BEFORE AN INDEPENDENT COMMISSIONER

UNDER the Resource Management Act 1991 (**RMA**)

IN THE MATTER OF an application by Industre Property Rua Limited for resource consent for a light industrial development at 16A Wickham Street, Hamilton (application number LU/0038/23)

Legal submissions on behalf of the Applicant

Industre Property Rua Limited

DATED 21 NOVEMBER 2023

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MAY IT PLEASE THE COMMISSIONER

INTRODUCTION

1. Industre Property Rua Limited (**Industre**) seeks resource consent for a light industrial development and ancillary offices, and removal of contaminated soil (**Application**), at 16A Wickham Street, Hamilton (**Site**). Industre has been granted consent from the Waikato Regional Council for the stormwater discharges associated with the application (**Stormwater Consent**).

2. Industre is a commercial property ownership company that specialises in high quality industrial assets. Industre purchased and developed the adjoining Waste Management site in 2019, for which consent was granted by Waipa District Council in March 2020. Following that successful development, the Site was purchased in April 2021. The proposed development is to occur in two stages, the first a purpose-built distribution centre for Wattyl paints, and then three additional smaller warehouse buildings.

3. Although the Site is zoned Rural under the Waipa District Plan, light industrial activities have occurred on the Site since 2007. Industre purchased the Site on reliance of the existing Industrial use.

4. These submissions address:

   (a) key issues;

   (b) the legal framework, s104D, s104 and plan integrity;

   (c) existing environment;

   (d) the Strategic Boundary Agreement;

   (e) the National Policy Statement on Urban Development 2020 (**NPD UD**);

   (f) the National Policy Statement on Highly Productive Land 2022 (**NPS HPL**); and

   (g) assessment of effects.

5. Industre has provided evidence from the following witnesses in support of the application:

   (a) Andrew Hay (Corporate);

   (b) Jarod Parker (Architecture);

   (c) Adair Brimelow (Engineering design services);

   (d) Simon Pottow (Fire protection);

   (e) Judith Makinson (Traffic); and

   (f) Gareth Moran (Planning).

KEY ISSUES

6. The Council's s42A report considers that the Application does not pass either of the s104D gateway tests. However, it is noted that this is finely balanced, particularly in terms of effects.

7. The s42A report describes the receiving environment as semi-industrial without a typical farming character.[1] It is recorded that the existing environment does not align itself with that described by the objectives and policies of the Rural zone, and therefore any further development or intensification of industrial activities will be contrary to the District Plan.[2]

8. In my submission, whether the Application is contrary to the objectives and policies of the District Plan requires careful analysis of the wording of the objectives and policies and identification of those that are 'relevant' and are to be afforded more weight.[3] This analysis cannot be divorced from the context of the existing environment. Mr Moran's assessment of the objectives and policies does this, and therefore should be preferred.

9. In terms of effects, the s42A report finds that building location in terms of character and mitigation of reverse sensitivity effects are acceptable,[4] and the three waters servicing for the Site has received support from the

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1 s42A Report, at para [7.2]

2 s42A Report, at para [11.14].

3 *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 815

4 s42A Report, at para [10.28].

Council's development engineer.[5] The only concern is that the proposed traffic management plan (**TMP**) will not mitigate the potential safety effects at the state highway intersections.[6]

10. Transport network effects has also been raised by Hamilton City Council (**HCC**) and Waka Kotahi NZ Transport Agency (**Waka Kotahi**). Mr Prakash while accepting that the change in traffic volume and crash risk is low,[7] is concerned about the effectiveness of the TMP,[8] and due to the existing safety issues at the Kahikatea Drive / SH1C intersection appears to apply a 'no effect' requirement.[9]

11. The TMP is proposed as a condition of consent, and it must be complied with.[10] The RMA is not a no effects statute, and an applicant cannot be responsible for existing issues in the transport network.[11] Ms Makinson has confirmed that the proposed development traffic will have negligible to less than minor effects on the safe and efficient operation of the road network.[12]

12. Further to the findings of the s42A report, Ms Makinson and Mr Moran's evidence support that the Application passes both s104D gateway tests.

13. The planning evidence of Dr Davey for HCC recognises that the Site is situated within a strategic industrial node identified for future inclusion into Hamilton City by both the Future Proof Strategy and the Waikato Regional Policy Statement (**WRPS**).[13] However, he considers that the Application has potential precedent and cumulative effects on the future urban form by setting the land-use pattern before integrated and funded planning and infrastructure can be conducted and completed.[14]

14. I agree that precedent effects or plan integrity are a relevant consideration

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5 s42A Report, at para [10.15, 10.16]

6 s42A Report, at para [10.13].

7 Mr Prakash, EIC, at para [74].

8 Mr Prakash, EIC, at para [11].

9 Mr Prakash, EIC, at para [62, 76, 78].

10 *The Strand Ltd v Auckland City Council* [2002] NZRMA 475.

11 *Transit New Zealand v Southland District Council* CO42/06 12 April 2006 [2008], NZRMA 379

12 Ms Makinson, EIC, at para [114].

13 Dr Davey, EIC, at para [22].

14 Dr Davey, EIC, at para [25].

in this case. The administrative law principle that like applications should be treated alike goes both ways.[15] The grant of the previous resource consents, for the Site and more recently for Waste Management, are relevant. The floodgates argument however needs to be treated with caution, as each proposal must be considered on its own merits.[16]

15. Here, the Site is part of an existing enclave of industrial activities directly adjoining an established industrial zone. It is within an area identified for future industrial use. The circumstances are unique to this location, and similar to the situation in *JARA Family Trust*, in the *horse has already bolted*.[17] The existing industrial use of the Site and surrounding area cannot be ignored or downplayed.

16. Dr Davey's evidence also raises concerns that to allow urban development that is not integrated with future planning and infrastructure can create potential inefficiencies and reduce future land use pattern options.[18] However, he does not address how development on this Site would have this effect, particularly as the industrial use already exists, and the proposed use aligns with the future planned use of the wider area.

17. The concern appears to relate to certainty that the Site will connect to three water services when available, and for contribution to the Hamilton City Council transport network to be made.[19] In the updated proposed consent conditions, Industre has confirmed that the Site will connect to Hamilton City Council's water and wastewater services when available, and that payment of development contributions for transport will be made to HCC in accordance with the traffic demand assessment.

18. Under s104 the positive effects of the Application must also be taken into account. Dr Davey has acknowledged that there is a scarcity of supply of industrial land in Hamilton City[20] and the importance for economic growth and development in the City and sub-region.[21] Unfortunately, the existing

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15 *Beacham v Hastings DC* W75/2009 [2009] EnvC 261, at [23].

16 *Beacham v Hastings DC* W75/2009 [2009] EnvC 261, at [24].

17 *JARA Family Trust v Hastings District Council* [2015] NZEnvC 208

18 Dr Davey, EIC, at para [47].

19 Dr Davey, EIC, at para [92], and Mr van Rooy, EIC, at para [20].

20 Dr Davey, EIC, at para [34].

21 Dr Davey, EIC, at para [18].

yard based industrial activities have caused soil contamination, and less than optimal stormwater discharges. The Application will provide improved economic and environmental outcomes.

19. The matters raised in the s42A report and the evidence for HCC appear to boil down to timing – not yet. This position just seeks to delay the inevitable use of the Site, while it is not clear what benefit this delay would have.

20. In my submission the Application is not contrary to the objectives and policies of the District Plan, will not give rise to adverse effects that are more than minor, and will not give rise to a precedent effect that could undermine the wider future planning for this area. There is no reason why consent should not be granted.

LEGAL FRAMEWORK

21. The Application is a non-complying activity under the Operative Waipā District Plan (**District Plan**) as light industrial activities are not listed in the Activity Status Table for the Rural zone.

Section 104D

22. Section 104D of the RMA sets out the "gateway test", that must be met before the Application will be considered under the usual s104 assessment. A non-complying activity application must pass one of the following tests:

    (a) that the adverse effects of the activity will be minor (s104D(1)(a)); or

    (b) that the application is for an activity that will not be contrary to the objectives and policies of any relevant plan or proposed plan (s104D(1)(b)).

