PALMERSTON NORTH CITY COUNCIL
HEARINGS COMMITTEE

IN THE MATTER of Sections 88, 93, and 104 of the Resource Management Act 1991

and

IN THE MATTER of an application made by WAYNE MASKILL for a land use resource consent in respect of an agricultural and carting contracting business situated at No. 572 Kelvin Grove Road, Palmerston North.

HEARINGS COMMITTEE:	**Councillors Gordon Cruden (Chairperson), Alison Wall, Anne Podd, Lew Findlay and Lynne Pope.**
PLACE OF HEARING:	**Palmerston North City Council Chambers.**
DATE OF HEARING:	**6th and 27th May 2005.**
DATE OF DECISION:	**20th June 2005.**
APPEARANCES:	**Ms Clare Barton for the Applicant.**
	Mr Darren McQuilkin for Mr Bevan McQuilkin in opposition.
	Mr Donald Jones for himself and Mr Garrick Munro in opposition.
	Mr. Matthew Mackay for Council.

DECISION

I. THE APPLICATION:

1. **Mr Wayne Maskill ("the Applicant") on 9th August 2004 applied to the Palmerston North City Council ("the Council") under Section 88 of the Resource Management Act 1991 ("RMA") for a land use resource consent, affecting the property owned by him and occupied by Maskill Contracting Limited, situated at No. 572 Kelvin Grove Road, Palmerston North comprising 3.9257 hectares being Lot 1 on Deposited Plan 79776 and being part of Block VIII of the Kairanga Survey District. ("the property").**

2. Under the District Plan the property is situated within the Rural Zone with legal access to Kelvin Grove Road. The Applicant owns and resides on the property but its principal user for the past 13 years has been the occupation by his company Maskill Contracting Limited. At the date of this application the principal buildings were a dwelling house occupied by the Applicant and other buildings and yards used by Maskill Contracting Limited.

3. The application stated the purpose for which the resource consent was sought:

> *"To provide for the continued operation of the agricultural and carting 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."*

The reference to *"the continued operation"* is a recognition that during the past 13 years the business has operated from the property without a resource consent.

4. The business comprises cartage contracting of several categories of goods. The principal business is carting straw bales, from the Manawatu and Rangitikei and to a lesser extent from Ashburton to Morrinsville in the Waikato. The associated back loading includes machinery and general freight on a daily basis from Auckland to the Waikato. More recently that back loading includes pre-fabricated garages and steel pipes for dairy farm underpasses. The business also transports tractors and agricultural equipment for C.B. Norwood Distributors Ltd to and from its premises in the Industrial Zone situated at No. 886 Tremaine Avenue, Palmerston North. This includes storing some of that machinery at the property for relatively short periods but on occasion up to 7 months. On our first site inspection there was a minimal amount of uncovered stored agricultural machinery. We were informed of those elements of the business 80% could be attributed to the carrying of straw bales and 20% to the Norwood contract.

5. Those percentages need to be reduced to allow for the significant non-agricultural back loading of the truck and trailer units. A further reduction is required to take into account that the property is also used for the battery storage. This storage varied from 2 and 20 tonnes of what were classified as Class 8 corrosive substances. On our second site inspection, at least some of these batteries were stored outside, in shipping containers. The assessment of environmental affects states these hazardous substances will be stored inside the new building on a concrete floor. On the other hand, despite a downscaling of local cartage, some farm produce and fertilizer are still delivered to local farmers. The Applicant by letter dated 6 December 2004 disclosed that the existing shed was also used as an engineering workshop by Frontline Forklifts, carrying on business of repairing fork lifts and associated equipment. This business employed two persons and operated from Monday to Friday between the hours of 8 am and 5 pm. On our inspections we noticed a number of forklifts in the shed. Mr MacKay informed us that Council accepted the Applicant's indication, that the forklift business would on 30 August 2005 cease on-site operations.

6. The existing business occupies 328 square metres comprising an office of 48 square metres and a storage and equipment building of 280 square metres. There is also space for 16 unmarked car parks. The proposed new buildings and outside

screened storage area, will increase that total area to 1,610 square metres. In addition, at certain periods large quantities of straw bales 5 to 6 metres high, are stacked towards the rear of the property beyond the areas of hard standing.

7. The property is the base for heavy vehicles owned by Maskill Contracting Limited. Before 2000 these vehicles comprised 4 truck and trailer units, 2 round town or local trucks and 7 agricultural tractors. In 2000 the agricultural side of the business was scaled back. The business now includes 6 truck and trailer units, 1 round town or local truck and 1 tractor. The tractor is used for loading and unloading agricultural machinery and associated farm work.

II. THE LAW:

8. The application and its related historical facts, raised a number of at times complex legal issues, which it is now appropriate to deal with before going on to make factual findings.

The nature of the resource consent

9. The Applicant has expressly applied for a land use resource consent classified in the expanded terminology of our District Plan, as a "Discretionary (Unrestricted)" activity, corresponding to the statutory equivalent of a "Discretionary" activity under the RMA. It is common ground that the property is within the Rural Zone but not part of an overlayed Rural-Residential Area.

10. The activity provisions of the Rural Zone are included in Section 9 of the District Plan. The Applicant accepts the business is not a permitted, controlled or discretionary (restricted) activity. The application, for a rather more onerous Discretionary (Unrestricted) activity consent, is based on the provisions of Rule 9.9.2 which states that "Rural Industries" fall within Discretionary Activities (Unrestricted). The Applicant principally relies on the submission that the business is a "Rural Industry" as defined in Section 4 of the District Plan, enabling the application to proceed as a Discretionary Activity (Unrestricted).

