ORIGINAL

Decision No. W 037 /2006

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under s120 of the Act

BETWEEN WAYNE MASKILL & MASKILL CONTRACTING LIMITED
(ENV W 0124/05)
Appellants

AND THE PALMERSTON NORTH CITY COUNCIL
Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson
Environment Commissioner K A Edmonds
Environment Commissioner I D Stewart

Hearing at Wellington on 26 and 27 April 2006: site visit 28 April 2006
Counsel/Appearances
J M von Dadelszen for the appellants
J W Maassen and R W Oakley for the Council
D McQuilkin for B McQuilkin – s274 party
D F Jones for himself and G L Munro – s274 party

DECISION

Introduction and site history

[1] This appeal is about the use of a *lifestyle block* of about 3.9ha at Kelvin Grove Road on the northwestern fringe of Palmerston North City. Mr Wayne Maskill has owned the property since the early 1990s and he lives there with his family. He originally also used the property

as a base for a rural contracting business. The paddocks immediately behind the house were turned into a yard with sheds and a workshop for the maintenance and storage of equipment. At its peak, the contracting business utilised seven tractors, with associated agricultural equipment, and employed six staff. In about 1993 Mr Maskill purchased a truck and trailer for hay cartage in summer and for carrying potatoes over winter. That cartage operation expanded into carting straw from around the Manawatu area to New Zealand Mushrooms in Morrinsville. From 1998 on, because of security concerns, the straw has been stored in stacks to the rear of the property. There is now a small cottage type building being used as the office, and a substantial security gate and security lighting.

[2] In the later 1990s it became apparent that the rural contracting business was not viable. The tractors and related equipment were disposed of and the business refocused solely on transport operations. By 2000 the business was operating four truck and trailer units and by 2002, six truck and trailer units and a smaller curtain-sided truck used for local work. Currently its biggest single customer, by revenue (about 24%), is C B Norwood Distributors Limited who engage it to transport tractors and other agricultural equipment. A further 20% of revenue comes from the transport of straw. Mr Maskill points out however, and we accept, that revenue does not necessarily relate to freight volume or to vehicle movements. He estimates that the *rural* component of the business, judged by volume or vehicle movements, would be in the order of 80%. We shall return to that issue.

The application

[3] It became apparent in 2004 to Mr Maskill that although the business had operated from the property for 12 years or thereabouts without formal complaint, he did require, and had always required, a resource consent under the Resource Management Act. In that sense the current application is retrospective, seeking to legitimise the existing operation, and also to expand it. The application made to the Council in August 2004 summarised the activities for which consent was sought as:

> To provide for the continued operation of the agricultural and carting contracting business and for the redevelopment of a portion of the site to allow for an addition to an existing building associated with the business at 572 Kelvin Grove Road. (Discretionary activity (unrestricted)) – Rule 9.9.2 in the Rural Zone of the Palmerston North City District Plan.

The application goes on to explain that the proposal involves an additional building of approximately 920m^2 gross floor area which is to be joined to the existing workshop, and a screened and roofed outdoor storage and working area. In summary the existing and additional built areas are to comprise:

- Office (existing) 48m^2
- Existing floor area (workshop) 280m^2
- New floor area (workshop/storage) 920m^2
- Outside screened storage area 690m^2

There will therefore be new built areas of 1610m^2, and a total of 1938m^2 of structures related to the business, plus yards and outdoor storage. The new screened area is to allow the unloading and reloading of vehicles to occur in an area screened from neighbouring properties and under shelter rather than in an outside yard as currently occurs. The new buildings will also allow materials awaiting delivery to be stored inside.

[4] Of some importance to the appeal, there was this description of the hours of operation:

> The hours of operation will be between 7.00am and 7.00pm seven days a week. On occasion there will be the need to operate until 10.00pm.