23. When assessing whether the adverse effects of the Application on the environment will be minor under s104D(1)(a), the decision-maker is entitled to make a detailed examination of the effects.[22] The following is relevant to a determination of whether an effect will be minor:

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[22] *Harewood Gravels Co Ltd v Christchurch City Council* [2018] NZHC 3118, at [254].

(a) 'Minor' is a comparative word meaning lesser or comparatively small in size or importance.[23]

(b) The decision-maker can consider aspects of mitigation and outcomes of imposing conditions of consent.[24] However, while it is appropriate to consider each adverse effect as mitigated,[25] positive effects can only be considered once the application passes through one of the gateway tests under s104D.[26]

(c) The decision-maker must look at the adverse effects as a whole. The Environment Court has noted that the evaluation under this provision is to be undertaken on a holistic basis, looking over the entire application and a range of adverse effects, not individual effects.[27]

(d) The assessment will be fact dependant. What is considered minor will involve conclusions as to the degree of effects based on the facts.

24. In considering s104D(1)(b), the relevant plan is defined in the RMA to mean a regional plan or district plan.[28] It does not include the provisions of a regional policy statement.[29] Here, the relevant plan is the Operative Waipa District Plan (**District Plan**).

25. In assessing whether the proposal is contrary to the objectives and policies a holistic view of the objectives and policies must be taken.[30] However, it is not appropriate to use broader objectives and policies to balance out important qualifiers of the most relevant objectives and policies, when making a conclusion as a whole.[31]

26. The Environment Court has noted that "[as] has been observed in many

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23 *Bethwaite v Christchurch CC* C085/93.

24 *SKP Inc v Auckland Council* [2018] NZEnvC 81, at [48].

25 *Stokes v Christchurch City Council* [1999] NZRMA 409, at [76].

26 *SKP Inc v Auckland Council* [2018] NZEnvC 81, at [50].

27 *SKP Inc v Auckland Council* [2018] NZEnvC 81, at [49].

28 Resource Management Act 1991, s 43AA.

29 *Auckland Regional Council v Living Earth Limited* [2008] NZCA 349.

30 *Clearwater Mussels Ltd v Marlborough District Council* [2016] NZEnvC 21, at [242].

31 *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 815.

other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed".[32]

27. The Court of Appeal has also stated that the nature of a non-complying activity means that it is unlikely to find direct support from any specific provisions of the plan.[33] However, absence of support does not mean the activity is contrary to the objectives and policies.[34] If a non-complying activity is opposed to the objectives and policies of the relevant plan, it will be "contrary" to the plan.[35] Conversely, if a development can be designed and implemented so as to be consistent with the objectives and policies then it cannot be said to be contrary to them. Whether a particular proposal is consistent with or contrary to the objectives and policies is a matter of assessment on a case by case basis.

28. Only one limb of section 104D needs to be satisfied to pass the gateway test, and consent authorities typically do not go on to consider the second limb if they find the first is met.

Section 104

29. In considering the Application under s104, the matters that the consent authority must have regard to, subject to Part 2, include:

(a) actual and potential effects on the environment of allowing the activity;

(b) any relevant provisions of:

(i) a national environmental standard;

(ii) other regulations;

(iii) a national policy statement;

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32 *SKP Inc v Auckland Council* [2018] NZEnvC 81, at [50].

33 *Arrigato Investments Ltd v Auckland RC* [2002] 1 NZLR 323, at [17].

34 *Outstanding Landscape Protection Soc Inc v Hastings DC* [2008] NZRMA 8, at [15].

35 *Kuku Mara Partnership (Forsyth Bay) v Marlborough DC* EnvC W025/02, at [727].

(iv) a New Zealand coastal policy statement;

(v) a regional policy statement or proposed regional policy statement;

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the Application.

30. *R J Davidson Family Trust v Marlborough District Council* confirmed that it may not be necessary to have recourse to Part 2 of the Act when considering a resource consent application. Where the relevant plan has been prepared having regard to Part 2 and the applicable statutory documents under it, reference to Part 2 could not justify an outcome contrary to the Plan.[36] Only where the consent authority is not confident that the plan has been properly prepared under the Act and the statutory documents, should it refer to Part 2.[37]

31. In *Bunnings Limited v Queenstown Lakes Council*, the Environment Court expressed some concern about this test, and in particular the phrase "competently prepared", which suggests it relates to the process rather than the outcome. The Court found some comfort that the "coherent set of policies and clear environmental outcomes" test can be applied by looking at the plan (but not behind it) and that *Davidson* did not preclude the invalid / incomplete / uncertain test from *King Salmon*.[38]

32. In *Bunnings* the Environment Court also noted:[39]

> there is one aspect of Part 2 RMA which almost always requires particular attention on a resource consent application: 7(b). The Environment Court observed in *Davidson* (EC) that it is nearly impossible to decide in advance (in a plan) whether a particular proposal is a more efficient use of resources than the plan's status quo...

33. It is appropriate to consider s7(b) here, particularly in light of the Rural

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36 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [82], [74].

37 *Ibid,* at [75].

38 *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59, at [20] – [21].

39 *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59, at [171].

zoning, existing industrial use, the nature of the activities sought, and identification of the area for future industrial use.

Plan integrity

34. The concept of plan integrity (and issues associated with the precedent effect of granting resource consents) are a relevant consideration under s104(1)(b)(vi) and (c).[40] Further, where granting the consent would undermine the integrity of the relevant plan, s104D(1)(b) will not usually be satisfied.[41]

35. The Environment Court in *Bunnings* referred to the discussion in *Blueskin Bay* that plan integrity does seem to be somewhat overused, and needs to be treated with some reserve:[42]

> Cases such as *Dye v Auckland RC* [2001] NZRMA 513 make it clear that while there is no precedent in the strict sense in this area of the law, there is an expectation that like cases will be treated alike and that the Council will consistently administer the provisions of the Plan. And cases such as *Rodney DC v Gould* [2006] NZRMA 217 also make it clear that it is not necessary for a proposal being considered for a non-complying activity to be truly unique before Plan integrity ceases to be a potentially important factor. Nevertheless, as that Judgment goes on to say, a decision maker in such an application would look to see whether there might be factors which take the particular proposal outside the generality of cases.

36. The Environment Court concluded:[43]

> Only in clear cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined. In such a case it is unlikely in the extreme that the resource consent would be granted in any event.

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40 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).

41 *Auckland Regional Council v Living Earth Limited* [2008] NZCA 349, at [27].

42 *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59, at [46, 103].

43 *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59, at [48].

37. Underpinning plan integrity is public confidence in the consistent administration of the plan. The fundamental principle that like cases be treated alike was addressed in *Doherty* where an almost identical subdivision had been consented in the immediate neighbourhood, and therefore fairness and equity were a key factor in granting consent.[44]

38. The Application is also similar to the facts in *JARA Family Trust*. In that case, the Court granted resource consent for a non-complying activity in the Rural zone rejecting the Council's argument that this would have an adverse effect on the integrity of the Plan. The Court found that the "*horse has bolted*" because the proposal was in an area that had been allowed to become a de facto industrial / commercial node. It was noted that the proposal would intensify the existing situation, but it could equally be regarded as making the best of a sub-optimal situation.[45]

EXISTING ENVIRONMENT

39. The Application must be assessed in the context of the existing environment, which is best described as industrial and does not exhibit the typical character and amenity values usually associated with the rural environment.[46]

40. The consenting history of the Site is set out in Mr Moran's evidence.[47] The consented activities include storage of asphalt material, overnight storage of trucks, transportable housing depot, and a timber sales yard. The existing activities are generally in accordance with the existing consents and include storage of machinery, asphalt, building materials, construction of prefab homes and container hire.

41. Dr Davey considers that the consented yard-based activities on the Site could reasonably be expected to occur in the Rural zone.[48]

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44 *Doherty v Dunedin CC* EnvC C006/04.

45 *JARA Family Trust v Hastings District Council* [2015] NZEnvC 208.

46 Mr Moran, EIC, at para [10].

47 Mr Moran, EIC, at para [35].

48 Dr Davey, EIC, at para [77].

42. I disagree. Rural based industry is defined in the District Plan as:

> activities involving animal, agriculture, forestry or horticultural crops, and includes (but is not limited to) rural transportation and agricultural contractors depots, and the preliminary packaging and processing of agricultural produce including packhouses and coolstores, stock saleyards, sawmills, grain silos and feedmills, meat and poultry processing, wineries and rural research facilities.