The effect of the property being unlawfully used for 13 years without a resource consent

11. It was undisputed that for the past 13 years the business has been carried on at the property and is not a permitted activity under the District Plan. We were informed that until recently the Applicant was unaware that the past and present user was unlawful. Council was apparently unaware of the nature of the business and had taken no enforcement or abatement steps under the RMA or otherwise.

12. During the Applicant's evidence and supporting submissions, there was reference to the contracting business having operated from the site for a number of years; that proposed increased floor areas will allow loading and unloading to be better screened; the potential amenity effects of the activity need to be seen in the context of existing use of the site; and the existing buildings and facilities define the amenity for the site and surrounding properties. Council officers also referred to the long existing agricultural and contracting business and that the application also sought expanded facilities.

13. At least some of that evidence raised the issue, whether we were allowed to take into account the past and present unpermitted activity, as a favourable factual base and then primarily only be concerned with proposed additions and expansion. We reject that approach on the ground that clearly, as a matter of principle, the Applicant cannot rely upon past unlawful and unpermitted operations, as the lawful or factual base for assessing the new proposed expansion. We similarly reject the submission that the potential amenity effects must be seen in the context of the existing factual use. We more strongly reject the submission that the existing buildings and facilities – to the extent they are unpermitted – define the amenity of the site and surrounding properties. They do not.

14. In summary, the Applicant advanced in support of the application, prior unlawful acts. We must not only give no weight to those acts nor may we take into account, in his favour, the risk of suffering financial loss if the application were declined. The Applicant's action carrying on for 13 years an unlawful business, was wholly at his own risk.

15. On the issue of retrospectivity, the Applicant referred to *Fiordland Travel Ltd v Queenstown Lakes District Council* W106/95. The Environment Court, dealing with unusual facts, considered a use carried on without a resource consent and reversed the refusal to grant a consent. The Council had requested the applicant to apply for but later refused a non-complying consent for certain flag poles and flags at the travel company's premises. On appeal the Environment Court held that the flag poles and flags were permitted within the interpretation of a building and complied with the District Plan bulk and location requirements. In allowing the appeal, the Court observed that the effect of the flag poles and flags were not only minor but minuscule. The case is easily distinguishable. Strictly no consent was required. Here a consent is required. There the effect of the flagpoles and poles were minuscule. Here the environmental impact of non-residential buildings together with related works and facilities is not minuscule.

16. Under the permitted baseline granted but unimplemented consents, are not necessarily a component of the existing environment. Although not relevant to this application, earlier conflicting case law has been resolved by Arrigato Investments Ltd v Auckland Regional Council [2002] 1 NZLR 323, holding that what is permitted as of right by a plan is deemed to be part of the permitted relevant environment. The Court also held beyond that the relevant environment is essentially a factual matter. Our adoption of that robust approach, reinforces our factual finding, that in assessing the environment for this application, we should not take into account past and existing unlawful use. If the permitted baseline is applied it is limited to farming, the house and associated farm buildings.

17. Council later adopted a similar and more accurate position, accepting that any permitted base line was limited to the permitted Rural Zone rights to erect one residence and farm buildings. We record that the former common law obligation to apply the permitted base line has now under Section 104(2) been replaced by a statutory discretion.

18. We propose for these reasons to proceed on the basis that the present application is for the whole of the present and proposed business but as a new venture. So far

as the existing environment and other matters are concerned, we will not take into account in favour of the application, any element of the past 13 years during which it may have been conducted for activities unauthorised under the District Plan.

The extent to which the interfacing Rural-Residential Area is to be taken into account

19. **The Applicant submitted we were limited to considering adverse effects to the surrounding Rural Zone land but could not take into account any different characteristics of Rural-Residential Areas. Council's similar submission also referred to the Rural-Residential Areas not being a District Plan Zone but only "areas" recognised in the different Subdivision Section 7 of the District Plan.**

20. **We reject both submissions. First, although Rural-Residential Areas do not have the status of a zone under the District Plan, the provisions for Rural-Residential Areas, with minimum lot sizes of 1 to 4 hectares, are similar to provisions for rural zoned land. Because of these practical similarities, it may be unsurprising that not only lay persons but lawyers, planners and developers, often refer, if inaccurately, to the Rural-Residential Zone. They may be in good company for the same error appears in the District Plan, Section 7, page 7-38, where Council's own 'Note to Plan Users' includes an 'Explanation' which opens with the words *"The Rural-Residential zones cover much of the elevated land... "* The reality is that professional and laypersons and even Council, not uncommonly refer to those areas as being in the Rural-Residential Zone. We approach such Areas on the basis, that while they do not constitute a zone, they share many of the same characteristics. Those characteristics, when appropriate, may be taken into account when assessing adverse environmental and other effects. Rural-Residential areas are located within the Rural Zone and on that alternative basis must be taken into account.**

21. **Secondly, the express provisions of Rule 9.9.2 enables the adverse effects generated in a Rural Zone also to be assessed, where they affect relevant Rural-Residential Areas. The reference in R.9.9.2(a) to adverse effects on the *"surrounding rural environment", "on the landscape values of adjoining areas"* and *"on the amenity of the surrounding area"*, requires those effects to be taken into account. Such effects include the affect on the interfacing Rural-Residential Areas. On this application they at least include immediate properties on the opposite side of Kelvin Grove Road as shown on District Plan Map 8. This Area commences on the westerly side of Kelvin Grove Road and extends so far as the City boundary.**

Whether the longer night time hours evidence allows the application to be amended

22. **Whether a variation to an application supported by evidence amounts to an amendment that may be allowed, largely depends on the facts. At one extreme if an Applicant seeks to make material changes to the application, such an amendment is unlikely to be allowed. For example, where the amendment would affect the notification process and by not being made by that stage, have prevented potential objectors, filing submissions in opposition. At the other extreme, a consent condition not anticipated by submitters but arising from the evidence, would not amount to an amendment. For example, Mr Glenn Connelly, Council Roading Engineer, recommended that the existing access to Kelvin Grove be moved 4 ½ metres. If we were to grant the application with that condition, it**

would not amount to an amendment of the application but represent part of our post-evidence quasi-judicial decision-making powers.

