

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

Decision No. [2019] NZEnvC 119

IN THE MATTER of the Resource Management Act 1991
AND of an appeal pursuant to s 120 of the Act
BETWEEN JOHN AND ALISON ROGERS
(ENV-2018-CHC-185)
Appellants
AND CHRISTCHURCH CITY COUNCIL
Respondent

Court: Environment Judge J E Borthwick
Environment Commissioner K Wilkinson
Environment Commissioner R M Dunlop

Date of Hearing: at Christchurch on 2 and 3 May 2019

Appearances: P Steven QC for the appellants
M Wakefield for the respondent

Date of Decision: 15 July 2019

Date of Issue: 15 July 2019

DECISION OF THE ENVIRONMENT COURT

A: Appeal is declined.

B: Costs are reserved, but not encouraged.

REASONS

Introduction

[1] The appellants, John and Alison Rogers, live on a small farm situated at the outskirts of Christchurch City. For some years they have been leasing part of their farm

ROGERS v CCC -DECISION



to a vehicle rental company, but only recently learned they could not do this as of right and needed to obtain resource consent.

[2] Having applied to store up to 500 rental vehicles by or under a grove of walnut trees, they were declined consent. The Rogers subsequently appealed the City Council's decision to decline consent. At the heart of the appeal is a dispute around the application of a plan policy for the location of commercial activities in a rural area.

The proposal

[3] As noted, the Rogers seek land use consent to store up to 500 vehicles on their Sawyers Arms Road property. The property comprises some 3 hectares of land. It is proposed to store vehicles towards the rear of the property, in two parking areas.¹ Parking would occur on an "as needed" overflow basis anticipated to be in the winter months but not limited to such by either the application itself or proffered consent conditions.² While we were told that Omega Car Rentals ("Omega") has stored vehicles at the orchard since June 2012, nothing in either of these documents limits a consent to a named party. The hearing proceeded on the basis that it is this use which John and Alison Rogers seek to consent.

[4] Omega has a Christchurch Airport depot located nearby at Orchard Road³ with space for the storage of up to 207 vehicles and an inner-city depot with space for 45 vehicles. Being a 3 – 4 minute drive from Omega's Airport depot, the Rogers' property meets the company's operational need to conveniently source vehicles when demand cannot be met from its Airport depot.⁴

[5] Omega pays rental of \$12/m² for storage of vehicles at the Sawyers Arms Road property with, we understand, no obligation to pay rent when cars are not in storage.⁵ Mr Besso, Omega's Area Manager, gave evidence suggesting that if the company was to pay rent in excess of \$12/m² this would affect the commercial viability of the company.⁶ This rent contrasts with the sum of \$75/m² paid by Omega for storage of vehicles at the

¹ The total land area of the parking areas being 6,400m².

² We note at pp 82-83 of the Transcript that Mr J Besso, Omega's Area Manager, suggested a duration extending between autumn to spring.

³ 158 Orchard Road, Mustang Park approximately 1,000m from the Airport terminal.

⁴ Transcript (Besso) at 76.

⁵ Besso, adopting the evidence of A Brown at [28]-[31].

⁶ Besso, adopting the evidence of A Brown at [25].



Airport.⁷ If by referring to the commercial viability of the company Mr Besso means the company would earn less income at higher rent prices, we can accept this statement. That said, he also impressed upon us that the issue as to the company's viability was a matter for the owners of the company.⁸

[6] Mr Besso was unable to assist the court as to where other car rental companies store overflow vehicles, nor could he advise on the availability of suitably zoned industrial land at or near the Airport for vehicle storage as he had not investigated the same.⁹

[7] Other pertinent aspects of the proposal, which we need not dwell on at length, include:

- (a) a limit of up to 30 vehicle trips/day with vehicles to be driven to the site ie use of heavy transporters to deliver vehicles is not proposed;
- (b) hours of operation limited to 0800 – 1800 hours seven days/week¹⁰ and the use of a single upgraded Sawyers Arms Road vehicle access¹¹ with no public access;
- (c) no physical changes to the site other than fencing, and retention and augmentation of the existing perimeter screen planting; and
- (d) that the consent be exercised only while the storage activity remained ancillary to “and for the purpose of providing financial support for the use, maintenance and development of the remainder of the site as a productive walnut orchard”.¹²

[8] The application was submitted with written approvals from five neighbouring properties located to the north, west, east and across Sawyers Arms Road being numbers 451, 457, 448 and 470 Sawyers Arms Road and 617 Johns Road. We disregard any likely effects of a grant of consent on those persons (s 104(3)(a)(ii)).

Site and surrounding environment

[9] The site is located towards the northern end of Sawyers Arms Road, some 300m

⁷ Besso, adopting the evidence of A Brown EIC [23]-[25] and Transcript 138.

⁸ Transcript (Besso) at 77-78.

⁹ Transcript (Besso) at 73.

¹⁰ Proposed condition 3.

¹¹ Proposed condition 7.

¹² Proposed condition 2.



from its junction with Johns Road (State Highway 1). The latter is part of the City's arterial road network and provides convenient Airport access. The site presently contains a dwelling, farm accessory buildings, the previously mentioned walnut orchard and shelter plantings augmented in places by native plantings. There are two vehicle crossings from Sawyers Arms Road, with the access points on the site's eastern and western boundaries. The site does not have any relevant consent history.¹³

[10] Like the site itself, the surrounding land is flat, on the fringe of the urban area and was said to be undergoing a period of change. Mr Whyte, giving planning evidence for the Rogers, described it thus:

[it] contains a mix of land uses including rural-residential use, residential units, a tree nursery (Little Big Tree Company) and retail activity (Pottery World), a tourist bus depot and [bus import company]¹⁴ (at 470 Sawyers Arms Road), horticultural uses and associated retail (Harrow's Berry Shop, 434 Sawyers Arms Road), and pasture or vacant rural land. Views from Sawyers Arms Road are often interrupted by roadside planting and shelter trees along internal property boundaries. Approximately 350 metres (at the closest point) to the east of the site along Sawyers Arms Road are the residential properties of Harewood.¹⁵

[11] We find that a sufficient description of the immediate, existing environment for current purposes while noting the further underlined detail provided by Ms Baker, the Council's planning witness. To the north and west of Johns Road there is a mix of business and resource-based activities, including (most significantly) the Airport and its related business activities.