43. The existing consented activities are yard-based industrial activities and do not service, nor are they related to, rural activities.

44. Dr Davey also considers that the consented activities are temporary in nature and the Application is to change this to an intensive industrial activity.[49]

45. However, the point above illustrates that a large warehouse that is used as a packhouse or coolstore, with a similar built form and 'intensity' as the Application, would be an anticipated activity in the Rural zone, and therefore on the Site.

46. Further, the existing industrial use is not temporary. Mr Hay has confirmed that the Site will continue to be used for industrial activities, even if the Application is not granted.[50] As already noted, this use also accords with the future planned use for the area.

47. Dr Davey also suggests that no consideration should be given to the recent consent granted for the Waste Management site.[51]

48. The Site has a similar long and iterative consenting history to 16 Wickham Street, and as addressed above, it is important for public confidence in the District Plan that like cases be treated alike.

49. There is no basis to treat the Application differently from the Waste Management consent. The reasons for granting that consent recognised:

> The site is located within the Rural zone, adjacent to the Industrial zone

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49 Dr Davey, EIC, at para [106].

50 Mr Hay, EIC, at para [24].

51 Dr Davey, EIC, at para [76].

> and adjacent to an existing consented industrial activity. The further development of this site for industrial purposes is considered to be consistent with the surrounding area.

50. It is also noted that HCC gave written approval to the Waste Management application.

51. Mr Moran has also provided a description of the other industrial activities occurring in the area.[52] As found in *JARA Family Trust*, the existing industrial enclave has been established and it cannot be ignored:[53]

> … we are drawn back to the reality that the theme of the provisions seems not to have been accepted by decision-makers in the past, and the decisions that have been made have led to the current existing environment.
>
> … but it is what it is, and it is not going to change in the foreseeable future. This area has been allowed to become a de facto industrial / commercial node, and there is no point in pretending otherwise.

52. Dr Davey's characterisation of the existing environment has materially influenced his other findings in respect of the Application, including his assessment against the objectives and policies of the District Plan, and his assessment of effects.

STRATEGIC BOUNDARY AGREEMENT

53. A Strategic Boundary Agreement was entered into between Waipa District Council and Hamilton City Council in October 2022 (**Agreement**). The purpose of the Agreement is to create a framework for amending the respective territorial boundaries for specified land (including the Site) to be transferred to HCC.

54. In the context of this Application, it is important to note that clause 20 of the Agreement provides:

> Nothing in this agreement shall fetter the regulatory function of either Council to assess and determine applications for resource consent (either land use or subdivision) in accordance with the rules, policies and

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52 Mr Moran, EIC, at para [42].

53 *JARA Family Trust v Hastings District Council* [2015] NZEnvC 208 at [25, 31]

> objectives as contained in the applicable District Plan. The Councils may, at their discretion, consider this agreement under section 104(1)(c) of the RMA as 'any other matter the consent authority considers relevant and reasonably necessary to determine the application'.

55. The s42A report considers that the Application is contrary to the commitment made by the Council under clause 5 of the Agreement.[54] That clause provides that the land uses within the Southern Links Land Area will continue to be strategically managed and retained for rural use, to protect the land resource for its ultimate potential urbanisation. Dr Davey also refers to this clause of the Agreement.[55]

56. If discretion is exercised to consider the Agreement, I submit its relevance to the Application is that it recognises the Site is to be transferred to HCC in the future and zoned for urban use. I do not consider that clause 5 is relevant as the Site is already in industrial use, not rural use, and cannot be retained for rural use.

NATIONAL POLICY STATEMENT ON URBAN DEVELOPMENT

57. The NPS-UD (as updated in May 2022) contains objectives and policies that require councils to provide at least sufficient development capacity to meet the expected demand for business land in the short, medium and long term.

58. The NPS-UD requires tier 1 local authorities, including HCC, to undertake a Housing and Business Development Assessment (**HBA**) every three years. The last HBA for Hamilton City in 2021 identified a shortfall in Industrial land. It is understood that the HBA is to be updated shortly. The HBA will then inform the Future Development Strategy (**FDS**) which will give further certainty on the location and proposed timing for the Southern Links Land Area to be transferred to HCC and rezoned for urban purposes.

59. It is anticipated that the HBA about to be released will still show a shortfall of industrial land. Dr Davey agrees that there is a scarcity of supply of

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[54] s42A report, at para [13.8].

[55] Dr Davey, EIC, at para [100].

industrial land.[56] Mr Hay will also provide further context to the availability of industrial land for development in Hamilton.

60. Enabling the continued use and development of the Site for industrial activities will enable a use and development of the Site that will support social and economic wellbeing (objective 1), enable industrial development in an area where there is high demand (objective 3), and will help to meet expected demand for business land (policy 2).

61. For these reasons, I consider that the Application is consistent with the outcomes sought in the NPS-UD.

NATIONAL POLICY STATEMENT ON HIGHLY PRODUCTIVE LAND

62. The NPS-HPL requires New Zealand's most productive land to be identified and managed to prevent inappropriate subdivision, use and development.

63. Mr Moran's evidence provides an assessment of why the Site is exempt under clause 3.10 of the NPS-HPL.[57] I agree with his assessment.

64. I also note, that when reading the NPS-HPL as a whole, it is clear that it was not intended to capture LUC 1, 2 or 3 land that was already developed for urban activities, or highly productive land that is subject to other existing activities (clause 3.11).

65. I consider that the Application is not contrary to the NPS-HPL.

ASSESSMENT OF EFFECTS

66. In assessing the transport effects of the Application, it is helpful to further address two interlinked matters:

    (a) the existing safety issues with the Kahikatea / SH1C intersection; and

    (b) the concern that the TMP will not be complied with.

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[56] Dr Davey, EIC, at para [34].

[57] Mr Moran, EIC, at para [54].

67. Mr Prakash finds that:[58]

> …while the change in traffic volume and crash risk is low, I consider that there is an underlying crash risk in particular, at the Kahikatea Drive / SH1C intersection and this proposal increases the risk of cumulative safety effects not being addressed.
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> In my view, allowing additional trips at the SH1C / Kahikatea Drive intersection while accepting that there is a crash risk and an inherent level of non-compliance by way of the TMP, does not align with the Safe System or Vision Zero principles and strategies.

68. Ms Makinson has explained that:[59]

(a) the safety issues at the Kahikatea Drive / SH1C intersection is a known and existing issue;

(b) the TMP restricts operational traffic to the Site to left in and left turns out only;

(c) the proposed consent conditions require compliance with the TMP;

(d) she has considered the effects of potential non-compliance with the TMP and conclude that they are negligible; and

(e) the existing traffic generated from the Site is not subject to any route or turning restrictions, and therefore the Application would represent an improvement.

69. Mr Prakash's evidence is on the basis that the TMP will not be complied with. However, the Court in *The Strand Ltd v Auckland City Council* confirmed that a consent authority, when it imposes conditions, should assume that the applicant and its successors will act legally and adhere to rules and conditions.[60] The Court observed that if consent authorities operated under the assumption that their rules and conditions would not be adhered to, nothing could ever receive approval.[61]

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58 Mr Prakash, EIC, at para [74, 75].

59 Ms Makinson, EIC, at para [9, 10, 98]

60 *The Strand Ltd v Auckland City Council* [2002] NZRMA 475.

61 At [19].

70. It is therefore necessary and appropriate to assess the transport effects on the basis that the TMP will be complied with.

71. In any event, the adverse effect that Mr Prakash raises is an existing network issue, and it is not the responsibility of Industre to make safety improvements to the Kahikatea Drive / SH1C intersection.

72. A similar issue arose in *Transit New Zealand v Southland District Council*, where Transit NZ sought that a condition to a subdivision consent be inserted, requiring a local intersection be upgraded at the applicant's expense or alternatively, that the consent be declined.[62] The Court held that seeking such a condition in this instance had an "ulterior purpose" to effect improvements to remedy an existing deficiency in the State Highway.