Confirmation that the latest time of truck entry and exit from the site would be 10.00pm is also contained in the Assessment of Environmental Effects (AEE). It is now the appellants' position that there may need to be occasional truck movements in and out of the property between 10.00pm and 7.00am. The Council and the opposing parties say that a question of *scope*; ie whether the application was sufficiently widely expressed to allow that extens ion to be granted, arises. In the result, we do not need to resolve that. On a semi-related point, the AEE also contained a comment that the performance condition for noise in the Rural Zone (Rule 9.12.1) could be accepted as a condition of the resource consent. It is now common ground that the Rule cannot be complied with during night hours, and Mr Malcolm Hunt, the appellants' acoustics consultant, suggests that noise should be measured at the notional boundaries of neighbouring houses. The restrictions on activities to enable compliance with night-time levels would be such that such activities are problematic.

The position of the s274 parties

[5] Mr Jones and Mr Munro live directly opposite the site on the northern side of Kelvin Grove Road. Mr B McQuilkin has a property immediately to northeast of the site. They all

oppose the application citing loss of rural amenity principally by way of noise and visual/landscape effects, loss of opportunity to develop their own land as they wish, and concerns about traffic safety.

The Council's position

[6] The Council's reporting Planning Officer recommended that the consent be granted. The Hearing Committee did not agree, and declined the application. The reporting Officer and the Council's Senior Planner both gave evidence before us and said that if they had understood what they say they now do about the true nature of the appellants' operations, the recommendation would have been to decline the application. On appeal, the Council vigorously opposed the granting of the consent. It did however concede that if we should decline the appeal, the appellants should be given sufficient time to relocate in a planned and orderly way.

Zoning and activity status

[7] The Palmerston North City District Plan has been wholly operative since March 2005. Under its provisions the subject land is zoned *Rural*. Subject to performance standards it may be subdivided down to 4ha (ie the traditional 10 acre block) as a controlled activity. Land on the opposite (northern) side of Kelvin Grove Road is also zoned *Rural* but has a *Rural Residential* overlay allowing subdivision down to 1ha as a controlled activity, provided performance conditions are met. Apart from separation from boundary controls and a maximum height of 9m there are no bulk and coverage controls for buildings in the *Rural* zone. This has implications when the *permitted baseline* is considered.

[8] A substantial block of land with frontages onto Kelvin Grove Road and Stoney Creek Road is identified as *Urban Growth Path*. The closest point of that land is about 300m from the site. We agree with the view of Mr Paul van Velthooven, the Council's land valuation witness, that subject to the restraints in the District Plan, it is all but inevitable that within a relatively short time the site will be surrounded by rural residential/large lot residential development.

[9] The submission for the appellants is that the business activity is still within the definition of *rural industry* in Section 4 of the District Plan. If that is so, the activity is to be

assessed as a *discretionary* activity. If however it is not a *rural industry* in those terms, then it is common ground that it is to be assessed as a *non-complying* activity. It seems logical to deal with that issue first although, in the end, it may not make much practical difference.

Is the present operation a Rural Industry?

[10] *Rural Industry* is defined in the Plan in this way:

> Rural Industry means land and/or buildings used for industry which processes agricultural goods and/or is better located in the rural area because of the need to achieve a separation from other activities; and land and/or buildings used by rural contractors, including but not limited to agriculture, aerial topdressing, forestry, earthmoving and construction, and transport.

If that definition is pulled apart it seems that there are three categories of *industry* which might qualify:

- an industry which processes agricultural goods and is better located in the rural area to achieve separation,
- some other industry which is better located in the rural area to achieve separation,
- rural contractors, with non-exhaustive examples given.

Mr Maskill did suggest that the storage of straw required *separation*, because of the demonstrated risk of vandalism. His concerns about that are understandable, but we doubt that the passive storage of straw could reasonably be brought within the rubric of *processing*. Further we think that the security issues could be managed in a more appropriate location. The principal argument for the appellants under this head is that the company remains a *rural contractor*, albeit one involved in transport. The term *rural contractor* is not defined in the Plan, so we must work from what we believe to be the ordinary meaning of the term. We think that Mr Maassen was correct in suggesting that, as generally understood, a rural contractor undertakes work on farms which the farmers do not do themselves because (usually) of the capital cost of the specialised machinery required to do it efficiently. Typically, rural contracting will involve activities such as haymaking, crop harvesting, major drainage works and the like. A transport capacity of some kind might be ancillary to that – eg for the cartage of harvested crops to a processor. But a stand-alone transport operation with no *on-farm* operations save pick-up and delivery cannot, in our view, be fairly described as a *rural contractor*. That the Maskill operation's work has some focus on transporting straw and the delivery of farm equipment from a distributor does not, in our view, move it out of the

category of a line-haul transport/warehousing operation and into the category of a rural contractor.

