

**BEFORE THE ENVIRONMENT COURT  
AT CHRISTCHURCH**

**I MUA I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI**

**Decision No. [2021] NZEnvC 7**

IN THE MATTER of the Resource Management Act 1991  
AND of an appeal under s 120 of the Act  
BETWEEN JJ LIMITED  
(ENV-2019-CHC-112)  
Appellant  
AND DUNEDIN CITY COUNCIL  
Respondent

Court: Environment Judge J E Borthwick  
Environment Commissioner D J Bunting

Hearing: at Dunedin on 24 November 2020

Appearances: P J Page and S R Peirce for the appellant  
S M Chadwick for the respondent

Date of Decision: 10 February 2021

Date of Issue: 10 February 2021

---

**DECISION OF THE ENVIRONMENT COURT**

---

A: The appeal is declined.

B: Costs are reserved. Any application for costs is to be filed by **Tuesday 23 February 2021** with replies by **Tuesday 9 March 2021**. In the event no application for costs is made, the court's order will be, without further decision of the court issuing, that there is no order as to costs.



## REASONS

### Introduction

[1] JJ Ltd is a multi-faceted, rural focused business currently operating from three sites in Mosgiel. In November 2018 JJ Ltd lodged an application with the Dunedin City Council for subdivision and land use consents to enable the company to relocate its business to a rural site at 257 Gordon Road on the outskirts of Mosgiel.

[2] The subdivision consent (if granted), would create two lots, one with an area of 4-ha and the other for the balance area of 36-ha. JJ Ltd would relocate its existing operations to the 4-ha lot and seeks land use consent for these activities.

[3] The City Council declined to grant resource consent, a decision which JJ Ltd appealed to the Environment Court.

### Overview of the proposal

[4] JJ Ltd's business has outgrown the three sites from which it currently operates, and the company now desires to collocate its various activities on one site. It estimates some 20,000 m<sup>2</sup> of land is required, allowing for the future expansion of its business. Together with its commercial and industrial activities, land is required for outdoor display of tractors and farm machinery; test-driving tractors by prospective purchasers and performance checking and demonstration of farm machinery.<sup>1</sup> JJ Ltd says that it cannot meet its land requirements on vacant land available within the nearby Industrial Zone.<sup>2</sup> While there appears to be sufficient contiguous industrial zoned land to accommodate the proposed depot, industrial and commercial operations, there is not enough land to also accommodate the tractor test track and cropping land on which to demonstrate farm machinery (e.g. headers and the like).<sup>3</sup>

---

<sup>1</sup> Jones, EIC at [20].

<sup>2</sup> Jones, EIC at [26].

<sup>3</sup> We estimate around 63% of the 4-ha is to be set aside for the test track and display areas under the proposal.

[5] JJ Ltd currently employs 20 full-time staff across its various operations. Of the staff employed we understand only two are dedicated to its retail business.<sup>4</sup> On average the company sells 90 tractors per year.<sup>5</sup> While sales of tractors and farm machinery are high value, they involve few transactions when compared to the company's other business streams.<sup>6</sup>

[6] Presently, one of JJ Ltd sites is located adjacent to a primary school. We were told the avoidance of conflict between pedestrians and vehicles associated with the school is an important factor motivating the move away.<sup>7</sup>

[7] The Joint Statement of Facts and Issues (the Joint Statement)<sup>8</sup> provides a good overview of the proposal and a helpful description as set out below:

1. The application site is located at 257 Gordon Road, Mosgiel, Dunedin, contained within Record of Title OT267/214).
2. The proposal involves a joint subdivision and land-use consent (SUB02018-139 and LUC-2018-711).
3. The subdivision involves subdividing the 40ha subject site into two lots. Lot 1 will have an area of 4ha, while Lot 2 will have an area of 36ha.
4. The land-use consent involves relocating an existing business, known as JJs Limited, onto proposed Lot 1. JJs Ltd is a multi-faceted business which involves importation of farm machinery, assembly, testing, demonstration, service and retail sale of the farm machinery.
5. The business will employ 16-18 staff, and will operate 7am to 6pm, Monday to Friday, and 8am to 12pm on Saturdays. A 24 hour/7 day a week service and repair operation is also part of the business, which is predominantly carried out on farm.
6. The proposal will involve construction of a workshop building with a footprint of up to 2,300 square metres, with an office and retail showroom at the eastern end of the workshop.
7. The proposal involves outdoor display areas, signage, on-site parking for both staff and customers, devanning area for containers, loading areas, a gravel storage area and a wash bay. A large test track will also be located to the rear of the workshop building, with a grassed demonstration area in the centre of the test track. The centre of the test track will be used to demonstrate farm machinery, including mowers, rakes, balers and wrappers. Landscaping and mounding are also proposed.
8. There is an existing dwelling on Lot 1 which will be retained. Proposed Lot 2 has an

---

<sup>4</sup> Jones, EIC at [36].

<sup>5</sup> Transcript (Jones) at 28.

<sup>6</sup> Jones, EIC at [36].

<sup>7</sup> Jones, EIC at [37].

<sup>8</sup> Dated 22 October 2019.

existing resource consent for a dwelling.

9. There is no land use proposal for lot 2.
10. The applicant's business currently operates across three separate sites adjacent to Gladstone Road South and the East Taieri Primary School. The applicant's existing operations are on sites zoned Industrial and uses a temporary site zoned Rural and subject to Designation D419 in the 2GP. The existing site configuration requires the applicant to use the public road network for the delivery, testing, and demonstration of agricultural machinery. The applicant seeks a site in the Rural Zone on which all of its operations can be co-located in a way that does not require the use of public roads.

[8] The Joint Statement also provides an accurate description of the surrounding environment, as follows:

1. The subject site is a 40ha, flat rural property. This site is primarily in pasture and is used to produce winter feed for farmers in the area. The site has frontage to both Gordon Road and Dukes Road South. The southern boundary of the subject site adjoins the Silverstream flood bank directly north of Mosgiel.
2. There is an existing dwelling located on the north-eastern side of the property, with associated sheds and parking area located in close proximity. Hedgerows and amenity planting largely surround this dwelling. The dwelling has vehicle access from Gordon Road. A consented second dwelling site is located approximately 225m to the west of the existing dwelling and will be accessed from Dukes Road. The proposed dwelling on lot 2 forms part of the *Hawthorn* environment. A dairy shed is located to the western side of the property.
3. With the exception of shelter vegetation around the dwelling on the eastern boundary, the site has a largely open spatial character.
4. The surrounding environment on the north, east and west boundaries is zoned Rural, with a mixture of farm properties, and smaller rural lifestyle properties. To the north of the site, across Dukes Road South, is a veterinary clinic and associated dwelling. Beyond this to the north is a range of rural and rural residential properties, as well as a motel at 352 Gordon Road. Diagonally across the 'five roads' intersection to the north is the local A&P showgrounds.
5. To the east of the site across Gordon Road are several rural properties, with a substation located at 230 Gordon Road, opposite the southern end of the site. To the west of the site are several rural-residential properties, and a larger block of farm land. Further to the west is a golf course and a small cluster of rural-residential properties.
6. Overall, the character of the area is comprised of a mixture of rural and rural residential properties, with some non-rural activities in the wider area. Shelterbelts or hedgerows line several surrounding properties and paddocks.