73. Ms Makinson's evidence finds that the effect of the Application on the capacity and safety of the road network is negligible to less than minor.[63]

CONCLUSION

74. Overall, the evidence supports that granting the Application meets the purpose of the Act:

(a) it is an appropriate use of the Site having regard to the existing environment;

(b) it passes both of the s104D gateway tests;

(c) adverse effects on the environment are less than minor, and positive effects will result in terms of remediation of contaminated soil, improved stormwater discharges, and economic benefits;

(d) it is important that integrity of the District Plan be upheld and like cases are treated alike;

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62 *Transit New Zealand v Southland District Council* CO42/06 12 April 2006 [2008], NZRMA 379

63 Ms Makinson, EIC, at para [114].

(e) the use is consistent with the future planned use for the wider area, and until water and wastewater services can be provided the services can be provided for on-site;

(f) it is an efficient use and development of an existing industrial site consistent with s7(b) of the RMA.

DATED at Auckland this 21st November 2023

Bianca Tree

Counsel for Industre Property Rua Limited

BEFORE THE ENVIRONMENT COURT

Decision [2015] NZEnvC 208
ENV-2015-WLG-00017

IN THE MATTER	of an appeal under section 358 of the Resource Management Act 1991
BETWEEN	JARA FAMILY TRUST Appellant
AND	THE HASTINGS DISTRICT COUNCIL Respondent

Court: Environment Judge C J Thompson
Environment Commissioner K A Edmonds
Environment Commissioner D J Bunting
Hearing: at Hastings 11 - 12 – November 2015
Counsel: M B Lawson for the JARA Family Trust
A J Davidson for the Hastings District Council

DECISION ON APPEAL

Decision Issued: - 7 DEC 2015

The appeal is allowed

Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] In a decision made under s357A(1)(g) of the Resource Management Act, following a decision made by the Hastings District Council to decline the applications by the JARA Family Trust for resource consents, a Commissioner also declined the applications. This is an appeal against that decision.

[2] The applications are for resource consents to construct an industrial workshop of 2,400m^2 and a canopy of 1,200m^2 for the construction, storage and sale of pre-fabricated residential and commercial buildings, and to utilise existing office and sales buildings of 110.4m^2 on the property for the same business. A total of 14 staff would be employed on site. The land in question is a parcel of 4.0544ha at 1139 Maraekakaho Road, to the west of Hastings City.

Zoning and activity status

[3] As just noted, the land is zoned *Plains* zone in the operative District Plan. Under the Proposed District Plan it is zoned *Plains Production* zone. In both cases the activities in question have *non-complying* status, meaning that before resource consents can be considered, one or other of the threshold tests of s104D must be met. The terms of those tests are:

> (1) … a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either —
>
> (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of — …
>
> (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.
>
> (2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

It is agreed by the planning witnesses for the parties, and we accept their views, that the adverse effects on the environment of the planned activities will be not more than minor, so that threshold can be passed. The proposal must therefore be considered under s104 and Part 2 of the RMA, and we shall come to those provisions in due

course. We shall also return to discuss the issue raised in s104(2) – the so-called *permitted baseline*.

[4] We should add that, in respect of the zoning under the Proposed Plan, the position may not be final. There is at least one appeal that may affect the *Plains Production* zoning, and there is a suggestion that, in light of comments reportedly made by Commissioners in another hearing, a Plan variation in respect of this land might be forthcoming. That is speculative at present, but rather aligns with views we shall discuss shortly.

The parties' positions

[5] The JARA Family Trust (JARA) owns the land. Mr John Roil is a trustee, and he is also a director and shareholder, together with Mrs Rose Roil, of Cottages (NZ) Limited. The company has developed prefabricated construction methodologies for houses and similar sized buildings which can be used in a factory setting, rather than outdoors. This enables, Mr Roil told us, benefits such as better quality control, consistency, reduction in waste, and guaranteed completion times.

[6] The business was previously operated from a site on the opposite side of Maraekakaho Road from the application site which had the same zoning. It had the necessary resource consents. We were told that the business needed to move simply because the old site became too small for the expanding operation, particularly for the storage of buildings. (That site is now occupied by the Waipak plastics manufacturing business, operating from a new 3500m^2 building). The proposed site will also allow for expansion in the future, and it has the advantage of a good public profile, having a long road frontage.

[7] In general terms, JARA regards the proposed use as not significantly different from what has been occurring on and around the site for many years, and sees the *Plains* or *Plains Production* zoning as unrealistic for the site if that is taken to mean only the growing, or processing of the produce of viticulture, horticulture or some other agrarian use. For those purposes, the Trust believes that the land would be

regarded as of poor quality for growing, but for primary processing purposes it would be perfectly acceptable.

[8] The Council accepts that the proposed activities will produce no more than minor adverse effects on the environment. Its concern is that it believes the activities to be conducted are strongly contrary to the objectives and policies of both the operative and proposed District Plans, and that the integrity of both documents would be seriously compromised if the consents were approved.

Existing environment

[9] The site is predominantly flat, with a split in levels created by a terrace running parallel to the Irongate Stream, which runs along the north-western boundary. The split in levels also defines a change in soil type. The higher portion is closest to the Maraekakaho Road boundary, and the lower portion of the land and the stream occupy about 80% of the site. The soil types on both are described in a report from Mr John Wilton, a horticultural consultant with AgFirst Consultants HB Ltd, as ... *of poor quality for cropping purposes*. Additionally, he considers that both levels are of a size and shape that makes them unattractive for possible development for cropping, orchards, or vines.

[10] The site already contains a house, a sales office, facilities to complete the construction of prefabricated buildings, and storage – these are authorised by existing resource consents but are of a lesser scale than what is proposed. Also, on two nearby sites also zoned *Plains* zone, the applicant has, with the authority of resource consents, already established the same (although much smaller) activities as are proposed for the site in question. In summary, the existing development on the site, as authorised by resource consents already granted are: a dwelling (relocated); an accessory shed (relocated); a shed and 46m^2 visitor accommodation (utilised as a secondary dwelling); all for what is described as an oversize mixed use industrial/commercial activity, being an office and outdoor industrial area for the storage, fit-out and finishing of transportable buildings.

[11] The site has been in use as a firewood yard for some 40 years and, when the Trust bought it, it also acquired an *existing use* certificate for that activity. We understand however that the Council regards that *existing use* as having now lapsed, presumably because it has not been active for more than 12 months.

[12] In the words of Mr Jason Tickner, the consultant planner engaged by the applicant, the site and its surrounding environment are not typical of the underlying *Plains* or *Plains Production* zoning, both because of the existing uses, its soils, and its versatility. He describes it as ... *an almost orphaned historical, industrial hub* ... . This area is known as *Irongate.*

[13] It has *Deferred Industrial* 2 zone (Irongate) land in the operative Plan and *General Industrial* in the proposed Plan immediately to its west and southwest. There are industrial uses on *Plains* zone land to its north and south, and a mixture of *Plains* zone primary production uses to the east, with the buildings of the SPCA facility on the opposite side of Maraekakaho Road.

[14] Expressed as something of an aside in his written brief of evidence, Mr Tickner also notes that an application for resource consent has been made to the Council to establish a ... *2400m^2 coolstore facility in the same locality as this application* ... . This, he notes, is to be considered as a *restricted discretionary* and non-notified activity and if both that application, and the consent under appeal, are granted the appellant will decide which may be given effect. Mr Roil expanded on this at the hearing. There is no intention to establish any coolstore operation – the application for consent was made simply to demonstrate that a large industrial building on this site, with environmental effects materially indistinguishable from what is proposed in the application under appeal, could quite readily be given consent. To that extent it confirms what we already knew: - viz that a large industrial building can be consented on this property, and that it is what is produced in the building that means it may, or may not, be a comfortable fit with the Plans' provisions.

Section 104(1)(a) – positive effects

[15] There is no issue but that the proposal will have some positive effects. It will, for instance, cater for the expansion of what is apparently a successful enterprise, with the employment opportunities that will inherently have.

Section 104(1)(a) – adverse effects

[16] As noted, it is agreed that there will be no adverse effects on the physical environment that will be more than minor. The *effect* that is raised in opposition to the proposal is the damage it may cause to the integrity of the plans' provisions, and we shall return to that shortly.

Section 104(1)(b) – national and regional planning documents

[17] There were no national policy statements or similar documents brought to our attention as being relevant.