23. The application form did not include any particulars of business operating hours. However, the accompanying lodged report, including a Section 88(6)(b) assessment of environmental effects, did deal with hours of operation. The proposed activities would occur from 7 am to 7 pm up to seven days a week and on occasion trucks may enter and leave the site up to 10 pm. These hours were relevant to Rule 9.12.1 performance conditions for noise. Sound emissions from the Applicant's activity must not exceed from 7am to 7 pm 50 dBA L_{10} and from 10pm to 7am 40dBA$_{10}$ and 70 dBA L_{max}. Mr Nigel Lloyd, Council's noise expert, carried out an on-site noise assessment and subsequent analysis in respect of those hours. He was satisfied, subject to mitigating measures, that Section 9 limits could be met between 7am to 10pm. As to occasional vehicle movements between 10pm and 7am lasting no more than 1 to 2 minutes, he further reviewed his assessment, after being told that 3 or 4 trucks each week would enter and park during night time hours together with a truck also leaving at 4 am from a location with limited screening. He considered there was considerable potential for night time limits to be exceeded and recommended that no trucks be allowed to operate on the property between the hours of 10pm to 7am. Mr Malcolm Hunt, the Applicant's noise expert, recognised that day time noise limits could not be met from the western boundary but could in relation to the more distant western house. We accept Mr Lloyd's opinion that the proper measuring location was the boundary. Occasional night time operations would be limited to entering and parking or leaving the property. They would not include any loading or unloading. He proposed night mitigation measures to minimise noise and saw no reason for those operations to create adverse impacts to any neighbouring house. An offered mitigating condition was that each night only one heavy vehicle, may move on or off-site between 10pm and 7am and be limited to a night time parking area.

24. Mr Maskell's oral evidence of increased night time operations, included trucks leaving or entering the property 3 or 4 times a week. Later Mr Lloyd was concerned at this increased night time activity. He became less comfortable with his written report when he had been unable to assess on site, the impact of that night time activity, relying on Mr Hunt's data. Council submitted that the application did not include night time operations and recommended that a condition expressly prohibiting operations between 10pm to 7am be imposed.

25. In respect of initially proposed operating hours *"... between 7am and 7pm up to seven days a week and on occasion trucks may enter and leave the site up to 10 pm"*, Ms Barton in reply submitted that 3 to 4 night truck movements were only occasional. We were referred to Mr Maskill's evidence that in many weeks none or only 1 to 2 night-time movements occured. Ms Barton stated that no express application had been to amend hours but it had arisen by implication. We were invited by the Applicant to impose a limited night time operations condition, in the terms advanced by Mr Hunt.

26. The circumstances where we may grant an amendment are extensively covered by case law. The test is whether an amendment made after notification is such that it was plausible that any person who did not lodge a submission would have done so

if the application information had incorporated the amendment – Haslam v Selwyn District Council [1993] 2 NZRMA 628. We were also assisted by the recent appellate judgments, we referred to at the hearing, of Shell New Zealand v BP New Zealand Ltd EC/W941, 929/01, HC CIV2003-485-476, CA57/05. BP owned a large area of vacant land in Mana with road frontage to State Highway 1. It was granted a resource consent to construct and operate a service station on part of that land. Shell appealed to the Environment Court. During the hearing BP, in an attempt to meet screening and other amenity objections, offered to landscape the adjoining land and accept the imposition of a consent condition to that effect. Shell appealed unsuccessfully to the High Court. Later the Court of Appeal refused to grant further leave to appeal. Shell submitted that the adjoining land was not part of the original application; it enlarged the proposed area by more than half; the amendment not being notified had deprived the public of the opportunity to object. The grounds for the High Court and Court of Appeal dismissing the appeals were that (1) the amendment did not alter the applied for activity but was in mitigation of any adverse effects of that activity; (2) the offered landscaping on the adjoining land was a permitted activity; (3) there would have been no other parties if they had known of the amended contents, at the notification stage, who would have objected.

27. In the present case although the amendment sought is limited to the application land, it extends the operation from day time to night time hours. More importantly, if the amendment were allowed, it would not be in mitigation of any adverse effects. To the contrary the night time operations would materially change the nature of the original application. They would significantly aggravate actual and potential adverse effects. The amendment would not involve a permitted activity but at least a discretionary activity. Finally, if the amendment had been notified, it would not merely be plausible but highly likely, that Mr Campbell being the owner of the property most affected by the amendment, would have objected. For all these reasons, we decline to expand or consider the application on the basis of night time operating hours. If the application is granted, it would be appropriate to impose a condition prohibiting night-time operations.

Whether the discretionary application may be changed to a non-complying application

28. The Applicant submitted that if the application should have been for a non-complying activity, we had jurisdiction to grant consent for a non-complying activity. We do not have that jurisdiction. Among the several jurisdictional obstacles, is that an application for a non-complying activity necessarily involves a preliminary decision on notification. Generally applications for a non-complying activity require full notification. This typically leads to persons objecting, who might not object to a discretionary application particularly where a potential objector is excluded by limited notification .