[11] So we conclude that, as a matter of fact, neither Maskill Contracting Ltd nor Mr Maskill are *rural contractors*, and the present and proposed activities are therefore not a *rural industry*. In turn, that means that the proposal is to be assessed as a non-complying activity.

Existing environment and permitted baseline

[12] There was considerable discussion about this point, and it is not entirely easy to resolve. We assess this by considering three possible components. First, what lawfully exists on the site now. Secondly, what may be permitted by a granted but as yet unimplemented resource consent. Thirdly, non-fanciful activities which are permitted as of right by the District Plan (the *permitted baseline*, properly so-called). There is no issue about the second possibility and that can be put aside. In terms of what lawfully exists on site at present, there is no argument about the lawfulness of the non-residential buildings presently on the site. As mentioned in para [7] the only relevant controls in the Plan are maximum height (9m) and a separation from boundaries formula. We heard no evidence to suggest they do not comply with either of those.

[13] Ms Clare Barton, the appellants' planning consultant, raised the suggestion that large glasshouses for some sort of horticultural production might be a non-fanciful possibility. Given the absence of coverage ratio controls, they could be very extensive. That suggestion was greeted with some reserve by Mr van Velthooven. He considered that this land is so valuable that such a venture would probably not make economic sense. That may be so, but we do not think that the possibility of substantial, truly rural, buildings of some kind on the site could be said to be *fanciful*.

[14] Mr Alistair Aburn, the Council's consultant planner, suggested in his evidence-in-chief that the bulk of the straw stacks on the property are greater than that envisaged for the *permitted baseline* for a farming operation. By that we understand Mr Aburn to be suggesting that a conventional farming operation would be most unlikely to have straw or hay stacks approaching the dimensions of those that exist. We agree. But in the absence of some defined controls in the plan we see no basis for saying that the existing stacks are not lawful.

[15] We cannot be definite about what building might be non-fanciful here. The best we can say is that the existing buildings, and indeed something rather larger, could reasonably be contemplated for some rural use. But it is not really the buildings themselves which are the issue in considering the permitted baseline in this context. Rather it is the activities which are carried on in and around those buildings which impact upon rural amenity and which might arguably create traffic issues. We understand it to be common ground that because those activities require, but do not have, a resource consent they cannot be considered as part of the permitted baseline.

[16] We realise that there is no law against driving trucks in and out of a rural property several times a day or, for that matter, parking a number of trucks on such a property overnight. During activities such as harvesting, a significant number of truck movements are readily imaginable. But it would, we think, be *fanciful* to contemplate that occurring on a 52 weeks per year basis on any normal rural property. Only a business such as is operated here would do that.

[17] While we do not set aside the concept of what the plan permits in terms of s104(2), in this appeal the concept of the permitted baseline is of rather limited assistance. It focuses only on the existing and possible bulk of buildings, which certainly may have some impact on rural amenity, but which does not tell the entire story.

Retrospective consent

[18] Ms Barton accepted that it is clear (see eg *Workman v Whangarei District Council* (A 137/98) and *N Z Kennel Club Inc v Papakura DC* (W100/05)) that an existing activity, if it does not have a necessary consent, should not be given any de facto advantage. In other words there is no presumption that an existing but unlawful activity has some form of lesser *existing use* advantage. Any proposal must be assessed as if it is a *greenfields* proposal and stand or fall on its own merits when assessed under s104 and Part 2 assuming that, if it is non-complying, it can pass either s104D threshold. Mr von Dadelszen submitted though that the absence of formal complaint from neighbours over the years was very significant, because it leads to an inference that the adverse effects complained of cannot really be all that bad. There is a logic to that but it does not, to our minds, overcome the point that the unauthorised

history of the site cannot be turned to advantage by an applicant. It is also to be borne in mind that the neighbours who now object do so from a position of knowledge of the existing effects, rather than from a fear of the unknown. The proposal also involves a significant increase in at least the effects of structures on the site.

