Ayrburn Farms Estates Ltd v Queenstown Lakes District Council

High Court Invercargill
12, 13 March; 20 April 2012
French J

CIV 2011-425-262

Resource consents — Appeal against grant of consent — Whether Environment Court failed to address matters within its discretion — District plan — Site standards — Errors of law not material — Part 2 matters — Consent authority's obligation to look to Part 2 matters — Establishment of primary school — Rural residential zone — "Provided For" — Resource Management Act 1991, ss 77B, 104C and 299.

St Joseph's Primary School had a campus in Queenstown. It wished to establish a second campus in Arrowtown. In 2006 the Roman Catholic Bishop of the Diocese of Dunedin purchased land in Arrowtown, which was zoned Rural Residential under the District Plan. On that site the Bishop proposed to build the second campus, which would be a 112-pupil school for years one to six.

The Bishop applied for a resource consent for the school. A number of local residents opposed the application. They were concerned at the introduction of a non-rural, non-residential use into their neighbourhood. The primary concerns were loss of privacy, noise and traffic issues.

The Environment Court found that proposed buildings were compatible with the surrounding area, the neighbours' privacy would not be adversely affected, the noise effects would be minor, and adverse traffic effects could be mitigated. The Bishop's application was granted, with extensive conditions. The residents appealed on the basis that the Environment Court failed to assess relevant matters within its discretion.

Held: (dismissing the appeal)

(1) The Environment Court only considered the eight assessment matters under the Site Standard system in the District Plan. However, a consent authority is also entitled to have regard to any other matter, provided it is an effect of the breach of the particular Site Standard at issue. The Environment Court erred in law by confining itself to the eight assessment matters. However, the residents could not identify any other evidence, or matter, excluded as a result of the Environment Court's error.

The error was not material (see [38], [39], [40], [43], [44], [46], [47], [48], [49], [50], [51], [62]).

(2) Out of the eight assessment matters the Environment Court focused its discussion on those that were contested, but specifically stated that it had considered all the assessment matters. It would be wrong to infer that all the assessment matters had not been taken into account (see [66], [70], [72], [73], [74], [78]).

(3) The Environment Court erred by only considering Part 2 of the Resource Management Act 1991 after it had concluded its evaluation, and considering it solely for the purpose of looking at benefits to the school, if consent were granted. Part 2 matters are designed to govern the exercise of every function and power under the Act. While Part 2 matters cannot be used as an additional ground to decline consent, the Environment Court had to look to Part 2 when exercising its discretion. However, because the Environment Court addressed matters found within Part 2 when considering the wider aspects of the Plan, the error was not a material one (see [87], [88], [96], [97], [98], [99], [100], [103], [104], [105]).

Auckland City Council v John Woolley Trust [2008] NZRMA 260, (2008) 14 ELRNZ 106 (HC) applied.

Te Runanga-A-Iwi O Ngati Kahu v Far North District Council HC Whangarei CIV-2010-488-766, 29 September 2011 applied.

Cases mentioned in judgment

Ayrburn Farm Estate Ltd v Queenstown Lakes District Council [2011] NZEnvC 98

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 (HC).

Moriarty v North Shore City Council [1994] NZRMA 433 (HC).

Resource consent

The appellants appealed against the Environment Court's decision to grant consent for the establishment of a primary school in their rural residential zoned neighbourhood.

JDK Gardner-Hopkins and *EL Matheson* for appellants

MA Ray for respondent

P Cavanagh QC and *R Ibbotson* for Roman Catholic Bishop of the Diocese of Dunedin

FRENCH J.

Introduction

[1] Several residents of Speargrass Flat Road, near Arrowtown, are strongly opposed to a school being established in their neighbourhood. The Queenstown Lakes District Council, however, granted the school a resource consent, and that consent was upheld on appeal by the Environment Court.[1]

[2] The residents now seek to appeal the decision of the Environment Court under s 299 of the Resource Management Act.

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1 *Ayrburn Farm Estate Ltd v Queenstown Lakes District Council* [2011] NZEnvC 98.