Limited notification

29. The recent limited notification provisions have brought advantages but also a few difficulties. The former procedure was clear and simple. Either an application was non-notified if all adversely affected persons gave written approval, otherwise it was publicly notified. Although a similar adversely affected person issue has

always existed at a non-notification stage, for limited notifications it will often be a more difficult issue. Council officers under delegated powers now have the additional responsibility to determine for limited notification purposes, persons to be privately notified and thereby solely entitled to appear at a public hearing.

30. In this limited notification application, officers notified Mr McQuilkin the easterly adjoining neighbour, Messrs Jones and Munro, the northerly neighbours on the opposite side of Kelvin Grove Road but not Mr Campbell, the owner of the westerly adjoining property. Although Mr Campbell's house was more distant from the Applicant's property than the McQuilkin house, the westerly property would have been much more affected by night time operations.

31. During the hearing the noise effects beyond the western boundary were disputed. As Mr Campbell had not given written approval, we are entitled to consider any adverse effects affecting his property. But because of the particular limited notification we did not have the benefit of his appearance or evidence.

32. At the hearing Council properly indicated that if at the notification stage, it had been aware of the new facts adduced at the hearing, Mr Campbell would have been notified. At the hearing no objection was made to the notification process nor was it open to us to rule thereon or could that issue have been subject to appeal to the Environment Court. This is because an adversely affected person not so classified by Council, who wishes to pursue that issue, is obliged to apply by way of judicial review to the High Court – Worldwide Leisure Ltd v Symphony Group Ltd [1995] NZAR 177; Videbeck v Auckland City Council HC Auckkand M1053–SW/02, [2002] BRM Gazette 157.

Whether the business is a "Rural Industry"

33. The Applicant's discretionary activity application relies the business carried on at the property being a "Rural Industry." Council officers reports also proceeded on that basis. At least on the factual position since 2000, it is arguable that it was line haul or long haul cartage business, rather than a rural contracting business. A finding in those terms would be assisted by the 2000 scaling back of the agricultural side and concentrating on the long haul cartage side of the business. In 2000, six of the seven tractors and one of the two local delivery trucks were sold. After that date the long haul trucks and trailers, significantly increased from four to six units.

34. The Section 4 definitions of District Plan terms, include "Rural Industry." To the extent that Section 4 provides its own District Plan dictionary, it those definitions which apply and prevail over any more common or natural meanings. Those decisive provisions define "Rural Industry" in these terms:

> *" 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."*

"Rural Industry" is expressly included in Rule 9.9.2 as a Discretionary Activity (Unrestricted). If the business is a "Rural Industry" the application has been brought for the proper activity. If not, then it could only properly be brought for a non-complying activity. In that event we have already held we have no power to change the application to one for a non-complying activity.

35. A major area of dispute was the Applicant's contention the business was a rural industry while objectors submitted it was a line haul contracting business. The Applicant estimated that about 80% of the business was carrying straw and 20% tractors and agricultural machinery. Those percentages need to be a little reduced because part of the business was storing batteries. We confirm that Mr. Maskill stated that in 2000 *"we scaled the agricultural side of the operation back and concentrated on the cartage side of things."* Ms Barton in reply acknowledged that the cartage of tractors and farm machinery did not amount to a rural industry. We make a similar inference in respect of the storage of batteries.

36. Mr Jones submitted the business no longer falls within the definition of a "Rural Industry for four main reasons – (1) the land and buildings will not primarily be used for the processing of agricultural goods and services; (2) the use of the facility has changed from local rural servicing and no longer is a local hay contracting business but has become a line haul transport depot; (3) the site is not primarily used for servicing the local rural area; (4) the business does not require to be located in a rural area. Mr Jones also called Mr Philip Pirie, Registered Surveyor, who has locally been in private practice for 23 years, was responsible for the 1990 subdivision of the property and lives in the nearby rural zoned Hiwinui area. In addition to roading evidence, he asserted that the present business was not a rural industry but a line haul cartage business. He contrasted that business to what he described as rural contractors giving as examples, Pratt Harvesting, Andy Dahl Contracting and Farmers Transport, servicing the needs of local farmers.

37. We find that whether the business is a rural industry, depends on the nature of the baled straw cartage operations. We accept many of the bales collected in Ashburton, Cheltenham and Marton, may be taken direct to Morrinsvile but some are loaded, unloaded and stored, if for short periods, at the Applicant's property.

38. Against that factual background, we turn to the Section 4 definition, which consists of one long sentence divided by a semi-colon. The first part of that sentence requires that the property is used for an 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."* Ms Barton submitted that the loading, unloading and storing of bales was such a process. The definition first restrictively requires that one of two such industries *"processes agricultural goods."* The Oxford English Dictionary defines *"process"* as *"a particular method of operation in any manufacture."* Another dictionary definition is *"A course or method of operations in the production of something."* The baled straw is produced, cut and baled on other properties. Subsequent loading, unloading and storing of some bales on the Applicant's property, is a post-process or post-production operation. We reject the submission that those operations are an agricultural *"process."*

39. We next consider whether the industry is *"better located"* in the rural area because of the need to achieve a separation from other activities. None of the straw is grown or processed on the property. On grounds of cost or convenience it is not a better location. It is not sufficient for the Applicant to establish that his property is a suitable location or equal to non-rural locations. The burden on the Applicant is to prove it's a *"better"* location than the alternatives. On this issue Council referred us generally but not specifically to the provisions of the Industrial Zone set out in Section 12 of the District Plan. We see no restrictions in that Zone more onerous than those that apply in the Rural Zone for a non-rural industry activity. Outdoor storage is expressly included as a permitted activity subject to conditions while the rules for noise are more liberal. If the industry included processing or storing farm effluent or related substances and odours, or parking sheep or cattle trucks, it might be better located in the Rural Zone. The business appears to comply with the requirements of the Industrial Zone for either a permitted or restricted activity. The loading, unloading and storage of clean, freshly cut straw bales would not be an Industrial Zone non-complying use. We find that the Applicant's industry would not *"better"* be located in the Rural Zone.