[18] In terms of regional documents, some provisions of the Regional Policy Statement were brought to our attention. In particular, there are two issues:

ISS UD1 The adverse effects of sporadic and unplanned urban development (particularly in the Heretaunga Plains sub-region), on:

a) The natural environment (land and water) …

ISS UD2 The adverse effects from urban development encroaching on versatile land (particularly in the Heretaunga Plains sub-region where the land supports regionally and nationally significant intensive economic activity) …

And these policies:

POL UD4.1 Within the Heretaunga Plains sub-region, district plans shall identify urban limits for those urban areas and settlements within which urban activities can occur, sufficient to cater for anticipated population and household growth to 2045.

POL UD4.5 Within the Heretaunga Plains sub-region, areas where future industrial greenfield growth for the 2015-2045 period have been identified as appropriate, subject to further assessment referred to in POL UD10.1, POL UD10.3, POL UD10.4 and POL UD12, are:

a) Irongate industrial area.

The first point to be made is to repeat that the land in question is not *versatile land*, nor is it supporting *significant intensive economic activity*.

[19] Mr Lawson made much of the *Irongate Industrial Area* shown on Appendix C in the RPS. He submitted that this warranted special weighting on the basis that the RPS process provided the first real statutory opportunity for the community to influence the future Industrial land use pattern. He compared this with the non-statutory documents that preceded it – the Hastings Industrial Expansion Strategy 2003 and the Heretaunga Plains Urban Development Strategy 2010. We accept the point that the Proposed District Plan process which is underway is to give effect to the RPS. However, we also accept the evidence of Mr McKay for the Council that, in terms of the RPS, the detail of the future *Industrial* zoning and its timing, including infrastructure provisions, is one for the District Council. There are infrastructure cost issues that the Council needs to resolve outside the RMA framework, and they may well have the practical effect of delaying the effect of the zoning.

Section 104(1)(b) – district planning documents

[20] The site is bounded by the *Plains* zone (in the Operative Plan) and the *Plains Production* zone (in the Proposed Plan) to its northeast, east and south. Under the Operative Plan immediately to the west and southwest of the site there is *Deferred Industrial 2 (Irongate)* under the Operative Plan and *Deferred General Industrial* under the Proposed Plan.

[21] Under the Operative Plan, Rule 6.7.1 makes commercial and industrial activities *permitted* activities in the *Plains* zone where they comply with the general performance standards and terms in s6.8 and the specific performance standards and terms in s6.9. The proposal would not comply with those performance standards and terms. Overall the Operative Plan would require resource consent under these rules:

(a) Rule 6.7.3 the front yard encroachment – *restricted discretionary*;

(b) Rule 6.7.5 non-compliance with commercial and industrial activity size limits – *non-complying*;

(c) Rule 13.4.7.2 earthworks volume limit – *restricted discretionary*.

[22] Under the Proposed Plan, Rules PP5 and PP6 specify that commercial industrial activities are *permitted* in the Plan's *Production* zone, within limits. The proposal would not comply with the general performance standard in relation to yards, nor with the performance standard in relation to total building coverage. Specific performance standard and term 6.2.6D(1) sets threshold limits for commercial activities at approximately the same levels as the Operative Plan, and the proposal would not comply. Nor would it comply with Rule EM6 – an earthworks volume limit.

[23] We have considered the significant objectives and policies under the Operative Plan. From them, the relevant spirit and intent of the Plan can readily enough be discerned. Without needing to recite and examine them all, some examples will demonstrate the point about Rural resources and the Plains area. R01 speaks of promoting the maintenance of the life-supporting capacity of the Hastings District's rural resources at sustainable levels; RO4 speaks of the maintenance and protection of natural physical resources that are of significance to the district; RP5 speaks of rural land close to urban fringes, and avoiding sporadic and uncontrolled conversion of it in a way that adversely affects the rural resource base; PLP1 speaks of maintaining the life-supporting capacity of the soil resource; PLP6 and PLP7 speak of limiting commercial activities to ensure sustainable management of the soil resource; IZP2 and IZP3 are about optimising the use of existing industrial areas rather than spreading into green field developments.

[24] We had submissions and evidence on the stronger policy direction of the Proposed District Plan. That included providing specified areas for urban activity so as to keep the Plains area focussed on production. We were told that the Plan's approach is well encapsulated in two policies from the Plains Strategic Management Area:

> PSMP2: Require that activities and buildings in the Plains environment be linked to land based production and are of a scale that is compatible with that environment. ...
> PSMP4: Limit commercial and industrial activities to those that have a direct relationship to crops grown and/or stock farmed within the Plains environment.

Those strategic objectives then appear in the *Plains Production* Zone through policies such as PPP3:

> Limit the number and scale of buildings impacting on the versatile soils of the District

And PPP7:

> Provide for industrial and commercial activities ... with limits on scale and intensity to protect soil values, water values and rural character.

[25] We accept all of that, and we have also noted the content of Plan Change 50, but as we are about to discuss further, we are drawn back to the reality that the theme of the provisions seems not to have been accepted by decision-makers in the past, and the decisions that have been made have led to the current existing environment. Further, given the reality that the land in question is not rated as being of even moderate value as a growing resource, and its relative isolation, it is difficult to be critical of that line of decisions.

Section 104(1)(c) – other relevant matters - Plan Integrity

[26] In a situation where it is accepted that the adverse effects on the environment of a proposal will not be more than minor, there is little point in discussing the concept of the *permitted baseline* in assessing effects on the physical environment in terms of s104(2), but the concept does have resonance in discussing issues such as plan integrity.

[27] The adverse outcome of the proposal which is argued to be so inimical to the thrust of the *Plains* zone, or *Plains Production* zone, provisions as to threaten the integrity of either Plan, is the loss of the productive capacity of the zone's soils by erecting buildings over them, or using them other than for a purpose of growing, or processing, food.

[28] The operative provisions of the *Plains* zone do permit the erection and use of buildings, quite apart from houses and ancillary buildings. There are no size or building coverage limits on accessory buildings associated with residential activities permitted on a site of this size. Industrial buildings for the ... *processing, storage and/or packaging of agricultural, horticultural and/or viticultural crops and/or*

produce ... with a GFA of up to 2500m^2 per site are *permitted* on any site (no matter what size) in the *Plains* zone under Rule 6.9.5. The justification for that is that such a rural industry is directly related to the production of primary produce on the land, and that is valid and understandable. While the *permitted* activities underline the point that *Plains* zone land is not forbidden territory for construction purposes, the question at hand is whether the construction of buildings for a purpose that has no agricultural, horticultural or viticultural connection at all would, or might, be taken as setting a precedent for such uses and thus significantly harm the integrity of the Plan.

[29] Ms Janeen Kydd-Smith, the consultant planner called by the Council, expresses the point this way:

> ... the repetition of this type of activity being able to establish on the Plains Zone/Plains Production Zone land would undermine both the Operative and the Proposed Plans' strategy for protecting and maintaining the soils/land resource. It would also undermine the Plans' preference for industrial activities to be located in industrial zones, rather than as green field developments.

[30] As an issue of fact, leading to a clear view about the issues of plan integrity, our visit to the area at the conclusion of the hearing on 12 November sharply crystalized an impression already forming from the verbal descriptions, and the photographs and plans produced, in the evidence. That is, that the area surrounding the site has, with the exception of the orchard on its eastern boundary, long since ceased to be dominated by truly *rural* characteristics. We think that any reasonable person, whether having an educated planning eye or not, would call it an *industrial/commercial* area. There is the SPCA complex opposite; the large (3500m^2) Waipak plastics manufacturing building diagonally opposite, and behind that a Ballance Fertiliser Storage and Sales and truck depot, including a truck wash and office; the large Farmers Transport operation a little to the west of that; the even larger Tumu/ITM complex on the northern side of Maraekakaho Road to the west; and the industrial operations hard on the site's western and northern boundaries, described in Mr Tickner's evidence as:

- Outdoor storage of demolition material associated with contracting and demolition business:

- Manufacturing of Engineered Wood Products, consisting of a 4,640m^2 Workshop and Offices:
- Coal storage and sale:
- The Display and sale of 'Total Span' buildings:
- Oversize Visitor Accommodation Complex:
- The manufacture of transportable cottages within a 700m^2 building.

Of all of those, only the Ballance fertiliser, and perhaps the Farmers Transport, operations have a recognisably rural connection, and even they do not process food or produce, of whatever kind, grown on the land.

[31] All of these, with the exceptions of the Farmers Transport and Tumu/ITM operations, are on sites zoned *Plains*. They create a large area that is dominated by substantial commercial/industrial enterprises. That may have been brought about by a series of decisions which a purist may regret; but it is what it is, and it is not going to change in the foreseeable future. This area has been allowed to become a de facto industrial/commercial node, and there is no point in pretending otherwise.

[32] Further, the proposed development is not going to expand the lateral dimensions of that node – it is close to the centre of it. Certainly it will intensify the existing situation, but it could equally be regarded as making the best of a sub-optimal situation, and as saving another, and perhaps more ideal, *Plains Production* area from a similar fate.

[33] While we quite understand the desire to preserve the integrity of the Planning documents, a series of decisions which appear to have not had that objective as a predominant factor has resulted in a situation where, quite simply, *the horse has bolted*, and the best that can be done is to stop the de facto node spreading outwards.

[34] That this is a question of judgement to be applied to the facts of each proposal is clear from a reading of decisions such as *McKenna v Hastings DC* (W016/2008), where a non-complying application was declined, and *Beacham v Hastings DC* (W075/2009), where one was allowed. There is no precedent in any true sense in these decisions – each depends on its own facts.

Conclusions on s104 issues

[35] The issue of effects can be put aside. The real question is whether the allowing of this proposal is going to make the apparent lack of regard to the apparent intent of the operative plan, over a good number of years, materially worse. We consider that the reality is that this node around the intersection of Maraekakaho and Irongate Roads has, de facto, ceased to be *Plains* zone land in a true sense. This piece of land, and those to its north, west and south, have, by their inherent nature in terms of productivity, and by the consent decisions that have affected them, become something of an anomaly in the *Plains* or *Plains Production* zones, and a simple recognition of that will not, we consider, do harm to the integrity of the Plans.

Part 2 RMA

[36] In terms of s8 and s6(e), no issues arising under the Treaty, or other matters of particular importance to Maori, were drawn to our attention, nor are there issues with any other matters which are to be *recognised and provided for* as being of *national importance* under s6.

[37] Section 7 contains the matters to which decision-makers are to have *particular regard.* Relevant to this appeal, those are:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) kaitiakitanga:
>
> (aa) the ethic of stewardship:
>
> (b) the efficient use and development of natural and physical resources:
>
> (c) the maintenance and enhancement of amenity values:
>
> (d) intrinsic values of ecosystems: …
>
> (f) maintenance and enhancement of the quality of the environment:
>
> (g) any finite characteristics of natural and physical resources: …

[38] For present purposes, the provisions about kaitiakitanga, the ethic of stewardship, and the quality of the environment, might be regarded as more or less synonymous – expressing the need for resources to be treated and used with care, and

with consciousness of the needs of future generations to have access to them. Efficiency of use and development would indicate a need to use resources, in this case land, to their best advantage. Thus, it would not be efficient to use highly productive and fertile land for a purpose that land with little or no productive capacity could equally readily be used for. No ecosystem that might be affected by the proposal was brought to our attention.

[39] The planning witnesses for the parties agree that there are no issues with s7(c) and s7(g): - for 7(c) in that amenity values will be maintained (although perhaps, we would add, they may not be enhanced). Insofar as s7(g) is concerned, we confess to having a somewhat conditional agreement with their view. If it was the case that this site had better productive capacity and potential than it apparently has, paying particular regard to the finite amount of productive land resource would obviously be a significant issue. If it is accepted that, as a productive growing unit, this site is of poor quality, then one might be much more relaxed about seeing it used for other purposes. The mid-point to be considered is its potential for use as a production-related industrial or commercial activity – packhouse, vegetable processing etc, which is specifically recognised in the relevant zones.

[40] On an overall view, against the background of the uses and activities which now exist in the immediate area, we are content that the proposal can be accommodated because it is not taking up finite resources which should, because of their inherent qualities, be reserved for another use.

Section 290A – the decision under appeal

[41] Section 290A requires the Court to have regard to the decision under appeal. That does not create a presumption that it is correct but it does, implicitly at least, call for an explanation if we should come to disagree with it. It is apparent that the issue of Plan integrity was the major factor in the earlier decision, just as it is here. We entirely understand that decision, and the reasons for it, but on the evidence and submissions we heard, for the reasons we have attempted to set out, we do not regard that issue in the same light, and have come to the opposite conclusion.

Result

[42] We are of course well aware that this is not an appeal about the terms of a proposed plan, but it has been necessary to comment about the viability of both the the operative and proposed Plans insofar as they affect this piece of land and the area immediately surrounding it. In doing so we have been as circumspect as we have been able – what might happen with the proposed Plan provisions must be left to the proper process. But for this application, we consider that approval for a *non-complying* activity is sound, and we allow the appeal.

Conditions

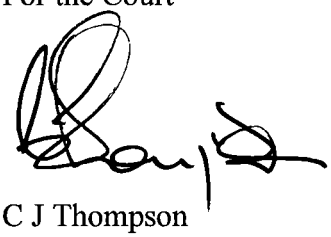
[43] We invite the parties to confer, and to present us with a set of draft resource consent conditions for consideration, by 31 January 2016.

Costs

[44] In the circumstances we would not encourage an application for costs, but as a matter of formality we reserve them. If there is to be an application it should be lodged and served within 15 working days from the Court's formal approval of conditions, and any response lodged and served within a further 10 working days.

Dated at Wellington this 7th day of December 2015

For the Court



C J Thompson
Environment Judge

BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision No: W 075 /2009

ENV-2009-WLG-000013

IN THE MATTER of an appeal under s120 of the Resource Management Act 1991

BETWEEN G M BEACHAM
Appellant

AND THE HASTINGS DISTRICT COUNCIL
Respondent

Court: Principal Environment Judge C J Thompson
Environment Commissioner M P Oliver
Environment Commissioner S J Watson

Heard at: Hastings on 9 September 2009. Site visit 9 September 2009

Counsel/Appearances:

M B Lawson for G M Beacham

G W Richardson – s274 party

B W Gilmour for the Hastings District Council

DECISION OF THE COURT

Decision issued: 05 OCT 2009

A. The appeal is allowed

B. Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] In a decision dated 19 December 2008 the Hastings District Council declined an application made by Dr Gregory Beacham for resource consent to operate a car restoration activity on his property at 1424 Maraekakaho Road, Hastings. This is an appeal against that decision. Dr Beacham's business has an international reputation for the expert restoration and refitting of classic motor cars, particularly Jaguars. The proposal is to operate the business within three recently constructed buildings, with an attached amenities block. Together the buildings occupy about 1096m^2 and form three sides of a rectangle, semi-enclosing a sealed courtyard onto which they open. The proposal would consolidate the car restoration business onto the one site at Maraekakaho Road.

[2] The property is 9.3457ha in area and the majority of it is operated as an orchard on which Dr Beacham and his family also live. Dr Beacham has recently leased out the orchard, to be operated in conjunction with others, so he no longer requires to store as much orchard-related material and machinery on site for his own use. The site is set among other similar activities and is immediately adjacent to the Mangaroa Prison, on the outskirts of Hastings City.

The present arrangements

[3] In 1988 Dr Beacham obtained a *specified departure* under the then planning legislation from the Hawkes Bay County Council for the operation of the (then much smaller) car restoration business from the generous but still residential scale garaging existing on the site. However, as the business grew, relocation of part of it was required and part of the property at 96 Algernon Road, also in orchard country south of Hastings, was taken on lease. The building on that site was originally a packhouse for the orchard on that property. Presently, the restoration business itself is conducted at Algernon Road and some vehicles awaiting restoration, and parts, are stored in the buildings at Maraekakaho Road.

[4] A *non-complying* resource consent for use of the Algernon Road property was granted in 2004 and enables the consent holder to operate the restoration business employing 15 staff within a 905m^2 building between the hours of 7.30 am and 6 pm Monday to Thursday. The site is within the *Plains* zone of the Hastings District. This consent would be surrendered if the appeal succeeds.