[9] From the Joint Statement, we noted the description of various other features of the environment including the local road network and on-site hazards. The application

also records that the site contains high-class soils and that it is currently being used for the production of grass for winter feed (hay and silage). These soils have been identified in the District Plan as LUC Class 2 which is more abundant than LUC Class 1 soil, with LUC Class 2 soil being reasonably common on the Taieri Plain.

### **Activity status**

[10] The site has a rural zoning under the operative and proposed District Plans.<sup>9</sup> Multiple land uses are proposed for the site and overall the proposal is a non-complying activity under the operative and proposed District Plans.<sup>10</sup>

[11] Consent is sought for the use of land and buildings to undertake the repairs and maintenance of tractors and farm machinery. JJ Ltd submits this activity comes under the proposed District Plan's definition of "rural contractor and transport depot". The City Council disagrees and says this activity together with fabricating and assembly of imported farm machinery, is a non-complying industrial activity when carried out on-site. Only where JJ Ltd uses land and buildings as a depot to carry out these services elsewhere, is the activity classified by the plan as being discretionary.

[12] JJ Ltd would also sell tractors and farm machinery at the site. Both parties agree this is "yard-based retail" and as such it is a non-complying activity.

[13] The proposed subdivision is also a non-complying activity under both plans.<sup>11</sup>

[14] Of the many activities proposed for the site, only the off-road test driving of tractors and testing/demonstration of farm machinery are permitted under the District Plans.

[15] Excluding the use of the existing dwelling for residential purposes, all of the proposed activities are also permitted in the nearby Dukes Road North Mapped Area

---

<sup>9</sup> More particularly, the site is zoned 'rural' under the operative District Plan and 'Rural Taieri Plains' under the proposed District Plan.

<sup>10</sup> Joint Statement of Facts and Issues dated 22 October 2019 at [22]-[25]. Different terms may apply when describing the same activity under the proposed and operative District Plans. Save in relation to "rural contractor and transport depot", there was agreement that the proposed land use activities are non-complying under Rules 6.5.7(i) and 6.5.7(ii) of the Operative District Plan and Rules 16.3.3.42, 16.3.3.46 and 16.5.2 of the Proposed 2GP.

<sup>11</sup> See Rules 18.5.2 and 16.7.4.3 of the operative and proposed District Plans respectively.

Industrial Zone.<sup>12</sup>

### **The law**

[16] As the proposal is a non-complying activity overall, s 104D of the Act applies. This section provides that 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)<sup>13</sup> will be minor; or
- (b) the application is for an activity that will not be contrary to the objectives and policies of the relevant plan(s).

[17] The parties and their witnesses agree the effects of the activity will be minor and, the first threshold test having been met, the proposal may be considered under s 104 of the Act.<sup>14</sup> As we accept their assessment of the environmental effects, pursuant to s 104 we will consider the application for resource consent having particular regard to:

- (a) the operative and proposed Otago Regional Policy Statements;
- (b) the operative and proposed Dunedin City District Plans; and
- (c) any other matter relevant and reasonably necessary to determine the application.

### ***Permitted baseline***<sup>15</sup>

[18] The permitted baseline was not applied by the Hearing Commissioners in the first instance decision. The application of the baseline was not addressed in evidence, which we assume was because the scale and significance of effects are not in contention. As we agree with the assessment of effects, we have not had regard to the same.

### ***The City Council's decision***

[19] Also required under s 290A is that there is consideration given to the decision on appeal. We agree with the outcome of the decision and do not discuss it at any length.

---

<sup>12</sup> Spalding, EiC at [38].

<sup>13</sup> Persons who have given their approval are R C Ireland, C S Ireland, D and C Robertson and E Dowden.

<sup>14</sup> Spalding, EiC at [9]; Cubitt, EiC at [7].

<sup>15</sup> See s 104(2) RMA.

## Weighting of the two plans

[20] Counsel agree that the provisions of the operative and proposed District Plan are largely consistent, and for its part JJ Ltd says the outcome of the case does not turn on the weight of the provisions of the respective plans.<sup>16</sup> The City Council appropriately asks that the court be mindful of directive provisions in the proposed District Plan, particularly where those are not under appeal and can be deemed operative.<sup>17</sup>

## Key issues

[21] Having regard to submissions of counsel, the following issues arise for determination:

**Issue 1:** Do positive effects of the activity arise by consolidating the activity off public roads that support the proposed activity locating in the Rural Zone?

**Issue 2:**<sup>18</sup> Do road safety risks arising from JJ Ltd's current use of public roads support the proposed activity locating in the Rural Zone?

**Issue 3:** How far does the exemption in proposed District Plan Policy 16.2.1.8 extend?

**Issue 4:** Does "Rural Contractor and Transport Depot", correctly interpreted, include the use of land and buildings for on-site repairs and maintenance?

**Issue 5:** Whether the proposal (which has a non-complying activity status) is consistent with, or contrary to, the relevant Objectives and Policies with operative and proposed District Plan?

[22] JJ Ltd no longer relies on an argument that the application for resource consent is a "true exception" to argue that its grant will not set an undesirable precedent so we

---

<sup>16</sup> Appellant, legal submissions at [21]-[22].

<sup>17</sup> Respondent, legal submissions at [39]-[41].

<sup>18</sup> The issue identified by Mr Page in relation to the second issue was too narrow and we have reframed the issue. Mr Page's version read "**Issue 2:** Do road safety risks arising from the testing of machinery on public roads that support the proposed activity locating in the Rural Zone?"

have removed that issue from Mr Page's list.<sup>19</sup> While counsel for the City Council made comprehensive submissions on the true exception test, this no longer is a matter we need to decide. In its place interpretation issues emerged, which we have noted up as Issues 3 and 4.

### **Issues 1 and 2**

[23] It is convenient to deal with Issues 1 and 2 together:

**Issue 1:** Do positive effects of the activity arise by consolidating the activity off public roads that support the proposed activity locating in the Rural Zone?

**Issue 2:** Do road safety risks arising from JJ Ltd's current use of public roads support the proposed activity locating in the Rural Zone?

[24] Expert evidence on traffic related issues was provided by Mr G C Fisher for JJ Ltd and Mr L P Copland for the City Council.

[25] In addition to the facts set out in the Joint Statement, Mr Fisher provided the following overview of JJ's existing operations in the context of traffic issues and the surrounding road network, the key points of evidence are summarised next:<sup>20</sup>

- JJ Ltd's three sites are located on Gladstone Road, McGlashan Street (which runs off Gladstone Road) and Gow Street (which in turn runs off McGlashan Street);
- Gladstone Road is a 50 km/hr two-lane two-way sealed arterial road with broken yellow no parking lines, cycle lanes and footpaths on each side;
- as well as traffic generated by JJ Ltd, a range of other businesses in the area also generate industrial and commercial traffic;
- the East Taieri Primary School is located on the corner of Gladstone Road and Cemetery Road immediately west of JJ Ltd's McGlashan Street site;
- there is a consented but yet to be constructed aged care facility located at the south western end of Cemetery Road, with this development expected to generate a significant volume of traffic;

---

<sup>19</sup> Transcript (Page) at pp 5, 9 and elsewhere.