40. No doubt for these reasons the Applicant placed more reliance and in the case of Council exclusive reliance, on that part of the definition after the semi-colon. Those latter words make the definition more difficult to construe. They include land and buildings *"used by rural contactors."* Both the Applicant and Council treated those post-semi colon words as separate stand alone categories. Council submitted that the use of the single final word *"transport"* supported the business being that of a rural contractor. If that were so, it would on the evidence reinforced by the Applicant's concession, be limited to straw cartage operations but not include non-agricultural back loading. As to the non-farming or agricultural forklift business, we adopt Council's approach that this still operating business will cease on 30 August 2005. On that assumption we will not include it as a relevant present user factor.

41. Mr Jones submitted that at least by implication, a rural contractor required to be a local and not a line haul cartage contractor. This raises a major issue. We record Section 4 does not expressly limit rural contractors to "local" contractors. If the Section 4 definition categories had been divided into several separate sentences, its construction would have been less difficult. The Applicant and Council relied on the final words being wider than the earlier words. The e*judem generis* canon of interpretation, potentially may provide some assistance. In summary where general words follow an enumeration of particulars, the latter are limited to the same general kind as the earlier particulars. The canon is not decisive but if applied it would restrict the latter otherwise apparently wide references to rural contractors and transport to those latter particular matters. Accordingly, *"transport"* would not standalone but be limited to transport for processed agricultural goods or for an industry better located in the rural area. Under that approach the evidence would not establish that the business is a rural industry.

42. Where a provision does not have a clear and plain meaning, the proper approach is generally to apply a purposive construction. This requires a determination, to be ascertained from the scheme of the District Plan and other approved sources, of

the overall purpose of the provision. The primary District Plan provisions for this purpose are those relating to the Rural Zone contained in Section 9.

43. Section 9.2 dealing with themes, refers to a range of non-agricultural uses within the *"rural area"* and the need to provide for new activities, which make use of rural resources, compatible with amenity values of the *"rural area."* The word "area" is not defined in the District Plan but impliedly refers to specific lesser areas of rural land than the whole Rural Zone. Although the word "local" is not used, the themes, objectives and policies of the District Plan are necessarily limited to land within the City. To that extent Section 9 deals with what may be termed local rural areas. Those areas include many rural localities within the Rural Zone. To that extent they may broadly be described as local activities. Some of those local activities include rural cartage and transport businesses. Those businesses may, of course, also lawfully carry on business not only beyond the Rural Zone but beyond the city boundaries.

44. Adopting a purposive approach, we are satisfied the present business carting over long distances, pre-processed straw bales, using large truck and trailer units, is arguably a line haul contracting business. We recognise that the straw bales are a form of agricultural produce but that of itself does not establish that the business is a "Rural Industry."

45. The parties conflicting arguments proceeded on the assumption that rural contracting and line haul transport operations were mutually exclusive. When we come to make factual findings, we may need to consider the third alternative of whether a line haul business carting straw bales could also fall within the definition of a "Rural Industry.

46. Finally, both the Applicant and Council recognised, that if the business was not a rural industry, there was no jurisdiction to grant this application for a discretionary activity. We confirm that we have no power to amend the application and grant consent for a non-complying activity.

<u>The District Plan</u>

47. In view of the disputed activity evidence, it is particularly necessary to refer to relevant provisions of the Rural Zone. This is because even if the straw cartage business is a rural industry, that does not of itself establish that the application falls within the terms of Discretionary Activity (Unrestricted). The latter activity provisions form part of Rule 9.9. Turning first to Objective 2, its Explanation states:

> ***"It is important that rural land continues to be used in a way which ensures that the productive potential of the land is maintained in a sustainable manner. However, the wide range of activities which occur in the rural area can produce a range of adverse effects which must be addressed if there are not to be negative effects on the rural environment."***

This Objective is *"To encourage the effective and efficient use and development of the natural and physical resources of the rural area."* Policy 2.2 is *" To ensure that the adverse effects of activities are avoided, remedied or mitigated such that the amenities*

of the area and nearby urban areas are maintained." This policy is in similar terms to other Section 9 provisions of the obligation to consider, where appropriate, amenities of other nearby zones. Certainly it requires us to consider the effect of the interfacing overlayed Rural-Residential Areas, which in any event are always within a Rural Zone. Policy 2.4 is *"To encourage the maintenance of sustainable land-uses in the area."* A large area of the property is not farmed for sustainable land uses.

48. Objective 3 is *"To enhance the quality and natural character of the Rural Environment."* Policy 3.2 which is *"To encourage the adoption of sustainable land land use practices."* A large part of the property is not used for such practices. The Objective 3 policies include Policy 2.1 which is *"To avoid remedy or mitigate the adverse effects of activities in land of high productive capability."* The Applicant did not adduce any expert evidence on the quality of the land but from our inspections and recent decision of nearby Henderson's Line land, the property probably has a higher rather than a lower productivity capacity. Policy 2.3 is *"To control the actual or potential environmentally adverse effects of activities in the rural area... "* including the adverse effects of odour, noise, traffic and visual impact. These are expressly relevant adverse impacts, on which we received substantial expert and other evidence during the hearing.