[12] We were not provided with a description of the traffic environment on Sawyers Arms Road. However, notwithstanding non-compliance with five transport standards¹⁶ and subject to the Rogers' proffered conditions, there was no dispute in this area.

[13] Mr Whyte also drew our attention to extant resource consents for nearby Rural Urban Fringe Zone ("RUFZ") sites. Relevantly, these included a car rental and distribution yard at 711 Johns Road granted in 2017 under the Christchurch District Plan and a further part of the existing environment. Ms Baker noted pertinently that 711 Johns



¹³ Baker EIC [5.2].

¹⁴ Baker [5.3] in reliance on s 42A report. Underlining added to Whyte EIC for completeness.

¹⁵ Whyte EIC [13].

¹⁶ Application AEE [16].

Road is identified as a Greenfield Priority Area – Business by the [Canterbury] RPS.¹⁷

First instance decision

[14] As required under s 290A, we have carefully considered the decision which is the subject of the appeal. The first instance Commissioner was seemingly presented with similar issues, submissions and evidence to those which we heard on aspects of the case. We note, in particular, the finding that Policy 17.2.2.5 is the critical policy against which the proposal is to be assessed and, in the Commissioner's opinion, the policy should be given considerable weight because of its directive nature.¹⁸ The following findings by the Council led to the decline of the application:

- (a) the need for rural land had not been established. While both the Rogers and Omega could demonstrate a benefit in the nature of a personal or corporate financial sense, they could not, as required by the policy, show a 'need' to locate on rural land;¹⁹
- (b) a grant of consent would cause significant precedent issues for the Council because of its relevance for other rental car companies;²⁰ and
- (c) granting consent for an application that does not come within one of two exceptions provided for under Policy 17.2.2.5, risked undermining the integrity of the District Plan.²¹

The issues

[15] In opening submissions Ms Steven identified the following as key issues to be decided,²² concerning whether the City Council:

- (a) failed to correctly apply the relevant objectives and policies of the District Plan including, but not limited to, Policies 17.2.2.1 and 17.2.2.5;
- (b) erred in finding that the application was contrary to Policies 17.2.2.1 and 17.2.2.5;
- (c) erred in concluding that a grant of consent would cause "significant



¹⁷ Baker EIC [5.3].

¹⁸ First instance decision [162] and [188].

¹⁹ First instance decision [177]-[181].

²⁰ First instance decision [200]-[207].

²¹ Ibid [201]-[207].

²² Steven opening submissions [38].

precedent issues”, and whether that particular conclusion was reached without any supporting evidence;

- (d) erred in concluding that a grant of consent would give rise to District Plan integrity concerns; and
- (e) failed to take into account relevant evidence in support of the application.

[16] For reasons that we set out next, these issues are answered in the negative. The City Council did not err or fail in the manner alleged.

The law

[17] It was common ground that the application falls to be considered as a non-complying activity.²³ As the application was originally lodged on 6 July 2017,²⁴ the relevant versions of ss 104 and 104D Resource Management Act 1991 (RMA) are those in effect at 18 October 2017. Secondly, it was agreed that the effects of the proposal on the environment would be minor (s 104D(1)(a)).

[18] Having satisfied ourselves as to the scale of effects, we find that the application passes the threshold test for consideration in s 104D(1)(a). That being the case, we have assessed the application under s 104.²⁵

[19] Section 104(1) provides that when considering the application for resource consent and any submissions received, the court must, subject to Part 2, have regard (relevantly) to:

- any actual and potential effects on the environment of allowing the activity;
- the relevant provisions of the Christchurch District Plan; and
- any other matter we consider relevant and reasonably necessary to determine the application (on appeal, precedent and Plan integrity issues are raised).

[20] For reasons that we will come to, we have not assessed the proposal under the Canterbury Regional Policy Statement (“RPS”) as we are not satisfied on the evidence before us that its provisions have not been given effect to in the District Plan, as was



²³ Wakefield, submissions [4.1(b)] and Steven, submissions [20].

²⁴ Christchurch City Council decision on the resource consent application, dated 2 August 2018 at [4].

²⁵ Wakefield, opening [4.1(c)] and Steven, opening [62].

contended by the Rogers.

[21] We record the planning witnesses' agreement that the permitted baseline does not apply, and further to this we have no regard to its application (s 104(2)).²⁶

Activity description and status under the District Plan

[22] Both planning witnesses were agreed that 'service industry'²⁷ best describes the proposed use of land. While other descriptions and labels were proffered, regardless of the label used, there is no dispute that the activity falls to be assessed as a non-complying activity in the RUFZ (rule 17.5.1.5).²⁸

[23] Accepting that the storage of vehicles is a 'service industry', an issue arose as to whether 'service industry' is also an industrial or commercial activity in Policy 17.2.2.5, the key policy in these proceedings.

[24] We return to this issue shortly. For context we record that the District Plan defines many terms used in its provisions. However, it is not the case that the definition is to be applied whenever the word (or phrase) appears in the text of the Plan. In this Plan the definition only applies where identified via the following means:²⁹

- (a) in some cases, a qualifier in the definition itself (ie "X in relation to Y, means..."); and
- (b) in the ePlan, dotted underline with hyperlinking.

[25] In all other instances, words and phrases used in the District Plan are defined using their ordinary dictionary meaning. Mr Whyte was uncertain whether the District Plan's authors intended the satisfaction of both limbs (ie (a) and (b)) in order for the definition to apply.³⁰ The qualification "in some cases" in (a) makes it tolerably clear to us, that for the definition to apply only one limb need be satisfied.

²⁶ Whyte, reply at [24]; Baker, EIC at [6.3].

²⁷ Chapter 2, 'service industry' means the use of land and/or buildings for the transport, storage, maintenance or repair of goods and vehicles and the hire of commercial and industrial equipment and machinery. Transcript (Whyte) at 117-118.