<sup>20</sup> Fisher, EIC at [11]-[39].

- the testing of new and in-service agricultural vehicles on the public road network can involve up to 50 tractor movements per week, up to 10 per day or at peak times up to 20 per day;
- drawing on information included in the New Zealand Transport Agency *Agricultural vehicles guide (2017)* (NZTA Guide), which provides guidance on the safe and legal use of agricultural vehicles on New Zealand roads, safety risks associated with agricultural vehicles being tested on the road network include these vehicles not being seen, moving at slower speeds than other road users, colliding with other vehicles while turning and for other vehicles to be impacted by fittings projecting out from the agricultural vehicles;
- for each of these risks, the NZTA Guide lists a series of measures for reducing the levels of the safety risks involved;
- the number of crashes across New Zealand involving agricultural vehicles is relatively constant (about 20 per year) with a proportion of these involving fatalities and serious injury;
- with JJ Ltd's operations starting at 7.00am, there is the potential for vehicles accessing and exiting JJ Ltd's sites to impact with other road users during the morning peak commute times including school drop offs;
- as there are insufficient on-site parking spaces on JJ Ltd's main site in McGlashan Street and staff and visitors are required to park on the roadside, there is the potential for road safety to be compromised by drivers seeking out parking spaces;
- JJ Ltd's proposed Dukes Road South site would allow for all testing to be undertaken off road, provide sufficient parking spaces on-site for all staff and visitors and provide a much safer vehicle accessway than at the current site(s).

[26] Overall, when compared with JJ Ltd's existing operations, Mr Fisher's evidence was that road safety would be enhanced if the operations were to be relocated to the proposed new site.

[27] While Mr Copland for the City Council agreed that reducing the use of public roads by agricultural vehicles would be likely to have positive road safety outcomes, his review of the network crash analysis for the local road network did not identify any trends nor existing road safety issues with agricultural vehicles using roads in the wider Mosgiel

area.<sup>21</sup> He added also that his review of the City Council records had failed to identify any complaints or concerns having been lodged with the City Council's transport department about JJ Ltd's existing site operations.<sup>22</sup>

[28] As an alternative to collocating all activities on the proposed rural site, the traffic and planning witnesses considered the use of vacant land in the Dukes Road North Industrial Zone for its commercial, industrial and depot activities while continuing to road test vehicles, noting that:

- this location is contiguous with land used for rural activities and these activities are already likely to generate movements of agricultural vehicles<sup>23</sup> on the road network in that area under normal farming operations;
- the Industrial Zone has an 80 km/h speed restriction compared with a 50 km/h restriction at Gladstone Road;
- the Industrial Zone is a straight, flat road with good sight visibility for overtaking;
- the difference in speed between agricultural vehicles and other vehicles using the two roads would not result in any marked difference in road safety between the two locations.

### ***Discussion and findings***

[29] Section 1 of the NZTA Guide lists the vehicles it covers, including agricultural tractors (including implements which are transported on tractors such as front-end loaders and mowers mounted on a three-point linkage), agricultural trailers and self-drive agricultural machines. This list would appear to be consistent with most, if not all, of the vehicles covered by JJ Ltd's business.

[30] As intimated under Issue 2, JJ Ltd currently use public roads for a range of activities including the post-assembly and post-maintenance testing of agricultural vehicles, the transport of over-weight and/or over-width agricultural vehicles for field-testing and for the road testing and demonstration of agricultural vehicles by prospective purchasers.<sup>24</sup> Off-road testing is also required for some farm machinery.

---

<sup>21</sup> Copland, EIC at [7]-[8].

<sup>22</sup> Copland, EIC at [9].

<sup>23</sup> Jones, EIC at [5] we understand he demonstrates and tests tractors and trailers on public roads.

<sup>24</sup> Jones, EIC at [5].

[31] There can be no disagreement that in absolute terms it would be safer if each of these activities was undertaken off-road and carried out on the test track and associated cropping land at the proposed site.

[32] Given the presence of the East Taieri School, we conclude also that it would be safer to carry out these activities from the proposed Gordon Road site or from Dukes Road North Industrial Zone<sup>25</sup> as opposed to Gladstone Road.

[33] We note that the NZTA Guide does not identify nor distinguish between the different reasons for agricultural vehicles using the road network such as for normal farming operations, or in the case of JJ Ltd's business, for the different types of activity listed above.

[34] NZTA's published guide is clear evidence that agricultural vehicles are an accepted class of vehicle which road users can be expected to encounter on New Zealand roads. We expect that, as the NZTA Guide says, the movement of agricultural vehicles can increase risk on New Zealand's road network.<sup>26</sup>

[35] We find Mr Copland's evidence compelling that, despite the New Zealand-wide statistics, from his research he did not identify any trends or existing road safety issues with agricultural vehicles using roads in the wider Mosgiel area and that the City Council had not recorded any complaints or concerns about JJ Ltd's existing operations.

[36] Coming back to the two issues, while a reduction of collision risk from agricultural vehicles using the roads located near a school is a positive effect of consolidating activities off-road at the proposed site, the evidence does not demonstrate the degree or significance of the current risk. Consequently, this is not a matter to which we give great weight. This improvement in road safety is, however, relevant and is a matter which we will take into consideration when reaching our decision.

[37] As a concluding comment on road safety issues, we were somewhat surprised that we were not made aware of whether JJ Ltd had any operating procedures restricting road testing during school drop-off and pick-up times. We have found such restrictions

---

<sup>25</sup> If JJ Ltd was to relocate to land that is zoned for the proposed commercial and industrial activities.

<sup>26</sup> NZTA Guide at Section 9.

on heavy vehicle movements to be standard practice where school children are required to cross the frontages of construction sites on their way to and from school. If not already in place, we would encourage JJ Ltd to develop and implement such procedures.

**Issue 3: How far does the exemption in proposed District Plan Policy 16.2.1.8 extend?**

[38] The appellant submits that the non-complying activities are anticipated in the rural zone where they have a functional need to locate in the zone and secondly, are for the well-being of rural communities.<sup>27</sup> As this argument turns on the interpretation of the proposed District Plan, we set out next the principles established by case law.

***Interpretation principles***

[39] We proceed on the summary of the principles set out in *Auckland Council v Budden*.<sup>28</sup> These have been recently approved by the High Court in *Simons Pass Station Ltd v Mackenzie District Council*<sup>29</sup> as an accurate and succinct statement of the relevant principles applying to the interpretation of subordinate legislation:<sup>30</sup>

[36] The principles for the interpretation of a subordinate RMA planning instrument are also well settled and not contentious. We are guided by the Interpretation Act 1999 ('IA'), particularly s 5 on purposive interpretation. The principles are also as set out in the leading Court of Appeal authorities of *Ratray* (decided pre-RMA) and the more recent decision in *Powell* (where *Ratray* was applied and interpreted in relation to an RMA district plan matter). In particular, we apply the approach described in the following passage in *Powell*:

[35] ... While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Ratray*, regard must be had to the immediate context ... and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgement of this Court in *Ratray* or with the requirements of the Interpretation Act.