49. Rule 9.9.2, specifically includes rural industries and contains these further policies, requiring various effects be avoided, remedied or mitigated, namely *(a) ... adverse effects of any proposed building, structure or storage area for products ... on the surrounding rural environment and on the landscape values of adjoining areas."* The references to *"rural environment"* and *"adjoining areas"* are wide enough to include the interfacing Rural–Residential Area; *(b).. the effects of noise and other environmental disturbance, on the amenity of the surrounding area."*; *(d) ... adverse effects on the safe and efficient operation of the roading network from the traffic movements generated by activities."*

50. The Applicant relied on the provisions of Rule 9.9.2, which includes rural Industries and contains this helpful *"Explanation"*:

> *"All industrial activities in the rural area, because of lack of services, have the potential to create adverse effects on the rural environment. Their usually one-off" location also increases their visual impact as does outdoor storage of goods and waste. A Discretionary Activity consent process gives Council the opportunity to assess any adverse effects and to ensure that those effects are avoided remedied or mitigated... "*

51. We have applied the District Plan to our findings of fact, in accordance with Rural Zone objectives and policies including Rule 9.9.2(a), (b), (c), (d) and (3).

RMA

52. We record we will consider the application in accordance with the Part 2 purpose and principles set out in Sections 5, 6, 7 and 8. When we have regard to the provisions of Section 104, subject to Part 2 purpose and principles, we will take into account any actual and potential effects on the environment; the regional

policy statement; our District Plan; and any other proper matter our Committee considers relevant and reasonably necessary to determine the application.

III. REASONS

Hours of operation

53. We accept that we may not consider evidence on night time operations nor if if we were to grant the application, allow such operations. To the contrary in that event, we would impose an express condition prohibiting night time operations.

Discretionary(Unrestricted) and Non-complying activities

54. If the evidence establishes that the proper District Plan category is a non-complying activity, we confirm that we have no power at this hearing to amend the application to a non-complying activity.

Rural industry

55. Whether the straw cartage business is a rural industry was subject to sharply conflicting views. When on the first day of the hearing that issue and unlawful past use became relevant, we requested the parties to consider those matters during the adjournment and make submissions including citing case law. When the hearing resumed, unfortunately the parties had been unable to find any relevant case law, or materially expand their earlier submissions. In the circumstances and in view of our next finding, we do not propose to rule on whether the business is a rural industry. We are content to leave that issue until it may arise on any future application.

The effect on the relevant environment

56. Section 2 of the RMA defines "environment" as including, inter alia, "... (b) all natural and physical resources; and (c) Amenity values; and (d) The social, economic, aesthetic and cultural conditions which are affected by those matters." Amenity values are defined 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."* The District Plan Rural Zone Objective 3 states that a purpose of the Zone is *"To enhance the quality and natural character of the rural environment."* Policy 3.3 declares it is *"To control the adverse visual effects on the rural environment ... of activities that disturb the land surface, introduce buildings... "*

57. Both the Applicant and Council adduced evidence and made submissions on what they defined as the environment. We are unable to accept substantial parts of that evidence and those submissions including:

(a) We confirm that we reject the Applicant's submissions (1) that the potential amenity effects must be seen in the context of the existing factual use; and (2) to an extent the existing operation and existing site buildings, in

large part already define the characteristics of the site and the impact on the surrounding environment. Both those submissions would wrongly require us to give weight, in favour of the Applicant, to past and present unlawful use.

(b) Both the Applicant and Council initially submitted that when considering the effect on the environment we may only take into account that effect on the Rural Zone environment. Later the Applicant conceded this may be extended to the surrounding area. Under the District Plan the Rural Zone includes the Rural-Residential Area overlay, so the environmental effects on that area of the Rural Zone must also be taken into account. Rule 9.9.2(b)requiring certain adverse effects to be avoided, remedied or mitigated, extends particularly to residentially used sites. This includes all residentially used sites. These include non-Residential Zone sites such as in Rural-Residential Areas. These District Plan provisions are fatal to any attempt to limit the relevant environment to the Rural Zone while excluding the immediately interfacing Rural-Residential Area. We find that the effect on that part of Rural-Residential Area, does form part of the relevant environment. It must therefore be considered including under Rule 9.9.2(a).

(c) The present non-residential buildings on the property comprise 328 square metres. The proposed new buildings, some up to a height of 8 ½ metres, would comprise a further 1,520 square metres made up of 920 square metres for the new workshop and storage areas and 690 square metres for the screened storage areas. There is also a substantial house erected on the property. The present and proposed non-residential building heights of 8 ½ metres are just below the Rule 9.6.5(c) maximum height of 9 metres. There are no performance conditions for the Rural Zone as to the maximum size of building areas.

(d) Rural Zone Rule 9.9.1(a) requires that any building or structure is to be of a scale and intensity in keeping with the character, amenity and ambience of the existing rural environment. We do not need to rely on that analogy. Because we may always enquire into whether the scale of such large new buildings or related facilities are "credible" or "plausible" for a rural zoned property. This was in part considered in Arrigato.