The non-complying thresholds – adverse effects

[19] The first threshold that a non-complying activity may pass, to qualify for consideration under s104, is that its effects on the environment will be minor.

[20] *Traffic safety:* - We are content that, particularly when Kelvin Grove Road is upgraded (which is planned for the near future) and if the driveway entrance was modified, the proposal would not pose any significantly heightened risk to traffic safety.

[21] *Amenity values:* - are defined in s2 RMA as:

> ...those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

We take the relevant environment as being broadly the visual catchment around Kelvin Grove Road from the present urban limits to the intersection with the Bunnythorpe/Ashurst Road. The first thing to be acknowledged is that rural environments are not necessarily, or not even often, visually pristine and invariably quiet. Their landscapes can be heavily modified. Tractors, chainsaws, farm bikes, other machinery and animals can be noisy. They can be smelly too. Structures can be of plain design and unattractive colour. But that said, they do have a distinct ambience and are markedly different from the typical urban environment. For rural residential dwellers, those distinctions are what contributes to their appreciation of *...pleasantness, aesthetic coherence and ...recreational attributes.* While truly rural activities can produce adverse effects on their environments, one has to consider the scale of what can be expected on a small rural or semi-rural block, and the legitimate expectations of amenity of those who choose to live on them.

[22] This environment has rural attributes in good measure. It is relatively open countryside, but with scattered woodlots and with streams and ponds in the lower ground. From much of it there are pleasant vistas to the high hills in the east. Such structures as exist are houses or buildings of relatively modest rural scale, with the exception of the existing Maskill buildings

and a scheduled contractor's establishment a little distance to the south on Stoney Creek Road.

[23] Our site visit observations confirmed the opinions of Mr Aburn and Mr Clive Anstey, the Council's landscape consultant, that what is proposed on the site will be quite out of scale with the site and its surroundings and will create a significant and adverse visual impact upon the surrounding environment. Additionally, the activity on and around the site, with truck, forklifts and other vehicles, although not necessarily obtrusively noisy, will be a steady and jarring presence. The site is now and, if consent is granted, would significantly more be, a *commercial/industrial* site in a rural residential area, with all the cumulative adverse effects that necessarily connotes.

[24] We are not convinced that the proposed mitigation by way of landscape planting would reduce those effects to a level that would be minor. The site is relatively narrow and there is little opportunity for planting in depth along the boundaries without causing shading problems on the site, and on the McQuilkin house which is close to the eastern boundary.

[25] Our conclusion therefore is that the effects of the proposal will be much more than minor and it cannot pass the first threshold.

The non-complying thresholds – objectives and policies

[26] The second available threshold is that the activity is not contrary to the objectives and policies of the relevant plan. The relevant parts of the Palmerston North City District Plan have been operative since November 2000 and the whole plan has been operative since March 2005. The provisions relating to the City's Rural Zone are contained in Section 9. Our attention was drawn in particular to these Objectives and Policies:

Objective 2

To encourage the effective and efficient use and development of the natural and physical resources of the rural area.

That Objective has the following relevant Policies:

2.1 To ensure that the adverse effects of activities in the rural area are avoided, remedied or mitigated such that the amenities of the area and nearby urban areas are maintained.

2.2 To control the actual or potential environmentally adverse effects of activities in the rural area, including the adverse effects of:

- odour;
- noise;

- traffic;
- visual impact.

Objective 3

To enhance the quality and natural character of the rural environment:

That Objective has these relevant Policies:

3.1 To provide for the health and safety of rural dwellers by establishing specific noise limits for the rural area....

3.3 To control the adverse visual effects on the rural environment (including effects on rural dwellers) of activities that disturb the land surface, introduce buildings, remove and/or process natural material.

Objective 3 has the following Explanatory note:

> The rural environment has a range of unique qualities which are valued by rural dwellers and those who view or travel through those areas. It is important that the amenity values and general ambience of the rural environment is protected from any adverse effects on them.

Objective 4

To recognise and enhance the diversity of the rural community.