[37] We add that, for subordinate legislation, where examination of the immediate context of the plan leaves some uncertainty, it is also permissible to consider provisions in light of

---

<sup>27</sup> Transcript (Page) at pp 2, 9, 11, 165-179.

<sup>28</sup> [2017] NZEnvC 209.

<sup>29</sup> *Simons Pass Station Ltd v Mackenzie District Council & anor* [2020] NZHC 3265 at [25]-[27].

<sup>30</sup> *Auckland Council v Budden* [2017] NZEnvC 209.

the purpose they fulfil in the authorising legislation (in this case, the RMA). Similarly, the fact that a district plan is to give effect to a RPS can make the latter of some relevance to the interpretation of the former.

[footnotes omitted]

[40] A contextual and purposive approach to interpretation also requires consideration of those matters identified in *North Canterbury Clay Target Association v Waimakariri District Council*, namely:<sup>31</sup>

- the text of the relevant provision in its immediate context;
- the purpose of the provision;
- the context and scheme of the plan and any other indications in it;
- the history of the plan;
- the purpose and scheme of the Act;
- any other permissible guides to meaning.

[41] The High Court in *Simons Pass Station Ltd* noted the relevance of above factors is underscored by the observations of the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* where it was stated that:<sup>32</sup>

It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[42] Importantly, it is the court's task to interpret the text of the legislation and not to rewrite it; the court is not to give the text meaning that it is incapable of bearing.<sup>33</sup>

### ***Relevant proposed District Plan provisions***

[43] For context, the key provisions of the proposed District Plan in contention are set

---

<sup>31</sup> *North Canterbury Clay Target Association v Waimakariri District Council* [2014] NZHC 3021, (2014) 18 ELRNZ 133 at [18].

<sup>32</sup> *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767 at [22].

<sup>33</sup> *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 350 (CA).

out next.

[44] Objective 16.2.1 of the proposed District Plan provides:

Rural zones are reserved for productive rural activities and the protection and enhancement of the natural environment, along with certain activities that support the well-being of communities where these activities are most appropriately located in a rural rather than an urban environment. Residential activity in rural zones is limited to that which directly supports farming or which is associated with papakāika.

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

[45] As anticipated by that objective, farming and conservation type activities are enabled in the rural zones (Policy 16.2.1.1), together with a range of named activities (Policy 16.2.1.2) and yet other activities in limited circumstances (e.g. Policies 16.2.1.3, 16.1.2.4, 16.1.2.5). Rural contractor and transport depots are one activity that is specifically provided for (Policy 16.2.1.2).

[46] The objective is also implemented by a policy which is to avoid commercial and industrial activities in the rural zones “unless otherwise provided for” (Policy 16.2.1.8). We set out the text in full as it is important to understand counsel’s argument. The policy reads:

**Policy 16.2.1.8**

Avoid supported living facilities, commercial activities, industrial activities, and major facility activities, unless otherwise provided for, in the rural zones.

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

***Interpretation of Policy 16.2.1.8***

[47] We agree with JJ Ltd that in Policy 16.2.1.8 the meaning of “avoid” is to not allow or to prevent the occurrence of commercial and industrial activities. However, there is an exception to the policy in that commercial and industrial activities are to be avoided “unless otherwise provided for”.

[48] Counsel for JJ Ltd, Mr Page, makes two submissions. Firstly, the meaning of “unless otherwise provided for” may be determined by reference to the rules in the plan. Specifically, the rules either:

- (a) permit commercial or industrial activities in zone; or
- (b) are for activities that are contemplated by the objectives and policies, albeit the activity, must be authorised by a resource consent.

[49] Mr Page prefers the latter interpretation<sup>34</sup> and says the granting of resource consent is a method by which this plan “otherwise provides for” commercial and industrial activities. We do not accept his submission as that would be to equate the purpose of the policy with the outcome on an application for a resource consent.

[50] Secondly, Mr Page submits commercial and industrial activities with a functional need to locate in the rural zone come under the exception to the policy “unless otherwise provided for”. He argued that this interpretation would implement Objective 16.2.1 “which seeks to support the well-being of communities where these activities are most appropriately located in a rural rather than an urban environment”.<sup>35</sup>

[51] The submission was developed in closing with reference to the proposed Regional Policy Statement (RPS) and the strategic directions of the proposed District Plan. Commencing with the RPS, the outcome for the rural areas is that sufficient land is managed and protected for economic production (proposed RPS Objective 5.3). This is achieved by “managing activities in rural areas, to support the region’s economy and communities by, [amongst other matters], providing for other activities that have a functional need to locate in rural areas” (proposed RPS Policy 5.3.1(f)).

[52] Mr Page submits the proposed District Plan’s strategic directions give effect to the RPS through Policy 2.3.1.2. He says this policy “contemplates that there will be activities provided for that support the rural economy and need a rural location or support rural activities”.<sup>36</sup> However, while the proposed plan’s lower order objective and policies address some activities in the rural areas, the policies do not provide for all activities that have a functional need to locate there.<sup>37</sup>

---

<sup>34</sup> Appellant, legal submissions at [37]-[40].

<sup>35</sup> Appellant, legal submissions at [41].

<sup>36</sup> Transcript (Page) at 166-168, 172-174 and elsewhere. Also described as a functional “connection” with the rural zone.

<sup>37</sup> Transcript (Page) 167-168.

[53] With reference to the RPS Policy 5.3.1(f) and proposed District Plan Policy 2.3.1.2, we understand the basic proposition to be that the phrase “unless otherwise provided for” in Policy 16.2.1.8 means “unless there is a functional need to locate” in the rural area. Applying his interpretation to the objective and policies, Mr Page submits key aspects of the proposal have a functional need to locate within the rural zone and as such are neither contrary nor inconsistent with the District Plans.<sup>38</sup>

### ***Discussion***

[54] The leaping-off point for JJ Ltd’s interpretational argument is the RPS<sup>39</sup> rather than the text of the relevant provision (i.e. Policy 16.2.1.8) in its immediate context. We prefer to follow the order of the plan interpretation principles set out above.

#### *The text of the relevant provision in its immediate context*

[55] The phrase “unless otherwise provided for” creates an exception to Policy 16.2.1.8 that is to avoid commercial and industrial activities in rural areas. The interpretational issue is how *far* does this exception extend?

#### *The purpose of the provision*

[56] Policies 16.2.1.1-16.2.1.12 provide for or anticipate in limited circumstances, activities in rural areas, including specified commercial and industrial activities. Collectively these policies implement Objective 16.2.1 which is to reserve the rural zones for:

- (a) productive rural activities;
- (b) protection and enhancement of the natural environment, and
- (c) certain activities that support the well-being of communities where these activities are most appropriately located in a rural rather than urban environment.