²⁸ Baker, EIC at [5.19]; Whyte, EIC at [38] and reply at [10].

²⁹ District Plan, Chapter 2.

³⁰ Whyte, reply at [15] and [16].



[26] Returning to the current proceeding, when the words industrial and commercial activities appear in Policy 17.2.2.5 they are not hyperlinked and therefore the definitions in the Plan that apply to 'industrial' and 'commercial' do not apply. Instead, the words are defined using their ordinary dictionary meaning.

[27] Mr Whyte was of the view that an activity cannot fall under more than one activity definition in the Plan. Thus, if the activity is 'service industry' he posits it cannot also be a 'commercial activity' or 'industrial activity'.³¹ On a related matter Mr Whyte was also of the opinion that the storage of rental vehicles on the Rogers' property for ready retrieval by Omega, is not part of Omega's 'business' insofar as the actual rental of vehicles is transacted at another site (either Omega's downtown or Christchurch Airport depots).³²

[28] It may be that when giving this evidence he overlooked the fact that the key policy, 17.2.2.5, does not use defined terms. In leading this evidence, however, the Rogers may well have been seeking, in the first instance, to avoid the application of Policy 17.2.2.5.

[29] Observing that the Plan definition of 'commercial activities' is not applied in Policy 17.2.2.5, we find Omega is a company carrying on the business of renting vehicles to the general public, as such it is engaged in commercial activity. Counsel for the Rogers accepted, rightly in our view, that the proposal could be regarded as a 'commercial activity' if the ordinary dictionary meaning of 'commercial' was applied.³³

[30] We were not assisted by evidence that essentially carved up Omega's business into its constituent parts in order to support the proposition that one part is not 'commercial activity'. The storage of rental vehicles when not in service is integral to Omega's business model³⁴ and we find the sum of its parts to be commercial activity.

[31] Finally, we note that, while not engaged by Policy 17.2.2.5, Mr Whyte nevertheless considered the Plan's definition of 'industrial activity', 'commercial activity' and 'commercial services'. Mr Whyte concluded the storage of rental vehicles at the Rogers' property could come within the Plan definition of 'commercial services', in which



³¹ Whyte, reply at [26].

³² Whyte, EiC at [29] and [52].

³³ Steven, opening at [88].

³⁴ Transcript (Besso) at 72.

case it would also be a 'commercial activity'.³⁵ On this occasion, the definition used in the District Plan and the ordinary dictionary meaning align.

Regional Policy Statement

[32] Mr Whyte applied directly the provisions of the RPS to the proposal. In the ordinary course this is unnecessary where planning witnesses are satisfied that the lower order District Plan has given effect to the RPS pursuant to s 75(3) of the Act.

[33] He says the RPS provides for the use of rural land for businesses that support rural activities.³⁶

[34] We understand the thrust of his evidence to be that the District Plan has not implemented the RPS policy on business activities in rural areas.³⁷ Drawing on the RPS definition of 'rural activities' as meaning, amongst other matters, "activities of a size, function, intensity or character typical of those in rural areas and includes ... businesses that support rural land use activities." Observing that the RPS gives no guidance as to the form that 'support' for rural land uses must take, it was Mr Whyte's opinion that the rent payments made by Omega qualified its business as one supporting 'rural land use activities' under the RPS. The support rendered by Omega was the payment of rent to the Rogers which is used by them to support the continuation of walnut production on their property.³⁸ On that basis he regarded vehicle storage as a rural activity, as defined in the RPS.³⁹

[35] Mr Whyte criticised the District Plan for making provision only for commercial and industrial activities in rural areas, whereas the policy in the RPS broadly applies to all businesses.⁴⁰

³⁵ Chapter 2, 'commercial services' means a business providing personal, property, financial, household, private or business services to the general public. The definition sets out a non-exhaustive list of businesses which are 'commercial services'. From the Cambridge Online Dictionary 'business' means "the activity of buying and selling goods and services". From the Merriam-Webster Dictionary 'business' is usually commercial or mercantile activity engaged in as a means of livelihood or transactions especially of an economic nature.

³⁶ Whyte, EIC at [109].

³⁷ Whyte, EIC at [42]-[45]; [102]-[109] discussed RPS objectives and policies, including Objective 5.2.1 which, amongst other matters, enables rural activities that support the rural environment.

³⁸ Whyte, EIC at [46].

³⁹ Whyte, reply at [29].

⁴⁰ Whyte, EIC at [43].



[36] We do not accept the above analysis. First, the word 'supports' contemplates a nexus between the business on the one hand and the rural land use activity on the other. Rental income aside, we find there is no nexus (connection) between the activities being carried out by the Rogers and Omega at this property. Second, Objective 17.2.1.1 and Policy 17.2.2.1 give effect to the RPS policy in that a range of activities on rural land are provided for including, inter alia, those that have a direct relationship with or are dependent on rural productive activities. These activities are not limited to commercial and industrial activities. We will not attempt to essay the types of businesses that may qualify, but give the example of veterinary clinics which are permitted within this zone, as being one obvious example.⁴¹

[37] We accept Mr Wakefield's submission on the topic of the RPS definition and its treatment of 'rural activities' and agree that this is not a case where the definitions lead to any deficiency in the District Plan such that recourse to Part 2 or other, higher order documents is necessary.⁴² As we are not satisfied on the evidence before us that the District Plan has failed to give effect to the RPS policy for businesses that support rural land use activities, we give no weight to any contrary opinion.

Christchurch District Plan

[38] The Rogers' property is located in the Plan's RUFZ and is subject to the Plan's Rural Chapter policy provisions. As we have remarked in a previous, unrelated decision, the rural objective and policies are not linked expressly to any of the Plan's seven rural zones except infrequently where a geographic area is named with the strong inference that the policy applies to the correspondingly named zone.⁴³ The court has previously commented on the challenge that this creates for the interpretation and application of the Plan's rural policy framework to proposed developments, but those matters are not within jurisdiction here and until changed the framework must be implemented.⁴⁴ This case is no exception.



⁴¹ Transcript (Whyte) at 127.

⁴² Wakefield, opening submissions at [6.7].