[3] Unlike the appeal to the Environment Court, an appeal to this Court under s 299 does not involve a re-hearing of the merits of the school's application. It has a much more narrow focus. In order to succeed, the residents must satisfy me that the decision of the Environment Court contains material error(s) of law.

[4] The key issue raised by the appeal is whether the Environment Court failed to have regard to relevant matters within its discretion.

Factual background

[5] St Joseph's Primary School currently operates from a site in Queenstown. The school has outgrown its Queenstown site, and for several years has been looking to find another site on which to establish a satellite campus.

[6] In early 2006, the Roman Catholic Bishop of the Diocese of Dunedin, who has oversight of the school, purchased a 2.5945 ha property at 478 Speargrass Flat Road. The property comprised land and a lodge which the church authorities proposed converting into a campus for 60 pupils.

[7] The lodge was, however, destroyed by fire in July 2006.

[8] This resulted in the school re-designing its proposal. The salient features of the re-designed proposal were as follows:

(i) 112-pupil school;
(ii) to include a 480 sq m classroom block and a 220 sq m administration block;
(iii) 43 carparks to be provided, together with playing fields and a hard court area;
(iv) St Joseph's School to remain as one entity, but operate from two sites; and
(v) Speargrass campus to provide for Years one to six pupils from Arrowtown, Lake Hayes and the outer Wakatipu basin. Years one to six pupils from Queenstown and all Years seven to eight pupils continuing to attend the Queenstown site.

[9] Under the Queenstown Lakes District Plan, the site is zoned Rural Residential, with a visitor accommodation overlay. It adjoins the Rural General zone to the north and south, with the Rural Residential zone to the east and west.

[10] The existing development in the area is predominantly rural residential-sized properties with residential buildings and associated lifestyle activity. The property at issue is one of the few larger-sized sites remaining in the zone. Outside of the Rural Residential zones, more extensive pastoral farming occurs in the Rural General zone.

[11] Section 8.2 of vol 1A of the Plan states that the purpose of the Rural Residential zone is to provide for low density residential opportunities as an alternative to the suburban living areas in the district. It goes on to state that the Rural Residential zone is anticipated to be characterised by low-density residential areas with ample open space, landscaping and with minimal adverse environmental effects experienced by residents. Rural activities are said to be not likely to remain a major use

of land in the Rural Residential zone, or a necessary part of the rural residential environment.

[12] In s 8.1, which contains "issues, objectives and policies", amenity and environmental values in Rural Zones are identified as including privacy, rural outlook, spaciousness, ease of access, clean air and, at times, quietness.

[13] The Bishop's application for a resource consent for the re-designed proposal attracted significant opposition from local residents. They were concerned at the introduction of a non-rural, non-residential use into their neighbourhood, and believed a school of that size was not compatible with the rural residential environment they valued. The primary concerns were loss of privacy, noise and traffic issues.

[14] Following a hearing before Council Hearing Commissioners, the consent was however granted. The residents then appealed to the Environment Court. There was a second hearing, which lasted seven days.

The decision of the Environment Court

[15] One of the key issues at the hearing was the correct classification of the proposed activity.

[16] The Plan classifies activities according to their status under the Act. The status classifications are permitted, controlled, restricted-discretionary, discretionary, non-complying and prohibited.

[17] The scheme of the rural living area rules under the Plan is that any activity which complies with the relevant Zone and Site Standards and is not listed as controlled, discretionary, non-complying or prohibited, is a permitted activity. If an unlisted activity fails to meet all the relevant Zone Standards, it is to be classified as a non-complying activity. If the activity complies with all the Zone Standards but breaches one or more of the Site Standards, its classification is restricted-discretionary.

[18] In the Rural Residential zone there is a very limited range of permitted activities. Generally, construction of buildings including residential units is a controlled activity.

[19] As for schools, there is no specific mention of schools in the Rural Residential zone. Accordingly, the activity status of the proposed St Joseph's School fell to be determined by reference to the relevant Site and Zone Standards.

[20] The residents contended that the proposed school did not comply with the Zone Standards. This was rejected by the Court. However, while finding there was compliance with all the Zone Standards, the Court also found that the proposal failed to comply with two of the relevant Site Standards. That meant the correct classification was restricted-discretionary.

[21] The two Site Standards which the proposal was found to breach were:

- Rule 8.2.4.1 (v) "Nature and Scale of Activities": — which limits non-residential activities in the zone to a maximum gross floor area of $40m^2$; and
- Rule 8.2.4.1(x) "Earthworks" — which imposes a limit of $100m^3$ per site per 12-month period, and a maximum area of bare soil

exposure (where the average depth is greater than 0.5m) to 200m^2 per 12-month period.

[22] Having found that the correct activity status was restricted-discretionary, the Environment Court then turned to consider and evaluate the restricted-discretionary assessment matters listed in the Plan relating to earthworks and "nature and scale of activities". The Court structured its analysis under the headings "Scale of Buildings and Activities", "Noise", "Landscape and Visual Impact" and "Traffic", its key findings being that:

- The scale of the proposed buildings was compatible with the surrounding area.
- The design, scale and external appearance of the buildings and associated works were appropriate.
- The privacy of the immediate neighbours would not be adversely affected.
- The noise effects would be no more than minor.
- The proposed earth mounds would not have an adverse effect on the amenity of the surrounding sites.
- The adverse traffic effects arising from the proposal were able to be mitigated sufficiently.

[23] The Court concluded:

> [120] We have found that a school, along with a wide range of community-type activities, are provided for in the Rural Residential zone as restricted-discretionary activities. A key assessment matter set out in the Plan relates to the extent to which the scale of the activity associated with the proposed school differs from the scale of activities in the surrounding area. We recognise that the proposed school will result in an activity that is different from the existing use of the subject site and to existing development in the surrounding area, which at present comprises single household units on small lifestyle properties. It was clear that many of the neighbours do not want any change to the existing situation ... However our assessment requires a consideration of the effects of the proposal in terms of the Plan and not just by comparison with the existing development. To a degree, the neighbours currently have an artificially low level of activity in their environment because this large site has been vacant since the previous lodge was burnt down in 2006.
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> [121] In assessing the matter of scale we accept that there will be a larger number of people at the school than at the previous lodge, and also more than is likely to be associated with six residential dwellings. However we consider that the relatively large size of the site is significant in that the proposal is able to accommodate all of the functional requirements of the school and also adequate mitigation including noise attenuation and landscaping. We also consider that the activity patterns and fluctuations which are part of a school mean that the higher activity levels will occur during the daytime and then this will be limited to the school term periods. The longer summer holidays, when people are more likely to be at home and outside, will have very little activity. We consider that these are relevant factors to be taken into account when comparing different activities.

> [122] Based on our analysis of the effects of the scale of the proposed activity, we are satisfied that it is compatible with the scale of activities in the surrounding area, having regard to the Plan and existing development. Overall, our conclusion is that the proposal satisfies the relevant assessment matters set out in the Plan.

[24] The Court then went on to consider Part 2 of the Resource Management Act and had regard to the benefits to the applicants if they were granted consent. It found that the proposed school would "assist in enabling people and the community to provide for access to education, and to associated social and cultural well-being".

[25] The application was accordingly granted, with extensive conditions. In considering the imposition of conditions, the Court recorded that it had considered those matters in the Plan relating to the restricted-discretionary activity analysis for the two Site Standards not complied with, and also the controlled activity provisions for the building component of the activity. This was consistent with 8.3.1(v), which stipulates:

> Where an activity is a *Discretionary Activity* because it does not comply with one or more relevant Site Standards, but is also specified as a *Controlled Activity* in respect of other matter(s), the Council shall also apply the relevant assessment matters for the Controlled Activity when considering the imposition of conditions on any consent to the discretionary activity.

Grounds of appeal

[26] On appeal, the residents do not challenge the finding that the application was for a restricted-discretionary activity. Nor do the residents contest the Environment Court's consideration of the earthworks Site Standard. Their appeal is confined to the Court's approach to the "nature and scale of activities" Standard and the Court's approach to Part 2 of the Act.

[27] In particular, the residents contend that the Environment Court's decision contains the following errors of law:

(i) In assessing the proposal, the Environment Court wrongly limited its discretion to the assessment criteria contained in the Plan.
(ii) Made a finding, namely that matters relating to rural activities and resources were not seriously at issue, when that finding was not supported by any evidence.
(iii) Failed to address two of the relevant assessment matters listed in the Plan.
(iv) Failed to have regard to and apply the specific wording of assessment matter 8.3.2(x)(a).
(v) Erred in its treatment of Part 2 matters and failed to recognise the significance of rural amenity values.

[28] These errors are said to have resulted in the Court failing to correctly assess the effects of the proposal on the amenity values of the area.

Preliminary procedural point

[29] The residents sought to include three written briefs of evidence from the Environment Court hearing in the common bundle.

[30] Mr Cavanagh objected to the briefs being included and submitted that if any evidence was to be included it should be the whole transcript and not selected portions.

[31] I decided to admit the evidence on a provisional basis, noting the objection and with a view to making a ruling as part of my substantive decision.

[32] As a general principle of fairness, Mr Cavanagh's point is well made. However, the purposes for which the evidence was being included in the bundle were very limited. First, it was to test the accuracy of a reference by the Environment Court to one of the briefs at issue, and secondly, to establish the existence of evidence which the Environment Court is said to have overlooked. I am satisfied it was appropriate for the evidence to form part of the record for the appeal and that it was not necessary for me to view the entire transcript.

Scope of an appeal under s 299

[33] An appeal to this Court under s 299 is an appeal limited to questions of law.

[34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:[2]

(i) applied a wrong legal test; or
(ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or
(iii) taken into account matters which it should not have taken into account; or
(iv) failed to take into account matters which it should have taken into account.

[35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.[3]

[36] Further, not only must there have been an error of law, the error must have been a "material" error, in the sense it materially affected the result of the Environment Court's decision.[4]

[37] Mindful of these general principles, I turn now to consider each of the alleged errors of law.

Did the Environment Court wrongly limit its discretion to the assessment matters contained in the Plan and ignore other relevant matters?

[38] The Plan lists certain assessment matters which the consent authority must take into account when considering whether to grant consent.

[39] It was common ground that in the case of a restricted-discretionary activity, only those assessment matters which

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2 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
3 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).
4 *Countdown Properties (Northlands) Ltd v Dunedin City Council.*

relate to the particular Site Standard at issue are relevant. This follows from the Plan and the Act which, in its pre-2009 amendment form, stated at s 104C:

> **104C. Particular restrictions for restricted discretionary activities** — (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority—
>
> (a) must consider only those matters specified in the plan or proposed plan to which it has restricted the exercise of its discretion; and
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> (b) may grant or refuse the application; and
>
> (c) if it grants the application, may impose conditions under section 108 only for those matters specified in the plan or proposed plan over which it has restricted the exercise of its discretion

[40] It was also common ground that the assessment matters in the Plan were guidelines and not tests.[5]

[41] As I have already mentioned, there were two Site Standards at issue in this case, namely "nature and scale of activities" and earthworks. The residents, however, only challenge the Environment Court's treatment of the former, and accordingly there is no need for me to discuss earthworks.

[42] The Site Standard system is explained in the Plan as follows:[6]

> **Site standards** are specified in relation to matters which tend to impact on the use of the particular site or adjacent areas. While these standards are important, they are not considered fundamental to the integrity of an area as a whole and so are specified in a way that if development does not comply with these standards the Council will consider the matter of non-compliance by way of a resource consent for a discretionary activity. This enables the Council to consider the implications of non-compliance on the use and enjoyment of the site involved and on neighbouring sites.

[43] Under the Plan, there are eight assessment matters to be taken into account when considering site standard 8.2.4.1(v), "Nature and Scale of Activities":[7]

> (a) The extent to which the scale of the activity and the proposed use of buildings will be compatible with the scale of other buildings and activities in the surrounding area.
>
> (b) The extent to which materials or equipment associated with an activity need to be stored outside the building, and the extent to which all manufacturing, altering, repairing, dismantling or processing of any goods or articles associated with the activity need to be carried outside a building, taking account of:
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> (i) The nature, coverage area and height of materials or equipment associated with the activity.
>
> (ii) The extent to which provisions would be needed for:
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> • security

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5 No issue was taken with the language of the Court's decision, which in some passages speaks of "satisfying the assessment matters".

6 Queenstown Lakes District Plan, s 1.4.

7 Queenstown Lakes District Plan, s 8.3.2(x).

- control of litter and vermin
- prevention or containment of fire hazard.

(c) The extent of noise or visual impact, and the degree to which materials or equipment associated with an activity are visible from any public road or place.

(d) The extent to which the activities on the site remain dominated by rural activities, rather than by activities which are not associated with or incidental to rural activities.

(e) The extent to which the activity requires a rural location in terms of scale, use of or relationship to rural resources, effluent disposal requirements, or potential adverse effects on an urban environment.

(f) The effect of the activity on the life-supporting capacity of soils.

(g) Any adverse effects of traffic generation from the activity in terms of:

(i) Noise, vibration and glare from vehicles entering and leaving the site of adjoining road.

(ii) Levels of traffic congestion or reduction in levels of traffic safety which are inconsistent with the classification of the adjoining road.

(iii) Any cumulative effect of traffic generation.

(h) The ability to mitigate any adverse effects of the additional traffic generation such as through the location and design of vehicle crossings, parking and loading areas or through the provision of screening and other factors which may reduce the effects of the additional traffic generation

[44] It is clear from the Environment Court decision that the Court did consider itself limited to consideration of the eight assessment matters and those assessment matters only, albeit within the wider context of the Plan and the existing development.

[45] Mr Ray, for the Council, submitted that the Court was right to take that approach. To the best of Mr Ray's knowledge, the approach adopted by the Court is also followed in practice by the Council itself.

[46] Whether the approach of the Environment Court was correct turns largely on the interaction of the following provisions in the Plan, namely:

8.3.1 **General**

(i) The following Assessment Matters are methods or matters included in the District Plan, in order to enable the Council to implement the Plan's policies and fulfil its functions and duties under the Act.

(ii) In considering resource consents for land use activities, in addition to the applicable provisions of the Act, the Council shall apply the relevant Assessment Matters set out in Clause 8.3.2 below.

(iii) In the case of Controlled and Discretionary Activities, where the exercise of the Council's discretion is restricted to the matter(s) specified in a particular standard(s) only, the assessment matters taken into account shall only be those relevant to that/these standard(s).

...

8.3.2 **Assessment Matters**

In considering whether or not to grant consent or impose conditions, the Council shall have regard to, but not be limited by, the following assessment matters: ...

[47] There appear to be three possible interpretations:

(i) The consent authority is limited in its consideration of a restricted-discretionary activity to the specified assessment matters and the applicable provisions of the Act. This is essentially the approach taken by the Environment Court, but within the wider context of the Plan.

(ii) The specified assessment matters and the applicable provisions of the Act, while mandatory, are not exhaustive. The consent authority is also entitled to have regard to any other matter provided it is an effect of the breach of the particular Site Standard at issue.

(iii) The specified assessment matters relating to the particular Site Standard and the applicable provisions of the Act are mandatory, but not exhaustive. A breach of the Site Standard, in particular such a wide-ranging one as the "scale and nature of activities", is a trigger for a full evaluation of the merits.

[48] The third possible interpretation need only be stated to be rejected, because a completely unfettered discretion would be inconsistent with the concept of restricted-discretionary.

[49] Of the two remaining interpretations, I prefer the second because it accords with the natural, ordinary meaning of the words, and in particular gives meaning to the phrase in s 8.3.2, "shall have regard to, but not be limited by".

[50] In my view, the second interpretation is entirely consistent with the concept of restricted-discretionary. Under the second interpretation, it is still only matters which relate to the particular Site Standard that may be considered. The second interpretation is also entirely consistent with s 8.3.1(iii). All s 8.3.1(iii) does is identify which of the listed assessment matters is to be taken into account. It would have been an easy thing for the draftsperson to have gone on and added that "no other factors whatsoever were to be considered other than the applicable provisions of the Act" if that was the intention, but the draftsperson has not done that.