(e) The 1990 subdivision creating the present Lot 1 Deposited Plan 79776, reduced the property to a relatively small 3.925.7 hectares. When considering scale and intensity, we must add to the earlier calculated 1,520 square metres a house of say 500 square metres, increasing the total to 2020 square metres. In addition there are large areas of hard standing used for parking of the 6 truck and trailer units, the local truck, tractor, 19 car parks and the heavy vehicle driveway. On our site visits, there were also large stacks straw bales of up to 5 or 6 metres in height, stored beyond the areas for vehicles. This straw not produced or used on the property further reduced the area left for agricultural or farming purposes. If Mr Connelly's recommendation to move the driveway access 4 ½ metres to the east were followed, that would further reduce farm grazing while the

nearby land includes a pond or dam. We were not supplied with the size of hard standing and related areas but the Site Layout Plan provides a reasonably accurate indication. On that basis and assisted by our site visits, we find that at least one-quarter to one-third of the property, would not be available for grazing or other similar farming purposes.

(f) We find that for such a relatively small Rural Zone property, the large non-residential areas including the buildings, hard standing, storage, driveway and other areas, cumulatively amount to an excessive scale and intensity, in relation to the surrounding environment. In alternative planning terminology, that scale and intensity in respect of the nature of the relevant local rural environment, are neither credible nor plausible. For all these reasons, we reject Ms Barton's contention that the *"The proposed works are in keeping with the existing scale and character of rural buildings and activities."*

(g) The Applicant has been largely unsuccessful in establishing planting along the eastern boundary to screen the property closer to McQuilkin's house. The major established plantings were limited to the common boundary of the property with Mr Campbell's westerly property.

(h) Mr John Brinkley, B.Hort.Sc(Massey) M.L.A (Edinburgh), MLI (UK), RANZILA, Council Senior Landscape Architect, identified the property as being at the southern end of the Kelvin Road "Five Dips" and the surrounding land as a rolling pastoral landscape. He considered the existing buildings were of an appropriate scale, blended in with the landscape, while most of the boundaries were effectively screened by plantings, with the exception of the boundary to the McQuilkin house. Unlike the McQuilkin property, he considered that there would only be a minor impact on the Jones and Munro's property. Mr Brinkley proposed further plantings, in accordance with an approved Landscaping Plan, effectively to mitigate adverse effects. However, the screening of the Jones and Munro property relied upon, was not provided by the Applicant but the result of those owners own planting.

(i) Mr Brinkley was critical of the proposed development. The new structures would be 1.6 metres higher. The bulk of the those structures, would have very little similarity to the existing workshop. They would not integrate with the existing buildings. Their two open ends would not disguise the bulk of the combined structures particularly from the McQuilkin property. We accept Mr Brinkley's conclusion, that the proposed structures will be out of scale and character with the existing site and will potentially create a significant impact. In his opinion, the McQuilkin property, will potentially suffer more than minor visual intrusion. However, if his mitigation measures were adopted, the overall visual effects of the new structures may be no more than minor.

(j) We generally share Mr Brinkley's conclusions except for the Jones and Munro property. He relies upon its own road frontage plantings, to provide and maintain the only north-westerly satisfactory screen. That opinion is

open to criticism. First, the existing trees are not on the Applicant's property, so consent conditions cannot be imposed to preserve those plantings. Secondly, it is speculative to find that the visual impact of the Applicant's property would have no more than a minor impact, on the Jones and Munro subdivision. Thirdly, his admitted subjective opinion, that smaller lifestyle blocks would be more degrading than the proposed development, also failed to take into account that any such subdivisions complying with Rule 7.16.1.2, would be a controlled activity, which Council could not refuse. To that extent he erred in taking that subjective opinion into account.

(k) We confirm that as no condition can be imposed requiring Messr Jones and Munro to retain their plantings, Mr Brinkley should have considered the potential visual impact, if they were not retained. Our site inspections suggested that the adverse effects would be much larger. The Jones Munro property and other nearby Rural-Residential properties, are on higher ground looking down to the lower located Applicant's property. This renders any screening by the Applicant far more difficult adequately to avoid, remedy or mitigate adverse visual impact effects. The Applicant failed to advance any such proposals.

59. Our regard for actual and potential effects on the environment, include roading matters under Rule 9.9.2(d), which includes this further relevant policy:

> ***"To avoid, remedy or mitigate the adverse effects on the safe and efficient operation of the roading network from the traffic movements generated by activities."***

On roading matters, three expert witnesses gave detailed evidence:

(a) Mr Glenn Connelly, B.E (Civil), MIPENZ, Council Senior Transportation Engineer, stated that the access minium District Plan sight distances for collector roads with a speed limit of 100 kph were 295 metres. The operating speed at this point of Kelvin Grove Road, which he treated as 6 metres wide, was 99 kph. The sight distances westerly towards Palmerston were 180-185 metres and easterly towards Ashhurst 225-230 metres but he considered those distances adequate. He stated the existing access is significantly deficient. Heavy vehicles exiting the property have to cross double-yellow lines to the wrong side of the road, before completing left-hand turning movements. On one occasion a truck demolished Jones and Munro's letter box on the opposite side of the road. The crossing as an immediate but only interim measure, should be upgraded in accordance with Transit New Zealand Planning and Policy Manual Diagram E – 'Private Access – Regular Use by Heavy Vehicles. This with additional length in the road widening opposite the entrance, would allow through traffic to pass vehicles turning right into the entrance. Increased vehicle volumes were expected with the further potential for intensification of the Rural-Residential Area. Council has recognised the need to upgrade Kelvin Grove with investigation and

design to be carried out in 2005/2006 and construction, subject to funding during 2006/2008. However, he stated it was possible the work would not be carried out for another 8 to 10 years. Mr Connelly concluded that if the recommended mitigation measures were undertaken, safety and other adverse roading effects would be no more than minor.