⁴³ For example, the Rural Banks Peninsula Zone and Policy 17.2.2.4(a)(i) or Rural Port Hills Zone and Policy 17.2.2.4(a)(iv). A notable exception is Policy 17.2.2.8 for the Rural Banks Peninsula Zone.

⁴⁴ *Yaldhurst Quarries Joint Action Group v Christchurch City Council & Anor* [2017] NZEnvC 165.

Absence of Zone Statements and pop up descriptions

[39] A compounding factor is that the Plan lacks zone statements that explain the purpose and outcome sought for individual zones.⁴⁵ Ms Baker, the planning witness for the City Council, referred to a description of the zone in her evidence quoting the planning maps as the source of this information.⁴⁶ And indeed an explanation of sorts is provided by the “pop up” descriptions for each zone accessible in the electronic version of the planning maps. For example, when one clicks on the RUFZ option in the key to any planning map the following text is displayed:

The Rural Urban Fringe Zone covers the flat land adjacent to metropolitan Christchurch. The zone provides for rural productive activities and the use of existing sites between 1 ha and 4 ha for rural dwellings while avoiding the creation of new sites of less than 4 hectares for rural dwellings.

[40] This description is instantly recognisable as incomplete by persons with knowledge of the Plan. Questions arose during the hearing about the descriptions statutory status and the court subsequently directed that affidavit evidence be filed by Council on, inter alia, the provenance of the “pop up” zone descriptions and how their inclusion in the Plan was authorised.⁴⁷

[41] On 17 May 2019 Ms Radburnd, a City Council planner, filed affidavit evidence on this and another matter directed by the court. Ms Radburnd deposed that the Plan’s zones are described in two places:⁴⁸

- (a) through zone descriptions included in the District Plan; and
- (b) by way of “pop up” text on the Council’s electronic planning maps.

[42] The advice at (a) above is partially complete in that zone descriptions are found in abbreviated form in the introduction sections of some zone chapters and in the objectives and policies of others but on the court’s reading the approach across all zones appears to be incomplete and inconsistent. In some instances, for example the industrial

⁴⁵ The pop up zone description is to be found by selecting a planning map and then in turn clicking on “View a Planning Map or Search for a Property”, clicking on the “All layers” option from the five-item menu displayed and finally, clicking on any one of the zones recorded in the map’s key.

⁴⁶ Baker, EIC at 5.8.

⁴⁷ Court Minute 8 May 2019.

⁴⁸ Radburnd, affidavit 17 May 2019 [5.2].



zones, the planning map “pop up” description closely matches those in the Plan’s industrial policies, but this is not the case for all zones, including the RUFZ. To the extent that the Plan contains any descriptions of the rural zones these are the “pop up” descriptions in the planning maps.

[43] Most relevantly, we note Ms Radburnd’s evidence that “the pop up descriptions [on the planning maps] do not form part of the District Plan”.⁴⁹ It is her understanding that:

... the “pop up” descriptions were drafted by Council planners and added to the property search function to assist lay users of the District Plan. I have not been able to ascertain the Council-level authority for adding these descriptions to the property search function. It has not been possible to determine the precise date on which the “pop up” descriptions were added to the online planning maps, but I understand it was early on in the development of the property search function.⁵⁰

[44] Ms Radburnd appears to link the “pop up” description principally, or solely even, to the planning map’s property search function.⁵¹ We see nothing that limits the facility to property searches or use by lay persons. Indeed, given that Ms Baker cited the zone description in evidence before us, it is reasonable to conclude that she has attributed a different purpose.

[45] The potential of the zone description is that it may be used to interpret objectives and policies if regarded as a method to implement the same. Were this to occur, particularly in relation to zone descriptions that are inaccurate or incomplete, this may have consequences for the administration of the Plan that were unintended by the Independent Hearings Panel who heard and made decisions on submissions to the District Plan following its notification. In our view this situation is not remedied or assisted by the property search disclaimer pointed to by Ms Radburnd.⁵² The disclaimer pertains to the content of the planning map, whereas the “pop up” description purports to be statements about the different zones in the District Plan.

[46] Insofar as it has been amended by persons unknown without following the process mandated in the Resource Management Act, we are concerned that the City



⁴⁹ Radburnd, affidavit at [5.6].

⁵⁰ Radburnd, affidavit at [5.7].

⁵¹ Radburnd, affidavit at [5.3]-[5.4].

⁵² Radburnd, affidavit at [5.8].

Council does not have control over the integrity of the electronic version of the District Plan.

[47] The court recognises that these matters are not within scope on the current proceedings. Their relevance is simply that, not being part of the Plan, the “pop up” zone descriptions cannot be relied on by witnesses or the court to interpret Plan provisions. Ms Steven supported this position.⁵³ We leave the subject there except to recommend that Council give the matter further consideration and action (as appropriate) if it is not already doing so.

Strategic directions⁵⁴

[48] Chapter 3: Strategic Directions provides overarching direction for the other plan chapters and has primacy over the objectives and policies in them. Chapter 3 is said to provide a series of high-level objectives for the district leaving the articulation of activity-specific and location-specific objectives and policies to subsequent chapters.

[49] As the Environment Court has said previously, the wording of the strategic directions is very general and their discrete application on a case-by-case basis was not intended. Rather, the strategic directions are given effect to by the objectives and policies in the balance of the District Plan and are to be interpreted and applied accordingly; per *Pickering v Christchurch City Council*;⁵⁵ *Yaldhurst Quarries Joint Action Group v Christchurch City Council*⁵⁶ and *Fright v Christchurch City Council*.⁵⁷ It is disappointing to see a fourth case where the Plan’s strategic directions have been applied directly to an application for resource consent by planning witnesses.

[50] We note the following strategic objectives (to the extent they are relevant to any matter in issue) and will come back to them in our analysis.

3.3.7 Objective – Urban growth, form and design

- a. A well-integrated pattern of development and infrastructure, a consolidated urban form, and a high quality urban environment that:

⁵³ Steven, reply [79] ff.

⁵⁴ Underlining in any objective or policies indicates the use of hyperlinks in the electronic version of the District Plan.

⁵⁵ [2016] NZEnvC 237 at [102].

⁵⁶ [2017] NZEnvC 165.

⁵⁷ [2018] NZEnvC 111.



- i. Is attractive to residents, business and visitors; and
- ii. Has its areas of special character and amenity value identified and their specifically recognised values appropriately managed; and
- iii. Provides for urban activities only:
 - A. within the existing urban areas; and
 - B. on greenfield land on the periphery of Christchurch's urban area identified in accordance with the Greenfield Priority Areas in the Canterbury Regional Policy Statement Chapter 6, Map A; and

...

3.3.10 Objective – Commercial and industrial activities

- a. The recovery and stimulation of commercial and industrial activities in a way that expedites recovery and long-term economic and employment growth through:
 - i. Enabling rebuilding of existing business areas, revitalising of centres, and provision in greenfield⁵⁸ areas; and
 - ii. Ensuring sufficient and suitable land development capacity.

3.3.16 Objective – A productive and diverse rural environment

- a. A range of opportunities is enabled in the rural environment, primarily for rural productive activities, and also for other activities which use the rural resource efficiently and contribute positively to the economy.

...

Chapter 17: Rural Chapter objective and policies

[51] The single objective for the seven rural zones follows:⁵⁹

17.2.1.1 Objective – The rural environment

- a. Subdivision, use and development of rural land that:
 - i. supports, maintains and, where appropriate, enhances the function, character and amenity values of the rural environment and, in particular, the potential contribution of rural productive activities to the economy and wellbeing of the Christchurch District;
 - ii. avoids significant, and remedies or mitigates other reverse sensitivity effects on rural productive activities and natural hazard mitigation works;

⁵⁸ "Greenfield" means undeveloped urban land that is located in a Greenfield Priority Area for future residential or business development on Map A in Chapter 6 of the Canterbury Regional Policy Statement.

⁵⁹ Underlining indicates use of a hyperlink to a defined term in the District Plan.



- iii. maintains a contrast to the urban environment; and
- iv. ...

[52] In the absence of a statement or policy addressing the zone directly, the outcomes for the RUFZ are unclear. This has not assisted our assessment of the proposal's congruence with the objective. Ms Baker inferred the function of the zone was to buffer residential areas to the east and the Airport/Industrial Zones to the west.⁶⁰ While the zone's location would suggest the area has this function, this is not expressly stated in the Plan. It appears to us that the character of the rural environment is undergoing change. Ms Steven submitted the proposal will maintain the "existing contrast (to the extent it exists) with the nearby urban environment."⁶¹ This submission is supported, in part, by the planning evidence for the City Council where Ms Baker acknowledges that the area has struggled to maintain a rural character and comments any increment in urban activities would further 'degrade' the zone. If they are correct, it strongly suggests that the District Plan's outcomes for the rural environment, are not coherent.

[53] Consequently, we have looked to the strategic directions for guidance on the implementation and administration of this objective and related policies, and we come back to this later in the decision.

[54] That said, there was no suggestion in the evidence of the proposal exerting reverse sensitivity effects. The evidence is that the proposal would have no more than a minor effect on rural character and amenity. Given its location towards the rear of the property and given also the screening of the vehicles from view by well-established landscaping, we accept this assessment.

[55] The policies most directly relevant to the current appeal are Policy 17.2.2.1 which provides for the economic development potential of rural land by enabling a range of activities and Policy 17.2.2.5 that, inter alia, avoids the establishment of commercial activities not dependent on or related to "the rural resource" unless they demonstrate specified characteristics.

[56] For completeness we have had regard to Policies 17.2.2.2, 17.2.2.3 and 17.2.2.4 but these are not central to the determination of the appeal, being largely concerned with



⁶⁰ Baker, EiC at [6.8].

⁶¹ Steven opening [70] ff.

the effects of the proposal – which, we find, are likely to be minor.

[57] The text of Policy 17.2.2.1 follows:

17.2.2.1 Policy – Range of activities on rural land

- a. Provide for the economic development potential of rural land by enabling a range of activities that:
 - i. have a direct relationship with, or are dependent on, the rural resource, rural productive activity or sea-based aquaculture;
 - ii. have a functional, technical or operational necessity for a rural location; or
 - iii. ...; and
 - iv. represent an efficient use of natural resources.

[58] The economic development potential of rural land is to be provided for by enabling a range of activities having a direct relationship to either the rural resource or a rural productive activity. Policy 17.2.2.1 implements strategic objective 3.3.16 by describing the types of activities to be enabled in the rural environment, in particular sub-clause (a)(i) delimits the scope of “primarily” and “other activities” in Objective 3.3.16.

[59] Addressing Policy 17.2.2.1a(i), nothing in the evidence causes us to find that the storage of vehicles has either a direct relationship with, or is dependent on, the rural resource. Indeed, any dependency on the rural resource was expressly disavowed by Ms Steven in her closing submission.⁶² While it is contended that vehicle storage has a direct relationship with the walnut orchard, as rent paid by Omega supports orcharding at the property,⁶³ we consider “relationship” requires the activities to be connected in some manner.⁶⁴ A relationship exists between the Rogers and Omega as landlord and tenant. That aside there is no relationship between the two activities.

[60] Consent may, however, be granted if the proposed activity has a functional, technical or operational necessity for rural land (Policy 17.2.2.1a(ii)). An enabling provision, Policy 17.2.2.1a(ii) is not restricted to commercial or industrial activities and establishes a different test or standard than Policy 17.2.2.5a(i), which we will shortly come to.

⁶² Steven, closing at [48].

⁶³ Transcript (Steven) at pp 15, 19, 30, 56, 60-61.

⁶⁴ Cambridge Dictionary defines ‘relationship’ as meaning ‘the way in which two things are connected’.



[61] As the terms used in the policy are undefined, we have had recourse to the Cambridge Dictionary as a guide to meaning. If 'operational' necessity relates to the activities employed in doing or producing some *thing*, then 'functional' necessity concerns the performance of a particular operation, that is the way in which something (a person or object) works or operates.⁶⁵ On the evidence before us, we are concerned to establish whether Omega has an operational, rather than functional, necessity for a rural location. No witness asserted Omega had any technical necessity *per se*. Secondly, and importantly, sub-clause (ai) imports a test of 'necessity' – this is a high standard; its synonyms include prerequisite and essential. The test goes beyond what might be desirable or convenient from the perspective of Omega.

[62] The location of vehicle storage at the Rogers' property is some 4-minute drive from Omega's Airport depot. This location enables Omega to meet its operational requirements for safe and direct access to vehicles in storage, in a commercially advantageous way. This is an industry which Mr Besso, Omega's Area Manager, described as "highly competitive" and where "cutting costs ... [is] important for us to be viable and competitive against the others".⁶⁶ If the Rogers' property was unable to be used for vehicle storage, Mr Besso confirmed Omega would relocate this activity to a new site.⁶⁷ In saying this, the Rogers have not demonstrated that Omega has an operational necessity for a rural location. Subject to rent, Omega would (and does) meet its need for land to store vehicles by renting land not zoned rural and not located in a rural environment.

[63] As for Policy 17.2.2.1a(iv), the co-location of vehicle storage within the walnut orchard, we accept may be an efficient use of the natural resource. However, efficiency needs to be considered in the broader context of land with zoning that is enabling of this activity.⁶⁸ While Mr Besso was unable to assist the court on the availability of suitably zoned land at the airport,⁶⁹ Mr Whyte accepted that it would not be an efficient use for suitably zoned land to be sitting vacant while cheaper rural land was utilised for the same purpose.⁷⁰ Indeed, in answer to the court's questions, Mr Whyte conceded that it would be economically rational for other rental companies to adopt a similar strategy as Omega

⁶⁵ Cambridge Dictionary definition of 'functional' and 'operational'.

⁶⁶ Transcript (Besso) at 72.

⁶⁷ Transcript (Besso) at 71.

⁶⁸ Baker, EIC at [6.44].

⁶⁹ Transcript (Besso) at 78-79.

⁷⁰ Transcript (Whyte) at 138.



and seek to store vehicles on cheaper RUFZ land than pay higher rentals in the more suitably zoned industrial land. Furthermore, we accept Ms Baker's opinion that parking cars on versatile soils is not an efficient use of natural resources, albeit that the co-location of vehicle storage and rural productive activities may be an efficient use of the site by the Rogers (as opposed to the community at large).⁷¹

[64] We come back to efficiency of use, when addressing counsel's submissions on s 7(b). We record our finding overall, that the vehicle storage finds weak support, at most, from this policy.

17.2.2.5 Policy – Establishment of industrial and commercial activities

- a. Avoid the establishment of industrial and commercial activities that are not dependent on or directly related to the rural resource unless they:
- i. have a strategic or operational need to locate on rural land; or
 - ii. provide significant benefits through utilisation of existing physical infrastructure; and
 - iii. avoid significant, and remedy or mitigate other, reverse sensitivity effects on rural productive activities;
 - iv. will not result in a proliferation of associated activities that are not reliant on the rural resource; and
 - v. will not have significant adverse effects on rural character and amenity values of the local environment or will not cause adverse effects that cannot be avoided, remedied or mitigated.

[65] This policy is at the heart of the appeal and is couched largely in the negative. 'Avoid', as RMA practitioners now well understand, usually means "not allowing or preventing the occurrence of", and we see no reason to adopt a different interpretation here.

[66] By way of overview, whereas Policy 17.2.2.1 is enabling of all activities, Policy 17.2.2.5 is solely concerned with commercial and industrial activities. Policy 17.2.2.5 overlaps with and constrains the foregoing policy in that commercial and industrial activities that cannot bring themselves under sub-clause (i) of Policy 17.2.2.1,⁷² must demonstrate a 'strategic or operational need to locate on rural land' and, in addition, achieve the policy's other requirements set out in sub-clauses (iii) to (v).⁷³ If it cannot,

⁷¹ Transcript (Baker) at 199.

⁷² It was common ground that Policy 17.2.2.5a(ii) is irrelevant in this case.

⁷³ We noted the alternative construction of Policy 17.2.2.5 in Ms Steven's reply at [42]-[46], responding to questions from the court. Without the additional requirement contained in sub-clause (iv) there would be arguably little to distinguish the exceptions in (i) and (ii) from the activities in 17.2.2.1.



then it must be avoided. The direction to “avoid...unless” we give significant weight.

[67] The words ‘industrial or commercial activities’ are not hyperlinked to their Plan definitions and we find no reason to veer from common usage for the purpose of this decision.

[68] In Mr Whyte’s opinion the proposed land use is not contrary to this policy as it is not a commercial activity.⁷⁴ In asserting this, Mr Whyte may have had in mind his opinion that under the RPS this is a ‘rural activity’, an opinion which we have not accepted. If vehicle storage is a commercial activity, then he asserts Omega has a strategic and operational need to locate in close proximity to the Airport, “which coincides with a location on rural land”.⁷⁵

[69] The meaning of ‘operational’ we have considered above. We have had recourse to the Cambridge Dictionary to define ‘strategic’. In a business setting ‘strategic’ relates to the way in which an organisation decides what it wants to achieve and plans actions and use of resources over time to do this.⁷⁶ Ms Steven gave an equally suitable definition of “relating to the identification of long-term or overall aims and interests and the means of achieving them”.⁷⁷

[70] Critically, the focus of Policy 17.2.2.5 is now on the ‘need’ – not the ‘necessity’ to locate on rural land. Overlapping with, but arguably a lesser test than ‘necessity’, ‘need’ is for a location on rural land.

[71] While Mr Besso’s evidence was not couched in terms of the company’s strategic needs, we would consider its decision to locate depots around the country in proximity to major transport hubs (in this case Christchurch Airport) and in proximity to its client base (again the Christchurch Airport and the Central Business District) in this way. It is Omega’s proximity to its airport and client bases and not the location of overflow vehicle storage in its off-peak season that are strategic to Omega’s long term aims or interests.⁷⁸ Bearing in mind that the policy creates an exception for commercial activities that do not depend on or are not directly related to the rural resource, we heard no evidence that



⁷⁴ Whyte, EIC at [100].

⁷⁵ Whyte, EIC at [100].

⁷⁶ Cambridge Dictionary.

⁷⁷ Steven, opening at [91].

⁷⁸ Transcript (Besso) at 76.

there was a strategic need for rural land *per se*.

[72] For the reasons given above, the evidence led on behalf of Omega does not satisfy us that the company has an operational need to locate on rural land. Omega's operational requirement for land does not pertain to the land's rural qualities or zoning, but to the land's proximity to the Airport and its ability to attain a lease for land on terms and conditions that are suitable to itself.

[73] While the objective which the policies implement is problematic, we do not accept the submission made on behalf of the Rogers that Policy 17.2.2.5⁷⁹ cannot be reconciled with strategic objective 3.3.7 unless, it is submitted, industrial and commercial activities are defined as 'rural activities' where they occur in a rural area. Such an approach would be to disregard the substance and effect of commercial and industrial activities.⁸⁰ The better approach is to read the strategic directions alongside each other. While the direction in Objective 3.3.7 is to provide for urban activities⁸¹ only within urban areas, Objective 3.3.16(a) allows for a range of 'other activities' in rural areas so long as they use the rural resource efficiently and contribute positively to the economy.⁸² When implementing the strategic objectives, the Independent Hearings Panel provided for a range of activities to occur on rural land (17.2.2.1) including commercial and industrial activities (17.2.2.5). As we are satisfied the policies are implementing the strategic objectives we have given the meanings in Policy 17.2.2.5, "avoid ...unless", significant weight.

[74] It was further submitted that Policy 17.2.2.5 is 'inexactly expressed' because 'strategic' and 'operational' are undefined.⁸³ Therefore, we were urged to apply the Policy 17.2.2.5 as if it were enabling of commercial and industrial activities.⁸⁴ We do not agree with counsel that the policy lacks for expression or that its meaning is incapable of interpretation. That said, the submission does not assist the Rogers insofar as the proposed vehicle storage activity cannot bring itself under the policy enabling a range of activities, in particular Policy 17.2.2.1a(i) and (ii).

⁷⁹ Also Objective 17.2.1.1 and Policies 17.2.2.1 and 17.2.2.6.

⁸⁰ Steven, opening at [101]-[111].

⁸¹ In this Plan, urban activities includes commercial and industrial activities.

⁸² Strategic Objective 3.16 provides for a productive and diverse rural environment through a range of opportunities is enabled in the rural environment, primarily for rural productive activities, and also for other activities which use the rural resource efficiently and contribute positively to the economy.

⁸³ Steven, reply [24].

⁸⁴ Steven, reply [25]-[34].



[75] Finally, it was submitted Policy 17.2.2.5 should be interpreted in a way that accords weight to the strategic needs of the Rogers (as opposed to Omega).⁸⁵ The benefits to the Rogers are a matter we are able to consider under s 104(1)(a). However, to find the policy is interpreted with reference to the strategic needs of the appellants, requires it to be effectively re-written. Even if the policy was to be applied in relation to the Rogers' strategic needs, those needs must still pertain to the need to locate on rural land. Instead, the Rogers' 'need' does not pertain to their location on rural land but for an alternative income stream to subsidise the costs of orcharding. We accept the City Council's submissions on this topic.⁸⁶

Other matters

[76] Several other issues developed in submissions and evidence, all of which we have had regard to but found to be of no consequence to the outcome and so we do not address them in this decision. Of those other matters, we make one brief comment. We heard submissions and received evidence on the provenance of Policy 17.2.2.5. While the vires of the policy was challenged we decline to be drawn on this matter. As Ms Steven correctly observes, the District Plan is operative, and the court lacks the appellate jurisdiction to amend or delete the provision.⁸⁷

Benefits

[77] Pursuant to s 104(1)(a) we accept that the proposal will have benefits. We regard these benefits as positive effects as they are generally enabling of people and communities to provide for their social and economic wellbeing. The benefits are:

- (a) rent income from land which may be used to defray the cost to the Rogers associated with the walnut orchard (although the retention of the orchard is not secured under the conditions of consent);
- (b) produce from this small farm has the potential to contribute to the economy and wellbeing of the Christchurch district; and



⁸⁵ Steven, opening at [96]-[98] and reply [35]-[41].

⁸⁶ Wakefield, reply at [4.1]-[4.4].

⁸⁷ Steven, reply at [21].

- (c) Omega benefits from the lease of land located in relatively close proximity to the Airport at a rental price per square metre that is less than the current price at the Airport.

[78] We are not unsympathetic to the circumstances that the Rogers find themselves in. At the time they purchased the farm, they had under-estimated the costs associated with a working orchard. The attraction of rodents and possums to walnuts means that unless the nuts are harvested, the trees may need to be removed lest they attract pests. Income aside, the Rogers also derive amenity from the walnut grove that greatly enhances their pleasure of living at this property.

[79] The evidence of Mrs Rogers was that the income from the walnut orchard was not sufficient to pay for its ongoing costs and that income from the car storage would enable the walnut orchard to remain.⁸⁸ Indeed, we were told that retention of the orchard would “be in jeopardy” without alternative income.⁸⁹ While we heard a great deal about the need for this income stream, the budget produced by Mrs Rogers detailed expenses for the current year (and beyond) of some \$15,600, of which approximately \$10,000 (being rates, insurance; accountancy fees and depreciation costs) could be regarded as fixed costs and would be payable whether or not the walnut trees were removed.⁹⁰ Whilst acknowledging the benefit of the supplementary income to the operation of the orchard, we do not necessarily accept that the Rogers are faced with the binary choice of either a walnut orchard with car storage or no walnut orchard at all. That said, the retention of the orchard is a matter solely for them to decide.

[80] On balance we give these benefits weight, although we find the benefits do not outweigh the Plan’s very directive policies or strategic objectives which the policies ultimately implement.

Section 7(b) of the Act

[81] Finally, Ms Steven argued that it may be appropriate in this case to consider Part 2, and particularly s 7(b), in the context of s 104 where there is a lack of clarity around the interpretation of Policy 17.2.2.5 or as to the rationale for the exception for commercial

⁸⁸ Mrs A Rogers, EiC at [35].

⁸⁹ Steven, opening at [57].

⁹⁰ Transcript (Rogers) at 104-105.



and industrial activities in rural areas based on a strategic or operational need to locate there.⁹¹ Counsel goes on to note a number of Environment Court decisions⁹² in support of a proposition that a consent authority may have resort to s 7(b) of the Act to “illuminate whether or not the purpose of the Act is being achieved by demonstrating the costs (and benefits) of implementing policies”.⁹³ In saying that, she also acknowledged Part 2 cannot be invoked to justify an outcome contrary to the thrust of coherent policies prepared with regard to the statutory purpose.⁹⁴ We also remind ourselves that while particular regard is to be given to s 7 matters in achieving the purpose of the Act none are determinative in their own right.

[82] Counsel appeared to advocate that the court undertake its own assessment of comparative costs and benefits in the context of s 7(b). Citing the New Zealand Treasury’s Guide to Social Cost Benefit Analysis, we were told the cost benefit assessment need not be a rigorous exercise. Even so, we are troubled by the application of the Guide in this case.

[83] Counsel limited her s 7(b) assessment to the “benefits” (but not costs) to the ‘Rogers and Omega [we interpolate] for the use of rural land for vehicle storage as compared with the “costs and benefits” of vehicle storage occurring within an appropriately zoned site’.⁹⁵ Approached in this way, counsel appeared to be testing the rural zoning of the Rogers’ property,⁹⁶ whether this is the right forum to do so is a moot point. Not unsurprisingly we learn from the evidence there is a demand by commercial activities for cheaper land to rent; land in the rural area is cheaper to rent than compared with land appropriately zoned for vehicle storage and finally rural landowners may supply (lease) land to commercial activities in return for higher rent. In the Rogers’ case this is subject also to their requirement that the proposed commercial activity have only minor effects on the environment.

[84] If we have misapprehended counsel’s purpose, it is because we received no evidence on the application of the New Zealand Treasury’s Guide to Social Cost Benefit Analysis or any economic analysis given by an appropriately qualified expert. The market

⁹¹ Steven, opening at [41] ff and reply at [67].

⁹² These decisions are not binding on another division of the Environment Court.

⁹³ Steven, reply at [67]-[78], and in particular [69].

⁹⁴ Steven, opening at [42].

⁹⁵ Steven, reply at [75].

⁹⁶ The Treasury Guidelines compare costs and benefits of factual and counterfactual projects, as well as costs and benefits of factual and counterfactual policies.



economy aside, we were unsure why counsel says the circumstances of a single enterprise may be used to test competing policies or inform an assessment of a proposal under s 7(b) directly. On this matter the observations in *Imrie Family Trust v Whangarei District Council* are salient. The Act:

does not allow decisions to secure the commercial viability of [particular enterprises]; and that although we need to consider the economic effects of the proposal on the environment, it is only to the extent that they affect the community at large, not the effects on the expectations of individual investors.⁹⁷

[85] If efficiency pertains to the production of the desired result with little or no wastage,⁹⁸ then for current purposes the Plan's provisions, inclusive of all relevant objectives and policies, afford a resource allocation framework against which effects on the environment and community are to be assessed.

[86] There is no evidence before us that the Independent Hearings Panel did not consider the efficiency and effectiveness; the costs and benefits of the relevant provisions as required under ss 32 A and 32AA of the Act. Indeed, we infer from the strategic objectives the competing outcomes (or in Treasury language the policies and countervailing policies) for the urban and rural areas was in the forefront of the decision-makers' minds. The strong direction that urban activities take place within the existing urban areas and on greenfield land (strategic Objective 3.3.7) is tempered by an objective to enable a range of opportunities in the rural environment, where those activities use the rural resource efficiently and contribute positively to the economy (strategic Objective 3.3.16). The objective and policies in the Rural Chapter implement these directions by enabling, in very limited circumstances, other activities in rural areas (17.2.2.1) with the qualification that enabled activities "represent an efficient use of natural resources" while avoiding commercial and industrial activities unless a proposed activity can bring itself under the strictures of Policy 17.2.2.5. Given this we do not consider recourse to Part 2 generally, or s 7(b) specifically, is warranted.

Precedent

[87] The Environment Court is to decide the appeal having regard to, amongst other matters, the District Plan. Policies 17.2.2.1 and 17.2.2.5 tightly constrain the

⁹⁷ *Imrie Family Trust v Whangarei District Council* A057/94; 1B ELRNZ 274 at 285.

⁹⁸ See Merriam-Webster and Cambridge Dictionary definition of "efficiency".



circumstances in which commercial activity may establish within the rural environment. The direction that commercial activities are to be avoided – that is not allowed to occur, unless they achieve the requirements of the policy – is to be given significant weight.

[88] While the outcome generally and function specifically of the Rural Fringe Urban Zone is difficult to discern under Objective 17.2.1.1, nevertheless we consider our interpretation of the policies accords with the relevant strategic objectives.

[89] Were we to approve the consent, that could only be because we have not applied the District Plan's policies according to their tenor. This is the precedent that the grant would create and upon which others could seek to rely. The risk of others seeking to rely on an interpretation of policies enabling of commercial activities establishing on leased rural land is not obviated by reference to the attributes of the proposed activity, for example, its co-location with rural productive activity and the rent enjoyed by the owners of the property.⁹⁹

Conclusion

[90] Regrettably for the Rogers, we are unable to approve the consent. The Environment Court applies – does not write – the policy of the District Plan and this case is a relatively rare instance of a proposal having negligible adverse environmental effect, but being directly challenged by directive policies weighing in against consent being granted.

Outcome

[91] For the foregoing reasons, the appeal is declined.

[92] Costs are reserved, but not encouraged. Any application for costs is to be filed by **5 August 2019** with replies by **12 August 2019**.

For the court:



J E Borthwick
Environment Judge



⁹⁹ Steven, opening at [139].