[57] Three observations can be made about Objective 16.2.1 and in particular the activities that support community well-being. First, the objective pertains not to *all* but

---

<sup>38</sup> Transcript (Page) at 5.

<sup>39</sup> Transcript (Page) 166.

only “certain” activities that support community well-being and secondly, these community well-being activities are ones that are “most” appropriately located in a rural rather than urban environment”. Finally, the activities that are provided or enabled under the relevant policies are not alike and arguably each support different aspects of the community’s social, cultural and economic well-being.

[58] JJ Ltd did not define what it meant by “functional need” nor address the inter-linked requirement for activities that support the well-being of communities to also be ones that are “most appropriately located in a rural area”. We garnered from the planning evidence called in support of JJ Ltd’s appeal that an activity that has a functional need to locate in the rural area is one that supports rural activities. The boundaries of “functional need” and “support” are indistinct terms and we think simply assumed from the standpoint of JJ Ltd’s enterprise and, perhaps also the accessibility and convenience of its customers who are located around the Otago region.

[59] As an aside, while not referred to by JJ Ltd, we did have regard to the National Planning Standard’s definition of “functional need” to see if this lent support for its interpretation. The Standard defines “functional need” as meaning “the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment”. The application of the Standard’s definition to the facts does not support a grant of consent.<sup>40</sup>

*The context and scheme of the plan and any other indications in it*

[60] Under the Proposed District Plan’s strategic directions, Policy 2.3.1.2 addresses the management approach of the proposed plan, which is in this instance to use zoning and other methods (specifically rules) to maintain or enhance the productivity of farming and other activities that support the rural economy. Policy 2.3.1.2 implements a strategic objective to promote economic productivity on the one hand and social well-being outcomes on the other (Objective 2.3.1). Referred to by JJ Ltd’s planning witness,<sup>41</sup> the policy is incapable of being applied directly to the application for resource consent and does not assist with the appellant’s interpretation of the proposed plan. The policy is simply to have rules providing for rural industry and other activities that support the rural

---

<sup>40</sup> That is so inasmuch as there is no evidence upon which we could conclude that the range of proposed activities can only occur in a rural environment.

<sup>41</sup> It was also referred to by counsel. See Transcript (Page) at 167.

economy and secondly, rules restricting commercial activities to those that need a rural location or support rural activities.<sup>42</sup> We would expect support for those rules in the substantive objective and policies.

### ***Outcome***

[61] Having regard to the purpose of Policy 16.2.1.8, in its immediate context we would interpret “unless otherwise provided for” as meaning *unless otherwise provided for in the objective and policies*. By way of example, on the court’s interpretation, rural industry – which is a sub-activity of industry – will not be avoided under Policy 16.2.1.8 because it is “otherwise provided for” under Policy 16.2.1.2.

[62] It is reasonably clear that the proposed plan has adopted a top-down approach that with increasing particularity develops the objectives and policies for the rural areas. We cannot comment on why certain activities are included in the policies and others not, but the text of the objective makes clear this is intentional.

[63] On the evidence before us, we can find no inconsistency between the RPS and proposed District Plan.

[64] Given the above, we do not accept JJ Ltd’s interpretation as it widens the exception in Policy 16.2.1.8 beyond those activities otherwise provided for in the objective and policies to introduce a new category of activity.

### **Issue 4: Does “Rural Contractor and Transport Depot”, correctly interpreted, include the use of land and buildings for on-site repairs and maintenance?**

#### ***Introduction***

[65] The final legal issue concerned the interpretation of a defined term in the proposed District Plan “Rural Contractor and Transport Depots”.

[66] Given that the proposal overall falls to be assessed as a non-complying activity, the salience of this issue to the disposition of the appeal was unclear. It may have had to do with Mr Cubitt’s thesis that the proposal supports the well-being of rural

---

<sup>42</sup> Policy 2.3.1.2 (b) and (h).

communities insofar as it is offering a range of services to the farming sector. We understand Mr Page to say that there are no effects nor policy arguments against the collocation of commercial and industrial activities with a rural contractor and transport depot, where these activities are “connected” with the depot.<sup>43</sup> The company’s businesses are connected insofar as they share staff, facilities and customers.<sup>44</sup>

### ***Discussion***

[67] Rule 16.3.3.44 provides rural contractor and transport depots are discretionary activities within the rural zones. The rule is not subject to any appeal on the proposed plan.

[68] JJ Ltd proposes to offer tractor and farm machinery maintenance and repair services on-site, and at their clients’ properties. Mr Cubitt considers this service a discretionary activity, whereas the City Council says the use of the land and buildings is discretionary only where maintenance and repair services take place off-site. The on-site repairs and maintenance of tractors and farm machinery are non-complying industrial activities. We agree with the City Council.

[69] “Industrial activities” is a defined term in the proposed District Plan and consist of “industry” including “rural industry and rural contractor and transport depot”. Industry is also defined and includes both the on-site and off-site services proposed by JJ Ltd.

[70] Relevantly, “industry” is defined as:

The use of land and buildings for any of the following:

- manufacturing, assembly, processing, storage, repair, maintenance, and packing of goods and materials, including machinery or vehicles; and
- a depot for the storage and dispatch of vehicles, equipment, and/or materials, and the administration and dispatch of workers using these in the field.

[71] “Rural Contractor and Transport Depots” are an industrial sub-activity, and are defined as follows:

---

<sup>43</sup> Transcript (Page) at 174.

<sup>44</sup> Transcript (Page) at 175.

#### Rural Contractor and Transport Depots

The use of land and buildings as a depot for rural contractor and transport services.

Examples of rural contractor and transport services are:

- fencing;
- crop harvesting;
- rural drainage; and
- stock transport services.

For the sake of clarity, this includes the storage, maintenance, repair and refuelling of the vehicles, machinery and other materials associated with these activities as well as the administration and dispatch of workers.

This definition excludes any retailing of farm equipment or other heavy machinery, which is defined as yard based retail.

Rural contractor and transport depots are managed at two different scales - small scale and large scale.

Rural contractor and transport depots are a sub-activity of industry.

[underlining indicates use of a hyperlink to a defined term in the District Plan].

[72] We do not accept JJ Ltd's submission to the effect that the activities listed in the second paragraph<sup>45</sup> of the Rural Contractor and Transport Depots definition are services that may be offered at a depot. JJ Ltd interprets the rule by adding punctuation<sup>46</sup> and ignoring the term 'depot'.<sup>47</sup>

[73] The term 'depot' is important and is defined in the Oxford Online Dictionary as meaning "a place where goods are deposited or stored" and likewise the Cambridge Online Dictionary as "a building where supplies or vehicles, especially buses, are kept".<sup>48</sup> The operative part of the definition is the use of land and buildings as a depot. We interpret "these activities" in the second paragraph as referring to the use of the land and buildings as a depot and secondly, that the list of activities in the same paragraph are activities that are ancillary<sup>49</sup> to the use of land and buildings as a depot. Put colloquially, this sub-activity is a carve out from the definition of "industrial activities", including repair and maintenance of machinery and vehicles, which would otherwise apply.