Policies

4.1 To permit a variety of land-based activities subject to control of their adverse environmental effects.

4.3 To allow a range of other activities where their adverse effects can be avoided or mitigated.

[27] In discussing Rural Industries, Rule 9.9.2 contains the following further Policies:

(a) To avoid, remedy or mitigate adverse visual impacts of any proposed building, structure or storage areas for products and waste, on the surrounding rural environment, and on the landscape values of adjoining areas.

(b) To avoid, remedy or mitigate the effects of noise and other environmental disturbance, on the amenity of the surrounding area.

[28] Mr von Dadelzsen and Ms Barton put some emphasis on Objective 4 and its Policies as support for the proposition that the Rural Zone is something of a multi-use zone with some industrial type activity provided for as a discretionary activity. There is validity in that, but we have come to agree with Mr Aburn that, overall, the clear thrust of the relevant Objectives and Policies is summed up in the Explanatory note to Objective 3 which we have quoted above. It is clear that the Objectives and Policies should be read as an overall package: - see eg *Elderslie Park Ltd v Timaru DC* [1995] NZRMA 433. For the reasons we have traversed in discussing adverse effects in paragraphs [20] to [25] we think that the proposal will bring about a situation that is exactly what the Objectives and Policies seek to avoid. In that sense the proposal not only fails to find support within the Objectives and Policies of the Plan, but is directly *contrary* to them. The proposal cannot pass that threshold either.

[29] Strictly, that is enough to dispose of the appeal but for completeness we should say that, had the proposal been able to pass either threshold, or had been assessed as a discretionary activity, we would not have granted consent under s104 and Part 2. We go on to summarise our reasons for that view.

Section 104 and Part 2

[30] We have already set out our views about actual and potential effects on the environment. There is nothing we can usefully add to that. It appeared common ground that there is nothing of relevance in any policy statement, nor in s6 or s8.

[31] In terms of s7, matters to which we should have particular regard, paras (c) – *The maintenance and enhancement of amenity values*; and (f) – *Maintenance and enhancement of the quality of the environment*...would both count against the proposal.

[32] Section 5 of course contains the purpose of the RMA – sustainable management. We acknowledge that the continued use of this property would assist Mr Maskill and his employees in providing for their economic wellbeing. It is likely to be cheaper to operate from there than it would be from a site in, say, an industrial zone in or around Palmerston North City (but not necessarily in some other part of the region). But in our view the balancing factors of s5(2), particularly para (c), quite outweigh that possible advantage.

[33] Considerable stress was placed on the issue of plan integrity often, but not particularly accurately, described as *precedent effect*. We can deal with that briefly, given the views we have on the substantive issues, under s104(1)(c). The concern expressed by the Council and opposing parties was that if this application was granted there would be an economic incentive for other perhaps similar enterprises to seek to locate in Rural areas. They argue that there is nothing unique, or even unusual, about this site, so it might be hard to refuse consents on the basis that like cases should be treated alike. While there are some strong statements from the Courts that, strictly, there is no true precedent in this field, we understand the concern. We would though see the real thrust of the problem as being plan integrity in the sense of the plan being an effective tool for the management of effects. That effectiveness

would be considerably diminished by allowing the confirmation of an undoubtedly industrial site in the midst of a rural residential area.

Result

[34] For those reasons the decision of the Council is confirmed and the consent, as sought, is declined. As previously mentioned the Council, fairly, conceded that if that was the result there should be a reasonable period allowed for Mr Maskill to relocate the operation. Mr von Dadelszen told us in closing that it would take a minimum of 12 months, if only to dispose of the straw stacks. Given the absence of formal complaint in the past, and the knowledge that the buildings and operations will not be expanded, we think it is reasonable to allow a period of grace. To give ample time, we will allow a consent limited under s123(b) to 18 months from the date of issue of this decision to allow the present activities, on their present scale, to continue. We suggest that the Council and Mr Maskill confer to settle a set of conditions which may need to address noise and night-time activities but otherwise essentially preserving the status quo. We ask that the draft conditions be forwarded to the Court for confirmation by 16 June 2006.

Costs

[35] Costs are reserved.

Dated at Wellington this 18th day of May 2006

For the Court

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

C J Thompson
Environment Judge

Issued: