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

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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
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> (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

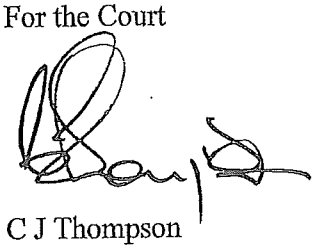
[43] We invite the parties to confer, and to present us with a set of draft resource consent conditions for consideration, by 31 January 2016.

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