---

<sup>45</sup> That is the paragraph commencing "For the sake of clarity..." and more particularly, storage, maintenance, repair and refuelling of the vehicles and machinery.

<sup>46</sup> Transcript (Page) at 170-171.

<sup>47</sup> Transcript (Page) at 169.

<sup>48</sup> See also Exhibit Common Bundle, Document 4.

<sup>49</sup> Here we are ascribing the ordinary meaning to the term "ancillary".

### ***Outcome***

[74] The undertaking of repairs and maintenance of farm machinery and vehicles at the proposed site does not come within the definition of “Rural Contractor and Transport Depots”. It follows that Rule 16.3.3.44 does not apply; this activity is a non-complying activity under Rule 16.3.3.46.<sup>50</sup>

[75] We turn next to the relevant provisions of the proposed District Plan.

**Issue 5: Whether the proposal (which has a non-complying activity status) is consistent with, or contrary to, the relevant Objectives and Policies with operative and proposed District Plan?**

### **Proposed District Plan**

#### ***Introduction***

[76] This appeal concerns an application for resource consent for multiple land use activities with different activity classifications. In the ordinary course a consent authority, and this court on appeal, will determine whether it is appropriate to grant or refuse the application; not necessarily whether it is appropriate to allow any one of the individual activities to occur.<sup>51</sup> Ultimately the court is charged with making a judgment<sup>52</sup> on the merits of the proposal considered in light of the relevant provisions in the planning instruments.

[77] Before considering the provisions of the proposed District Plan, we note that JJ Ltd’s planning witness, Mr Cubitt, does not address in evidence many of the provisions assessed by the City Council’s planner, Ms Spalding. We presume his focus is on those provisions in respect of which there is a difference of opinion as between the planning witnesses, the resolution of which is material to the outcome of the appeal. While we have considered all the evidence, we will take his lead when discussing the provisions of the plan.

---

<sup>50</sup> This rule provides that “all other activities in the industrial activities category” are non-complying.

<sup>51</sup> *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765 at [47].

<sup>52</sup> In accordance with ss 104, 104B and s 104D RMA.

***Proposed District Plan Provisions***

[78] The proposed District Plan identifies two key issues facing the rural environment. They are:

- the fragmentation of rural landholdings from subdivision, which can lead to rural properties too small to be used for productive purposes; and
- non-productive land uses or those activities that would ordinarily be expected to locate in the urban parts of Dunedin seeking to locate in rural areas.

[79] Objective 16.2.1 and its implementing policies are important and noted above. While certain activities can take place in the rural area (Objective 16.2.1), the productivity of rural activities in the rural zones is also to be maintained or enhanced (Objective 16.2.4). Objective 16.2.4 is implemented by policies that only allow land use and subdivision activities to occur where any loss of current or potential future rural productivity would be insignificant in an area of high-class soils (Policies 16.2.4.2(a)(i) and 16.2.4.3(b)). Correlated with these policies is the zone's minimum 40-ha site size. Finally, Policy 16.2.4.1 also applies as it is proposed to remove and store in bunds the topsoil from the footprint of the building, test track, gravel storage area and parking area and the external sealed areas. Policy 16.2.4.1 requires earthworks in an area of high-class soils to be retained on site.

[80] We note, Policies 16.2.4.2 and 16.2.4.3<sup>53</sup> are under appeal, but that Objective 16.2.4 and Policy 16.2.4.1 are not.

[81] Finally, while certain activities can take place in the rural area, rural character values and the amenity of the zone are to be maintained or enhanced (Objective 16.2.3). The effects of the proposal on rural character and amenity are agreed to be not in issue and we proceed on the basis that the proposal is consistent with the relevant objective.

---

<sup>53</sup> Transcript recorded these as 16.24.1, 16.24.2 and 16.24.3.

***Discussion and findings****Commercial and industrial activities sub-topic*

[82] We recap the key findings above. Firstly, JJ Ltd has not succeeded in its interpretation of the phrase “otherwise provided for” in Policy 16.2.1.8 means “unless there is a functional need to locate” in the rural area. Secondly, it is not in dispute that part of the proposal is for the use of land and buildings as rural contractor and transport depot – at least when repair and maintenance business is carried on off-site. This activity is one that is to be provided for in the rural zone (Policy 16.2.1.2). However, the use of land and buildings for the repair and maintenance of customer vehicles and machinery is an industrial activity in relation to which the policy is to avoid.

[83] Further, save in relation to the growing of hay and crops to demonstrate farm machinery (e.g. headers and tedders), the proposed land uses are not productive rural activities. As Mr Cubitt rightly acknowledges, these productive uses<sup>54</sup> are ancillary to the carrying out of commercial and industrial activities.<sup>55</sup>

[84] Finally, we have had regard to the appellant’s submission that if the rural contractor and transport depot is provided for under the policies then any commercial and industrial activities “connected with” the depot are also “appropriate” if they have no additional effects and provided the commercial and industrial activities have a functional need to locate to that zone.<sup>56</sup> As we noted earlier, the various enterprises are connected insofar as they share staff, facilities and customers.

[85] On the one hand, there is benefit to JJ Ltd collocating all of its activities on a single site. On the other hand, it appears to us that the spatial requirement for cropping land and the test track is driving the decision to locate out-of-zone activities in the rural area because there is insufficient land in the Dukes Road North industrial zone to collocate these activities together with JJ Ltd’s commercial and industrial activities. The evidence does not demonstrate that the commercial and industrial activities are “most” appropriately located in a rural zone (Objective 16.2.1), indeed the fact that the activities are permitted in the neighbouring Industrial Zone and that a competitor has recently

---

<sup>54</sup> That is, hay and crops.

<sup>55</sup> Transcript (Cubitt) at 53-54.

<sup>56</sup> Transcript (Page) at 174.

relocated to that zone negates this.

*Subdivision and high-class soils sub-topic*

[86] Assessed as a percentage of the total area of high-class soils in the District, the proposal is to “remove”<sup>57</sup> less than 0.0004% of the District’s high-class soils. By this metric, Ms Spalding’s evidence was that the loss of current or potential future rural productivity would be insignificant. Mr Cubitt does not assess the percentage of high-class soils to be occupied by the non-productive uses, but in common with Ms Spalding he claims the removal of the high-class soils will not have any effect on the productivity of the wider rural zone.

[87] We were not adequately assisted by the planning evidence in our understanding of how the objective and policies are to be applied when considering the significance of any loss of current or potential future rural productivity. In saying that, we bear in mind that Policies 16.2.4.2 and 16.2.4.3 are under appeal and their wording is complex. Further we accept that a measure of soils lost as a percentage of the total high-class soils in the District is a relevant metric. However, by itself the metric does not fully inform the judgement required under the policies about the *significance* of any loss of current or potential future rural productivity. The metric is a measure of the spatial extent of soils to be occupied, and as such, this is simply one measure of incremental loss, but not – as far as we can tell – the cumulative loss of high-class soils. Without explaining their rationale, the planning witnesses simply equate this metric with productivity. While soil classification and productivity are strongly correlated, the focus of the policies is on the significance of any change in productivity should the soils be occupied, in this case, by commercial and industrial activities (amongst others).

