019**, again in a Public Excluded meeting in an item entitled DISCHARGE OF ENCUMBRANCE, the Council unanimously resolved to:

1. Note that the Urban Design team considers that there are urban design reasons for some realignment of property boundaries along Victoria Street and that the encumbrance removal should be subject to satisfactory resolution of those urban issues
2. Approve the proposal to discharge the encumbrance, subject to the results of the section 138 Local Government act 2002 consultation process



Credit: Dixon Street Park, 11 June 2019, Stuff

3. Authorise Council Officers to finalise and give effect to the discharge of the encumbrance if no submissions opposing the proposed discharge of the encumbrance are received

- **The Consultation process** was finally undertaken in April when:

The letter to ICW seeking their submission as part of the consultation states:

- a) "The building development and potential encumbrance removal was anticipated by Council as part of the Victoria Street Transformation project completed in 2015. At the same time the new inner-city park on Volunteer Corner was created opposite 79 Dixon Street."
- b) It seems the 2014 VTM project had already determined the land would be redeveloped yet the issue of the encumbrance was not put out for public consultation at that time.

PUBLIC CONSULTATION IN APRIL-MAY 2019

A report to Council states:

- Eight written submissions were received, seven opposed and one supporting.
- Two Oral Submissions were heard by the City Strategy Committee at their meeting of 16 May 2019.
- Subsequently staff presented a paper backgrounding the issues, setting out objections with their reasons why these could be overcome, and putting a recommendation to City Strategy Committee for their meeting on 13 June 2019 to recommend to Council that it
 - a) Agrees not to uphold the 7 objections to the encumbrance discharge at 79 Dixon Street, Te Aro, received as a result of public consultation under section 138 of the Local Government Act (2002)
 - b) Approves the discharge of the encumbrance on the title of 79 Dixon Street, Te Aro as urban design issues have been satisfactorily resolved, including a 0.9m deep footpath widening along Victoria Street (on private land)
 - c) Notes that officers are working on other opportunities to provide new green and open spaces in the Te Aro area to cater for the increasing inner-city population.

NOTE: Staff comment in their report that 'Consultation has been carried out in accordance with the relevant legislation and more than the minimum requirements; including the placing of a physical public notice sign on site, writing to the local residents association at the commencement of the consultation period.'

ICW contends this is not an accurate reflection of the process.

SUMMARY OF KEY ISSUES

where ICW believes WCC did not meet consultation requirements

- **Meeting legal requirements**

WCC did not operate within the requirements of the Local Government Act 2002 in relation to its PURPOSE or its responsibilities under the Principles of Consultation specified in that Act. Public trust in WCC's consultation processes has been significantly eroded by examples like this case study.

Public consultation was not undertaken in a timely manner (i.e. at the time of the redesign of Victoria Street), nor in good faith (undertaken when consent decision had already been made)

- **Timing of consultation** – the possibility of encumbrance removal should have been raised as soon as known – i.e. as part of the Victoria St redesign. However, the timing of the actual consultation in 2019 appeared to be a tick box exercise as resource consent for the building was approved in December 2016, so the decision was already effectively made.

Council papers did not clarify that consultation had never been undertaken at the time of the redesign of Victoria Street. Councillors cannot claim ignorance though, as they are accountable for seeking assurance that there were no issues such as the encumbrance to be resolved.

It appears there may be issues within WCC where work being done in one area has consequences for work in another that are not recognised. A simple checklist (ISO) approach would ensure such issues do not arise.

- **Information given in relation to consultation in April 2019 did NOT include:**

- a) that the owners of the land have agreed to pay Council a significant sum for the discharge of the encumbrance. The figure was agreed between the parties via a valuation mediation process.
- b) that, if the encumbrance were to remain in place, Willis Bond suggested it could build in the airspace above the garden and seating area.
- c) that a Victoria Street Transformation project (VTM) was designed and executed on the basis the land would be redeveloped, and a building constructed onsite.

- **The consultation took no account of a designated PUBLIC space being sold for commercial gain without public input** and when it was made public that payment was involved, the sum agreed for the discharge was deemed commercially sensitive and never divulged. Surely, commercial sensitivity is not relevant when discussing the removal of the right granted to the public to use the land as a park. If money had not been paid by the developer in this instance, it would be reasonable to assume that the encumbrance protecting public use would have remained. To their credit, the developer did propose a compromise solution which the council, without explanation, has not pursued



Credit: Dixon Street Park, 11 June 2019, Stuff

- **There is no evidence of follow-up on the suggestion from Willis Bond** regarding building in the airspace, which could have retained a public space on the corner.
- **Nor is it clear** yet where the stated 'new green and open spaces in the Te Aro area' will be.
- **Submitters to the consultation process received no formal advice** regarding the rejection or rationale of the Council decision to remove the encumbrance.

ISSUES FOR DISCUSSION WITH WCC

Consultation undertaken in the manner of this Case Study undermines trust in Council processes and worse, undermines democracy.

- What training exists for Councillors and Council staff in relation to meeting their obligations to operate within their legal obligations in relation to their purpose and to the Principles set out in law for Consultation?
- At the Governance level of Council decisions how do Councillors ensure that consultation has in fact been carried out in a manner that meets their accountabilities for undertaking consultation in a manner that meets the principles outlined in law as well as their overarching accountability for ensuring a proper democratic process, and that it has not merely ticked legal process boxes?
- How might WCC ensure that participants in their consultation processes have trust that all-inclusive information has been provided, their submissions are genuinely and fully considered, and it is not just a check box exercise?

Mistakes do occur and it seems a key mistake here was not sorting out the Encumbrance when the Victoria St Transformation project reported to Council. Clearly from then onwards, all work was done on the assumption that the Encumbrance would be removed. It seems consultation in 2019 was undertaken solely to appear to have met legal requirements.

- If an error is made early in a process in not going out to consultation at the appropriate time, how best should Council to address this?
- In this example of this Case Study Public Excluded meetings were held when issues of public good were discussed.
 - a) Were there valid reasons for this issue being dealt with under PUBLIC EXCLUDED?
 - b) Did the reason apply to the whole of the issue – or only to the decision to accept a monetary gain in return for removal of the encumbrance?
- What WCC 'testing criteria' is in place to appropriately determine the right balance between the need to withhold and the public interest in release of information?
- **Cross Project issues.** How does WCC ensure clarity about implications of one project for another – e.g. Victoria St redesign and Encumbrance Removal in this Case Study instance.
- **Relevant Information for informed consultation contributions.** How can WCC better ensure information provided for consultation purposes meets the standard required in legislation and that important information is not withheld or presented in emotive or 'leading' ways?

CONCLUSION

Inner City Wellington argues that the processes carried out throughout this case study indicate an urgent need to ensure best practice in leadership and governance is delivered to transform local democracy into a process that flows upwards from the community, rather than one of centralised decision making in WCC.

The principal reason ICW made a submission to the Council on the encumbrance issue was to have the designated space retained for the public good. The developer proposed a compromise solution to retain the park for the public good which the Council chose to ignore – why?

ICW looks forward to discussing the issues raised in the paper with Wellington City Councillors and Senior Staff as a means of contributing to the development of better democratic resilience in our city.

"By working together, and putting communities at the heart of our decision making processes, we can tackle the really tough problems facing us"

Dave Cull
LGNZ president

APPENDIX 1 -- LOCAL GOVERNMENT ACT 2002

Section 138 Restriction on disposal of parks (by sale or otherwise)

(1) A local authority proposing to sell or otherwise dispose of a park or part of a park must consult on the proposal before it sells or disposes of, or agrees to sell or dispose of, the park or part of the park.

(2) In this section,—

dispose of, in relation to a park, includes the granting of a lease for more than 6 months that has the effect of excluding or substantially interfering with the public's access to the park

park—

(a) means land acquired or used principally for community, recreational, environmental, cultural, or spiritual purposes; but

(b) does not include land that is held as a reserve, or part of a reserve, under the Reserves Act 1977.

Section 138: substituted, on 28 June 2006, by section 13 of the Local Government Act 2002 Amendment Act 2006 (2006 No 26).

And also subject to Section 82, the Principles of Consultation set out in the same Act

Section 82 Principles of consultation

(1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:

(a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:

(b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:

(c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:

(d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:

(e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:

(f) that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.

And the purpose of Council which is, or should be, fundamental to every action they take ...

SECTION 10 Purpose of local government

The purpose of local government is—

(a) to enable democratic local decision-making and action by, and on behalf of, communities; and

(b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

REFERENCES

Report of the Controller and Auditor-General: Public Consultation and Decision making in Local Government (Dec 1988)

Computer Freehold Register Under Land Transfer act 1952 – WN49C/32
Lot 1 Deposited Plan 82741 – B549825.3 Encumbrance to The Wellington City Council – 25.11.1996 at 11.16am (25 Nov 1996)

Victoria St Transformation Project Update 1 (11 Sept 2014)

WCC AGENDA and MINUTES: WCC Environmental committee (11 Feb 2016)

4. Public Excluded

4.1: Encumbrance Removal - 79 Dixon Street, Te Aro

Resource Consent Application Service Request Numbers 369428 (27 Sept 2016)

Proposed new Central Area Building 65-71 Dixon Street and 79 Dixon Street/165 Victoria Street and SR 398336 - 251 Victoria Street.

Public Excluded meeting of Council – Discharge of Encumbrance
Unanimous resolution to “Authorise Council Officers to finalise and give effect to the discharge of the encumbrance if no submissions opposing the discharge are received.” (20 Feb 2019)

Proposal to remove Encumbrance Submission form - by Monday 29 April – public consultation document
Letter to ICW informing of proposal to remove Encumbrance and informing submission was welcome (29 Mar 2019)

City Strategy Committee meeting – Item 3.2
Proposal to remove an Encumbrance at 79 Dixon Street, Te Aro (13 Jun 2019)



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