(b) Mr Wayne King, REA(Civil), CMILT and a MWH Ltd Senior Project Engineer gave evidence for the Applicant. He contested Mr Connelly's recommendations relating to road access, safety, programming and funding. He questioned any Applicant funding obligation. He measured the seal road having a lesser width of 5.8 metres. Diagram E based on a width of 6 metres, requires a further seal of 1 to 2 metres. If those standards were imposed, the Applicant would have to construct that portion of the road, to a greater width than the present carriageway. The consequential affect of higher speeds closer to the Jones and Munro entrance, means that solution is likely to create a more hazardous situation. Depending on programming, the upgrading, including a changed vertical alignment, may have a life of less than 3 years.

(c) Messrs Jones and Munro called Mr Pirie on roading matters. He pointed out that Kelvin Grove Road, as a collector road, requires a sealed width of 7 metres and 1 metre shoulders. The actual road widths are 5.5 to 5.7 metres with at the access point only 5.5 metres. The current access without any legal easement, encroached over Mr Campbell's property. The entrance is opposite two other and a planned third entrance. The E Diagram was designed for milk tanker and occasional stock trucks and not for regular high truck and trailer use. Mr Pirie asserted there were serious factual and technical errors in Messrs Connelly and King's reports. Mr Connelly later impliedly recognised part of the entrance encroached on private land, when he varied his recommendation, requesting that the entrance be moved 4 ½ metres to the east. This would also increase westerly sight distances.

60. We consider the proposed interim measures are essential. We remain concerned at the date of implementation. If the Council upgrade were delayed to 2010, we would not consider that interim proposal, sufficient to mitigate the road safety and other current dangers. On the evidence, the timing remains unclear. We can at best, only reach the conclusion, we hope not too optimistically, that the upgrade will be completed before 2010.

61. The remaining area of potential environmentally adverse effects related to noise. Expert noise evidence, was given by Mr Malcolm Hunt of Malcolm Hunt of Malcolm Hunt Associates, Noise and Environmental Consultants for the Applicant, while Council called Mr. Nigel Lloyd, Director of Acoustic Services of Acousafe Noise Control Solutions.

62. We confirm that evidence proposed longer night time hours between 10 pm to 7 am. General noise requirements are to be found in Sections 16 and 17 of the RMA and in the Rural Zone provisions of the District Plan. Rule 9.12.1, sets out noise controls during the day from 7am to 10pm and more stringent night time

restrictions from 10pm to 7am. We have already held that the Applicant can not during the hearing amend the application to include those increased night time hours. The major hearing dispute was over night time hours. As to day time hours, Mr Hunt considered if his recommended conditions were imposed, the potential noise effects would be no more than minor. Mr Lloyd after recommending that no trucks be allowed to operate between the hours of 10pm and 7 am, suggested a separate condition for day time hours. He was satisfied if those conditions were imposed day time noise, would be adequately avoided or mitigated. We are satisfied that those recommended noise conditions would adequately avoid or mitigate any adverse noise effects rendering them minor.

V. RMA

63. Our primary Section 104 task is to have regard to any actual and potential effects on the environment of allowing the activity. Section 104(1)(c) concludes by giving us the very wide discretion to have regard to *"any other matter the consent authority considers relevant and reasonably necessary to determine the application."* . We have considered the evidence and submissions, against the background of the Part II purpose and principles of the RMA and its other relevant provisions together with the relevant sections of the Regional Policy Statement and the District Plan.

VI. SUMMARY:

64. We confirm that having heard the evidence and submissions together with the added benefit of two site inspections, we arrived at the foregoing findings of fact. These have resulted in our being satisfied, on the balance of probabilities, that even if the business were a rural industry:

(a) The Applicant wrongly in part defined the relevant environment on the basis of the characteristics of the factually unpermitted and unlawful use of the property for a substantial part of the last 13 years;

(b) The Applicant wrongly assessed the potential amenity effects in the context of that unpermitted and unlawful use;

(c) The Applicant misdefined the existing unpermitted use as being relevant to an assessment of the relevant environment;

(d) The Applicant gave inadequate consideration to the relevant environment of the immediate Rural Zone land by wholly excluding from consideration adverse effects to the interfacing Rural-Residential Area;

(e) The Applicant wrongly considered that the proposal was in keeping with the existing scale and character of rural buildings and activities;

(f) The Applicant failed to take into account, or sufficient account, the excessive scale and intensity of the proposal in relation to the property and the relevant surrounding rolling pastoral farmland and adjacent rural-residential environment;

(g) The Applicant wrongly relied on private voluntary plantings on other persons Rural-Residential land as providing in his favour, necessary but unenforceable screening, to mitigate the adverse visual impact of the proposal on that Area;

(h) Some of these failures, were shared by Council evidence and submissions, which reduced the weight that might otherwise have been given, to that evidence and those submissions.

65. After considering the whole of the evidence, we find that a material number of adverse environmental effects, including visual effects, are more than minor. We further find that the evidence adduced, does not satisfy us that those effects can adequately be avoided, remedied or mitigated.

66. For those and our other earlier expressed reasons, we are satisfied that the Applicant has failed to establish that his proposal would comply with the relevant Rural Zone Discretionary (Unrestricted) objectives, policies and rules, including the further policies under Rule 9.9.2.

VII. REFUSAL OF RESOURCE CONSENT:

66. Accordingly pursuant to Section 104B of the Resource Management Act 1991, we hereby refuse the application by the Applicant Wayne Maskill for a Discretionary (Unrestricted) activity land use resource consent.

Dated this 20th day of June 2005.

(Cr. Gordon Cruden)
Chairperson

(Cr Alison Wall)
Member

(Cr Anne Podd)
Member

(Cr. Lew Findlay)
Member

(Cr Lynne Pope)
Member