[88] Mr Cubitt agreed with the court that there are other factors that might be considered under this policy.<sup>58</sup> For example, a potentially more accurate measure of incremental loss may be to consider:

- (a) the area of high-class soils proposed to be removed as a percentage of the total land containing high-class soils
  - (i) excluding:

---

<sup>57</sup> Spalding, EIC at [66].

<sup>58</sup> Transcript (Cubitt) at 76-79.

1. land zoned for future urban development<sup>59</sup> under the proposed District Plan; and/or
2. areas of high-class soils that are not contiguous i.e. fragmented, discrete pockets of soils.

Other relevant considerations might include:

- (b) the attributes and versatility of the area's soils for a range of land uses;<sup>60</sup>
- (c) the presence or absence of factors limiting productivity, including other land uses in the area; and
- (d) the commercial viability of rural activities in the area generally.<sup>61</sup>

[89] We give little weight to the planners' opinions that the use of high-class soils to construct the landscape bunds achieves Policy 16.2.4.1. Both interpret the policy as requiring the physical retention of soil on the site, although each expressed disquiet around the policy's implementation of the objective.<sup>62</sup> The question that goes begging is whether Policy 16.2.4.1 concerns the literal retention of soil on-site or alternatively the retention of high-class soils, including the attributes of these soils? We consider that there is a reasonable argument to be made for the latter given that the policy implements an objective that is to maintain or enhance the productivity of rural activities in this zone (Objective 16.2.4).

[90] We acknowledge that the proposed District Plan does not require the outright retention of all high-class soils and that a range of non-farming activities are contemplated. The fact that this proposal includes a depot contemplated by Policy 16.2.1.2 within this rural zone, does not lend support to collocate other activities that the plan would otherwise avoid. Further we agree with the City Council, that were JJ Ltd to cease its activities at the proposed site, it is unlikely that the land would revert to productive use.<sup>63</sup>

---

<sup>59</sup> For example, green field sites yet to be developed.

<sup>60</sup> Based on historical and present-day rural activities, Mr Cubitt gave evidence that soils in the area were not as versatile as other areas of high-class soils, for example, Outram. However, we regard soils' attributes and versatility is a matter for an agronomist or soils' expert and are unable to give his opinion any weight. See Transcript at 77-78.

<sup>61</sup> See *Self Family Trust v Auckland Council* [2020] NZEnvC 214 at [103]-[109] as to how an approach to commercial viability in the context of a plan change.

<sup>62</sup> See Spalding EIC at [68]-[70]; Transcript (Cubitt) at 76.

<sup>63</sup> Respondent, legal submissions at [48].

[91] Finally, the only other matter of note is the planners' views that the minimum site size is correlated with the retention of high-class soils for productive uses, as non-productive activities would be discouraged from establishing on sites of this size. This is a view we share.<sup>64</sup>

[92] On the evidence before us, we find that the proposal is (at the very least) in tension with Objective 16.2.4 and Policies 16.2.4.1-16.2.1.3.

### **Operative District Plan**

[93] We have considered the status of the proposal under the operative District Plan, noting again the proposal overall falls to be assessed as non-complying under this plan.

[94] As Mr Cubitt correctly observes, the objectives and policies of the operative District Plan are less prescriptive and take on an effects-based approach.<sup>65</sup> We also agree with him that the relevant provisions address three themes: amenity values, productive capacity and the potential for conflict between different land use activities. However, rather than discussing 'themes', we prefer to commence with the significant resource management issues identified in the operative District Plan about which the objectives and policies respond.

[95] The significant resource management issues for the rural area concern the potential for land fragmentation to adversely affect the sustainable management of natural and physical resources<sup>66</sup> and the importance of productive capacity of the rural area to Dunedin's economy.<sup>67</sup> The third issue of relevance in this appeal is the potential for certain activities to adversely affect the character and amenity values of the rural area. The operative District Plan explains that the productive use of land, in one form or another, is a key component in the character of most rural parts of the district. Objective 6.2.1 responds to the first two identified above issues and Objective 6.2.2 to the third.

[96] Considered in the round, the operative District Plan is principally concerned with the use of the land resource in the rural zone. The ability of the land resource to meet the needs of future generations will be maintained (Objective 6.2.1) by providing for

---

<sup>64</sup> Transcript (Cubitt) at 79; Transcript (Spalding) at 124.

<sup>65</sup> Cubitt, EiC at [67].

<sup>66</sup> Issue 6.1.2.

<sup>67</sup> Issue 6.1.3.

activities that are based on the productive use of rural land (Policy 6.3.1) and by sustaining the productive capacity of the rural zone through controlling the adverse effects of activities (Policy 6.3.2). The explanation to Policy 6.3.2 notes that in order to minimise the impact on rural productivity, permitted residential activities in the rural zone require allotments to have a minimum area of 15-ha. Land fragmentation and the establishment of non-productive uses of rural land is expressly discouraged (Policy 6.3.3).

[97] Allied with the above is the objective that the amenity values associated with the character of the rural area are maintained and enhanced (Objective 6.2.2). As noted in *Blueskin Energy Ltd v Dunedin City Council*, amenity values are regarded in two ways; firstly, the general amenity associated with the character of the area and secondly, the particular amenity of adjoining properties.<sup>68</sup>

[98] The amenity values associated with the character of the rural area (Objective 6.2.2) will be maintained and enhanced if the character of the rural area is maintained (Policy 6.3.5). The elements that go to make up rural character are described in Policy 6.3.5. This policy has two parts that are to be read and applied together. Thus, rural subdivision and activities are required:

- (a) to be of a nature, scale, intensity and location consistent with maintaining the character of the rural area; and
- (b) to be undertaken in a manner that avoids, remedies or mitigates adverse effects on rural character.

[99] In addition, the effects on adjoining properties are avoided, remedied or mitigated (Policy 6.3.6).

[100] Finally, we were also referred to Objective 6.2.5 and Policy 6.3.12 but consider these to be of limited relevance. In context, these provisions are more concerned with the potential for reverse sensitivity effects than with the alienation of the land resource from future productive activities as applied by Ms Spalding.<sup>69</sup>

---

<sup>68</sup> *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150 at [105].

<sup>69</sup> Spalding, EiC at [105] and Appendix C.

### ***Discussion and findings***

[101] While the objectives and policies refer to “productive use” and “non-productive use” of land, the plan does not define these terms. We interpret the two terms as referring to the use of land for primary production.<sup>70</sup> This interpretation is available having regard to the purpose of the objective and policies.

[102] While JJ Ltd is carrying on an activity that supports the primary sector, the proposal itself is not a productive use of rural land. The activities comprising the proposal are not provided for in the rural zone, indeed the establishment of non-productive uses of land is discouraged. Subdivision of land to create a new under-sized lot,<sup>71</sup> is also discouraged (Objective 6.2.1 and Policy 6.3.3.). While cropping is a productive use of the land we regard this activity as part of the carrying on of commercial and industry at this site.<sup>72</sup> The fact that there is any primary production occurring at all on this site we regard as a neutral matter in the overall determination of the appeal including Policies 6.3.1 and 6.3.2.