Zoning and Planning Status

[5] The Maraekakaho Road property is situated within the *Plains* zone of the Hastings District Plan, operative since 2003. There are no identified sites of significance or designations affecting the property.

[6] It is common ground that the application falls within the definition of *industrial activities* contained in Chapter 18 of the Plan as: *The use of land and buildings for the manufacturing, fabricating, processing, packing or storage of substances, into new products and the servicing and repair of goods and vehicles, whether by machinery or hand and includes transport depots and the production of energy but excludes helicopter depots.* It is also common ground that Rule 6.9.5(1) contains the specific performance standards applicable to industrial activities. Industrial activities other than the processing storage and packaging of crops are confined to a maximum gross floor area per site of $100m^2$ and require that no more than three non-resident employees may be employed on site. Plainly the proposal would fail to comply with those performance standards and under Rule 6.7.5 the proposed activity becomes a *non-complying* activity.

[7] Plan Change 46, relating to the *Plains* zone, was notified on 26 June 2008, almost exactly one month before Dr Beacham's application was lodged. The Council notified its decisions on submissions on 23 May 2009. There is only one appeal, and it is not relevant to this proposal. The Plan Change, although not altering the wording of the objectives and policies, sought to limit all *permitted* industrial activities to buildings of not more than $100m^2$ GFA and to clarify that only rural crop/produce-related industrial buildings larger than $100m^2$ GFA are provided for (as a *restricted discretionary* activity). The Plan Change did not relevantly affect the performance standards, nor the status of the activity relevant to this proposal, which therefore remains *non-complying*.

[8] That being so, the application must pass one or other of the two thresholds contained in s104D before it can be considered for a resource consent under s104. That is, its adverse effects on the environment must be no more than minor, or it must be shown to be not contrary to the relevant objectives and policies of the District Plan, when read as a whole. In this case the expert planning witnesses agree that the adverse effects of the proposal are not

more than minor - so we may pass directly to a consideration of the application under s104 and leave a consideration of the Plans objectives and policies until a later point.

Section 104(1)(a)- effects on the environment

[9] We have mentioned that the expert planning witnesses agree that any adverse effects on the environment would not be more than minor. This is not surprising given that the buildings already exist – they are part of the existing environment. That is not to say that the issue of effects on the environment can be ignored. Mr Richardson, a s274 party who lives opposite the Maraekakaho Road property, raised issues about traffic generation and the use of chemicals on the site as possible adverse effects in his original submission to the Council. There was no evidence about those issues, and in the apparent absence of any issues arising from them in the 20 plus year history of this enterprise, we cannot sensibly give such vaguely expressed concerns any real weight now.

[10] Nor, of course, is it to be overlooked that this activity has positive effects. In terms of the purpose of the Act, as expressed in s5, it contributes towards enabling people and communities to provide for at least their social and economic wellbeing and, depending on one's degree of enthusiasm for classic cars, perhaps their cultural wellbeing as well. It does so by providing employment for highly skilled staff, and business for suppliers. According to Dr Beacham's unchallenged evidence, the business has over its lifetime contributed of the order of $50M to the general economy in export earnings.

Permitted baseline

[11] It may seem a little pointless to discuss the concept of the *permitted baseline* in a situation where it is agreed that the adverse effects will not be more than minor, but the concept has a resonance when it comes to considering issues such as Plan integrity. Section 104(2) gives a consent authority the discretion to disregard an adverse effect created by the proposal...*if the plan permits an activity with that effect.* The adverse effect of the proposal which is argued to be so inimical to the thrust of the *Plains* zone provisions as to threaten the integrity of the Plan is the loss of the productive capacity of the zone's soils by erecting buildings over them.

[12] The operative provisions of the *Plains* zone do permit the erection of buildings, quite apart from houses and ancillary buildings. Mr Macdonald confirmed that there are no size or building coverage limits on accessory buildings associated with residential activities permitted on a site of this size. Industrial buildings for the ...*Processing, storage and packaging of crops, produce and agricultural materials*... with a GFA of up to 2500m^2 per site are permitted on any site (no matter what size) in the zone under Rule 6.9.5. The justification for that is that such a rural industry activity is directly related to the production of primary produce on the land, and that is valid and understandable. But the *permitted* activities underline the point that *Plains* zone land is not absolutely inviolable. These were the very provisions which enabled Dr Beacham to construct the existing buildings as *permitted* activities. That seems to us to be a relevant point to consider. We hasten to add that we have not overlooked the subsequent *tightening* of the provisions under proposed Plan Change 46.

Affected person approvals

[13] Section 104(3)(b) provides that a consent authority (in this case, the Court) shall not have regard to any effect on a person who has given written approval to the application. There are four such persons; Mr Brian Clearkin, the owner and occupier of an orchard property on the corner of Maraekakaho and Stock Roads, Mr Grant Taylor (on behalf of the Luton Trust) the owner and occupier of a property to the east of the subject site, Mr T and Mrs M M Hyland, the owners and occupiers of a property immediately opposite the site on Maraekakaho Road, and the Department of Corrections in respect of the Mangaroa Prison, which surrounds the site on three of its boundaries. We have mentioned that Mr Richardson, also a neighbouring owner, opposes the application so the local support is certainly not unanimous. Nevertheless, the fact that its closest neighbours give it their consent is a reasonable indication that its effects, albeit at a reduced scale, have not proved problematic in the past.

Section 104(1)(b) – planning documents

[14] There are no relevant national statements, nor is the Coastal Policy Statement relevant. Brief mentions were made of the Hawkes Bay Regional Resource Management Plan by Mr Alan Matheson, the Council's Consultant Planner, who referred to Objective 38 – *The sustainable management of the land resource so as to avoid compromising future use and water quality*... and to its accompanying Policies 67 and 68; and by Mr Matthew Holder, the Appellant's consultant planner. He referred to Objective 16 – *for future activities, the*

avoidance or mitigation of nuisance effects arising from the location of conflicting land use activities. We agree with Mr Holder's view that Objective 16 is not a live issue here. Mr Matheson says that the Regional Plan supports the District Plan provisions about the *Plains* zone soil resource. We agree with that view also.

[15] The District Plan was the focus of attention. Many of its provisions were mentioned, but particularly relevant objectives include:

RO1 To promote the maintenance of the life-supporting capacity of the Hastings District's rural resources at sustainable levels.

RO2 To enable the efficient, and innovative use and development of rural resources while ensuring that adverse effects associated with activities are avoided, remedied or mitigated.

RO4 To ensure that the natural, physical and cultural resources of the rural area that are of significance to the Hastings District are protected and maintained.

PLO1 To maintain the life-supporting capacity of the unique resource balance of the Heretaunga Plains.

PLO2 To avoid, remedy or mitigate potential adverse effects of land use activities on the rural community, adjoining activities, marae, and the economy.

PLO3 To provide for the establishment of landholdings on the Plains which can accommodate a wider range of activities that can retain the life-supporting capacity of the Plains resources.

The principal supporting policies are:

RP3 Provide for a wide range of activities to establish which complement the resources of the rural area, provided that the sustainability of the natural and physical resources of the area is safeguarded.

PLP1 Enable the establishment of a wide range of activities provided they maintain the life-supporting capacity of the soil resource of the Heretaunga Plains for future use.

PLP4 Control the adverse effects of activities on the community, adjoining activities, and the environment.

PLP5 Activities locating in the Plains Zone will need to accept existing amenity levels associated with well established land use management practices involved with the sustainable use of the soil resource.

PLP6 Limit the scale and intensity of the effects of Commercial Activities in the Plains Zone in order to ensure the sustainable management of the soil resource and to mitigate adverse effects.

PLP7 Provide for the establishment and development of Industrial Activities on the Plains Zone, in a manner that complements the sustainable management of the soil resource, adjacent activities and protects the amenity of the zone.

[16] In summary, we accept that those provisions aim to promote the sustainable management of the Heretaunga Plains land resource, finite in nature and with a productive and life-supporting capacity, not just for the present but also for future generations. Also, as Mr Matheson put it *...commercial and industrial activities are limited in relation to the type and size of those activities, particularly those that do not support the sustainable use of the versatile soils resource.*

[17] This is an issue thoroughly traversed in a number of relatively recent decisions of the Court. For instance, in *McKenna v Hastings DC* (W16/2008) and *Ngatarawa Development Trust Ltd v Hastings DC* (W17/2008), the Court found that the proposals then before it were so contrary to the thrust of the Plan provisions that they should not be given resource consents. The scenario in *H B Land Protection Society Inc v Hastings DC* (W57/2009) was different, in that what was before the Court was a Council-initiated Plan Change to enable the establishment of a regional sports park. Nevertheless, what was at stake was some 30ha of *Plains* zone land, the productive capacity of much of which would, for all real purposes, be lost if the park was built. In that instance, the Court found that while the productive capacity of the soil was undoubtedly important, countervailing values prevailed. The point to be made here is that the protection of the capacity of the *Plains* soils is not an absolute, and other activities are not *prohibited.*

[18] In each case, it is a question of assessing effects and of considering the Plan provisions. If the adverse effects significantly outweigh the positives, and/or the proposal is in irreconcilable conflict with the Plan provisions, then a negative answer is plainly indicated. If things are not that bleak, then it may be that a proposal can still be regarded as promoting the purpose of the Act – the sustainable management of resources.

Section 104(1)(c) – plan integrity

[19] The real issue in this appeal is whether allowing this application would be so contrary to the relevant objectives, policies and other provisions of the District Plan that it would harm its

integrity and effectiveness as an instrument enabling the Council to avoid, rather than to remedy or mitigate, the adverse effects the Plan formation process has identified.

[20] This was at the core of the dispute between the parties, and the fundamental reason why the Council declined the application. The decision of 19 December 2008 records:

> ... the application would have the potential to create an adverse precedent effect. It was felt that the qualities of the proposal could be readily replicated on other sites in the Plains Zone and were not sufficiently unique to this site. Therefore the Council, being consistent in its approach, would find it difficult to refuse consent to similar applications.

[21] We need to begin a consideration of this issue by recalling that the original Maraekakaho Road operation was sanctioned by a *specified departure* granted by the then County Council in 1988. A *specified departure* was, loosely, the equivalent of a *non-complying* consent under the current legislation. We have mentioned also that the Algernon Road operation received a *non-complying* consent from this Council in 2004.

[22] Mr Ian Macdonald, the Council's Environmental Manager, expressed the view that the earlier consents were materially different from the present application because they both utilised existing buildings on the two properties, and thus did not involve taking more land out of production. We see the same circumstances here. Dr Beacham made no secret of his real intent in constructing these buildings, but they were built as storage sheds, and thus were *permitted* in the zone. Now, as has happened twice before, an application has been made to convert them to some other use.

[23] We accept of course the administrative law principle that like applications should be treated alike, but that principle applies both ways. Given that this operation has twice before been regarded as sufficiently outside the run of foreseeable non-complying proposals that it could be examined, and approved, on its merits we must ask why it should be differently regarded now. We heard no suggestion at all that the grant of either of those consents had led to any, let alone a deluge of, applications for similar consents in respect of other properties. The enterprise's own history has discounted the *floodgates* hypothesis, and makes it difficult, if not impossible, for the Council to mount a credible argument that the integrity of the Plan will be imperilled if this consent is granted.

[24] We have said before, and must say again, that the *floodgates* argument does tend to be somewhat overused, and needs to be treated with some reserve. The short and inescapable point is that each proposal has to be considered on its own merits. If a proposal can pass one or other of the s104D thresholds, then its proponent should be able to have it considered against the s104 range of factors. If it does not match up, it will not be granted. If it does, then the legislation specifically provides for it as a true exception to what the District Plan generally provides for. Decision-makers need to be conscious of the views expressed in cases such as *Dye v Auckland RC* [2001] NZRMA 513 that there is no true concept of precedent in this area of the law. Cases such as *Rodney DC* v *Gould* [2006] NZRMA 217 also make it clear that it is not necessary for a site being considered for a *non-complying* activity to be truly *unique* before Plan integrity ceases to be a potentially important factor. Nevertheless, as the Judgment goes on to say, a decision maker in such an application would look to see whether there might be factors which take the particular proposal outside the generality of cases.

[25] Only in the clearest of cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined.

[26] That was the position the Court found to exist in its decision in *McKenna v Hastings DC* (W16/2008). There too the adverse effects of the application itself were found to be not more than minor, but there was a direct clash with the provisions relating to the *Plains* zone and the avoidance of the fragmentation of its landholdings and the productive capacity of its soils. A somewhat similar, if less crisply defined, position was found to exist in *Ngatarawa Development Trust Ltd v Hastings DC* (W17/2008).

[27] It is not just the history of this operation that leads us to discount the Plan integrity argument in this instance. This proposal has current features that, individually and collectively, make it unlikely that a materially indistinguishable proposal would come over the horizon. We have in mind factors such as: that it can be conducted in existing buildings; that the soils in this front part of the Beacham orchard are, according to Mr William Wilton, a horticultural consultant engaged by Dr Beacham, poor and of inferior productive capacity; that

the proposal will not fragment the ownership of the land, as a residential subdivision would; that it is a reorganisation and continuance of a longstanding local business; that the two existing resource consents will be surrendered, thus bringing about a close to neutral net *non-complying* position for the operation, and that Dr Beacham is prepared to offer a restrictive condition that there be no further development on the property, even though that could be permitted by the Plan.

Section 104(1) – Part 2

[28] There are no issues relevant to Mäori under s8 or s6(e), nor are there matters of national importance under the other paragraphs of s6. Of the matters to be given particular regard under s7 we can list as relevant:

(b) The efficient use and development of natural and physical resources:

(c) The maintenance and enhancement of amenity values:

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

[29] Arguably, it is more efficient to use the area of poorer soils on the property for a purpose other than for a second rate productive purpose. That has been tried and produced an inferior product. We do not though put any particular weight on that issue. The issues of amenity values and the quality of the environment do not arise on the evidence we heard. The *Plains* zone soils are a finite resource and that, as will be apparent, has been the focus of the hearing and our considerations.

Section 290A – the Council's decision

[30] Section 290A requires the Court to have regard to the Council's decision. That does not create a presumption that it is correct but it does, implicitly at least, call for an explanation if we should come to disagree with it. We have already quoted the central reason from the Council's decision declining the application – see para [20]. It is apparent that the issue of Plan integrity was critical in its thinking and, for the reasons we have outlined – see paras [19] to [27] – we do not regard that issue in the same light.

Result

[31] The effective, and likely permanent, loss of the life-supporting capacity of *Plains* zone soils, even of such a small area as this, to a non-rural industry is not to be accepted lightly – we must have accumulative effects in mind. For many proposals that factor alone would likely be decisive. But for the reasons we have outlined, we do not see this proposal as being in such conflict with the Plan provisions as to create a Plan integrity issue if it is granted. Further, the factors we have listed in para [27] put it in a category which, while not unique, is sufficiently outside the likely mainstream of proposals that it can fairly be considered as a *non-complying* proposition. We conclude that, in the overall weighing process under s5 of the Act, the positive factors of the proposal outweigh its negatives and that the resource consent can be granted.

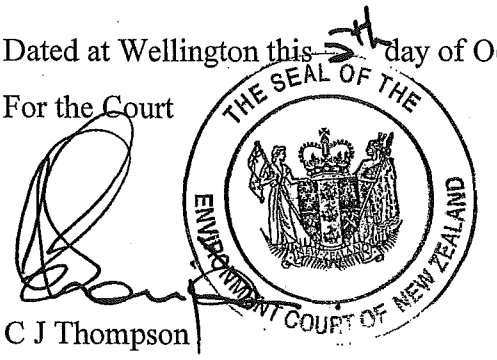
[32] For those reasons, the decision of the Council is not upheld and the resource consent should be granted. The conditions of the consent require thought – for instance to give effect to Dr Beacham's offer of a restriction on further development, as mentioned in para [27]. We ask that Counsel confer and present a set of conditions for approval by 23 October 2009.

Costs

[33] In the circumstances we do not encourage an application for costs, but as a matter of formality they are reserved. Any application should be lodged by 23 October 2009, and any response lodged by 6 November 2009.

Dated at Wellington this 5th day of October 2009

For the Court



C J Thompson

Principal Environment Judge