[103] Both parties accept that the effect on amenity of adjoining properties can be mitigated (Policy 6.3.6). Having received no evidence to the contrary, we proceed on this basis.

[104] However, when considering the wider effect on rural character, JJ Ltd appears to have overlooked the possibility that the relevant policy (Policy 6.3.5) has two parts that are to be read in conjunction. The court was referred to evidence given by landscape witnesses at the City Council hearing but not called on appeal. Mr Cubitt said the landscape witnesses agreed the effect on landscape and rural character will be minor<sup>73</sup> and this may have been the view of the Hearing Commissioners,<sup>74</sup> but Ms Spalding does not agree. Effects aside, she points out that the first part of the policy “requires rural subdivision and activities to be of a nature, scale, intensity and location consistent with

---

<sup>70</sup> ‘Primary production’ is defined in the operative District Plan and means the unprocessed product of any form of farming, including forestry, aquaculture, viticulture, horticulture and the collection or harvesting of wildlife.

<sup>71</sup> Lot 1 (4-ha).

<sup>72</sup> Transcript (Spalding) at 119-121. As noted in the Transcript, ordinarily the court would use the language of “ancillary”, but this term is defined and applied in a different way in the proposed District Plan.

<sup>73</sup> Cubitt, EIC at [60].

<sup>74</sup> Hearing Commissioners’ Decision dated 18 June 2019, under the heading ‘Reasons for this Decision’, paragraph 3 (pages unnumbered and unparagraphed).

maintaining the character of the rural area”.<sup>75</sup> In this regard the subdivision to create a 4-ha lot is well below the 15-ha minimum lot size in the operative District Plan.<sup>76</sup>

[105] Ms Spalding does not address the second part of the policy pertaining to activities and whether these are of a nature, scale and location consistent with maintaining the rural character. Nor is there discussion of this policy in the decision under appeal.<sup>77</sup> Assuming this is relevant, aside from the veterinary clinic<sup>78</sup> located across the road, on our site visit we do not recall observing other commercial or industrial activities taking place within the locality. We did not raise the matter with the planning witnesses and therefore do not make any finding on whether the activities are inconsistent with the directive wording of Policy 6.3.5. However, we accept that the subdivision (at least) is inconsistent with Policy 6.3.5 – which requires certain outcomes and is also inconsistent with the less directive working of Policy 6.3.3 – which is to “discourage” land fragmentation and the non-productive use of land.<sup>79</sup>

### **Other matters**

[106] Save in relation to the interpretation of Policy 16.2.1.8 of the proposed District Plan, we have not had regard to the Regional Policy Statements directly. To the extent that the planning witnesses have directly assessed the application under the Regional Policy Statements’ provisions, we did not find this evidence assisted our consideration of the proposal where it is not being asserted that the District Plans do not give effect to the RPS.

[107] Both parties referred to the recent decision of *Rogers v Christchurch City Council*<sup>80</sup> and its approach to precedent with consequential outcome for the rural zones are difficult to foresee. As in the *Rogers* case, were we to accept JJ Ltd’s interpretation, and approve of the non-complying commercial and industrial activities, we would not

---

<sup>75</sup> Spalding, EIC at [102].

<sup>76</sup> Spalding, EIC at [102].

<sup>77</sup> Policy 6.3.5.

<sup>78</sup> Veterinary clinics are provided for under the proposed District Plan in the rural zones.

<sup>79</sup> Ms Spalding gave evidence the proposal was contrary to Policy 6.3.3; EIC at [103]. Without giving a citation, Ms Spalding defined ‘discourage’ as meaning to prevent or try to prevent (something) by showing disapproval or creating difficulties. The Oxford Online Dictionary does define ‘discourage’ this way, but it is not the only definition given. ‘Discourage’ also means persuade (someone) against an action and to cause (someone) to lose confidence or enthusiasm. The use of the term ‘avoid’ in the same and other related policies we interpret as meaning ‘not allow’. If correct, this ‘suggests discourage’ does not necessarily mean ‘prevent’. Of course, the plan may not be using terms consistently.

<sup>80</sup> [2019] NZEnvC 119.

have applied the proposed District Plan's provisions according to their tenor.

[108] JJ Ltd's proposal to grant resource consent subject to a condition where, for the purpose of s 134 of the Act, the consent is said to be personal to the appellant and is not to be attached to the land,<sup>81</sup> does not overcome the City Council's concerns as to precedent set by the court interpreting the plan in this way. Indeed, this condition has a hollow ring to it as there is no associated condition to rehabilitate the land; there is no evidence to demonstrate that high-class soils can be restored. As Messrs Cubitt and Page acknowledged, the cessation of activities is not the only outcome for the land if JJ Ltd ceased operating at the site.<sup>82</sup>

### **Conclusion**

[109] Ultimately the decision whether to grant or decline this application for resource consent is a discretionary matter, the relevant matters to consider are set out in s 104 of the Act. Proceeding on the basis that the effects on the environment will be minor, we have considered the proposal in relation to the objectives and policies of both District Plans and, to the extent relevant to our determination, the provisions of the proposed Regional Policy Statement.

[110] There are aspects of JJ Ltd's proposal that would benefit the environment, including an absolute reduction in road safety risks in relation to its existing uses of public roads by its agricultural vehicles (particularly near to the East Taieri School). The collocation of all activities on the one site would also benefit the smooth and efficient operation of the business and no doubt advantage customers. In this regard, it is our impression that an important factor for discounting in-zone industrial land is the spatial requirement for cropping land on which to test and demonstrate farm machinery (which we understand to be a service new to the business) and for the test track.

[111] These above benefits would also be partially realised if JJ Ltd was to collocate onto one site at the neighbouring industrial zone while continuing to use public roads, but not roads in the vicinity of a school, for the purposes of testing, transporting and (where practicable)<sup>83</sup> demonstrating agricultural vehicles and farm machinery.

---

<sup>81</sup> Land Use Consent, proposed Condition 1.

<sup>82</sup> Transcript (Page) at 14; Transcript (Cubitt) at 47 and elsewhere.

<sup>83</sup> We proceed on the basis that some components of the assembled farm machinery must be tested off-road (currently at a site near Momona).

[112] Taking into account the benefits, while not to understate their importance to JJ Ltd, they are insufficient to overcome the strongly worded direction in Policy 16.2.1.8 of the proposed District Plan to avoid commercial and industrial activities locating in rural areas and the other provisions in the operative and proposed District Plan which the proposal is in tension. Productive rural activities are currently taking place on the land and there are no site-specific considerations that could be reasonably brought to bear to support a different outcome than that articulated for the rural zones in the two District Plans.

[113] It is our judgment that the appeal should be declined. Costs are reserved.

For the court:

Jane S



---

**J E Borthwick**  
**Environment Judge**