[51] It follows from all of the above that, in my view, the Court appears to have misinterpreted the Plan by confining itself to the eight assessment matters. That amounts to an error of law.

[52] However, in order to warrant appellate intervention the error must have been a material one.

[53] Mr Gardner-Hopkins acknowledges that the most relevant matters are likely to be contained in the Plan's assessment matters anyway, but says that not only did the Court never turn its mind to whether there were any other relevant matters, it actively excluded

matters. In support of that submission, Mr Gardner-Hopkins relies on a passage in the decision where the Court expressly records:[8]

> ... that parts of the submissions and of the evidence, particularly that of the planners and landscape architects, related to a much wider range of matters and provisions in the District Plan and the Act than we are empowered to consider when dealing with a restricted-discretionary activity.

[54] Mr Gardner-Hopkins submits that if evidence has been excluded as a result of the error, then by definition that must be material.

[55] However, the Court does not specify which parts of the submissions and evidence it excluded from consideration, or why. Given the context, the Court may well have been referring to evidence that was based on the activity being wrongly classified as non-complying, in which case the exclusion has not arisen from any error of law. It is also possible the Court was simply referring to evidence which did not relate to the two Site Standards at issue (earthworks and "nature and scale of activities"), in which case again the exclusion has not arisen from any error of law.

[56] Faced with this difficulty, I asked Mr Gardner-Hopkins to specify what evidence had been ignored as a result of the Court wrongly confining itself to the eight assessment matters. Mr Gardner-Hopkins was only able to identify two items of evidence, and although he described these as "examples", he was not able to point to any others.

[57] The first item was evidence given by a landscape architect and landscape planner, Dr Steven, about the lack of social connection between the proposed school and the residents. Dr Steven testified that the proposed school will impact upon the sense of community experienced by residents through the imposition of a facility within their midst that has few, if any, connections with the local community and which will not be perceived as an integral part of the local community, unlike other rural schools.

[58] Dr Steven's assertion was based on the assumption that pupils will generally not be from the local community. This assumption was apparently disputed at the hearing, but even if it were factually correct, I do not accept that the lack of social connection is an effect arising from the "scale and nature of activity". It arises from the composition of the particular student body, a different thing. If this was the evidence excluded by the Court, then they were right to exclude it.

[59] The second item of evidence which it is said was a matter outside the eight assessment matters but nevertheless relevant to the Site Standard breached, was evidence given by a planning consultant about the Plan's policy on location of schools. The consultant, Mr Brown, gave evidence about various provisions of the Plan, including the existence of other zones which specifically provide for the location of educational facilities. His opinion was that schools are not expected in the Rural Residential zone.

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8 At [88].

[60] Mr Gardner-Hopkins acknowledged that this evidence relates to the fact of the proposed activity being a school, rather than the proposed size of the school buildings. What Mr Brown said would be true of any school. Nevertheless, Mr Gardner-Hopkins submits the evidence does still relate to the Site Standard because it would be impossible to have a school with a floor area less than 40 sq m.

[61] The argument is ingenious. However, if the Court had taken evidence about other zones into account, that would in my view have been contrary to the stated purpose of site standards, and therefore not relevant. The Plan specifically provides that the purpose of having site standards is to enable the consent authority "to consider the implications of non-compliance on the use and enjoyment of the site involved and on neighbouring sites".[9]

[62] The residents have not identified any other evidence or matter wrongly excluded as a result of the Court's interpretation error. I am therefore not satisfied that the error was a material error.

Did the Environment Court make a finding that was not supported by any evidence?

Did the Court erroneously fail to have regard to two of the relevant assessment matters listed in the Plan?

[63] The focus of these two related grounds of appeal is assessment matters 8.3.2(x)(d) and 8.3.2(x)(e).

[64] Assessment matter (d) states:

> The extent to which the activities on the site remain dominated by rural activities, rather than by activities, which are not associated with, or incidental to rural activities.

[65] Assessment matter (e) states:

> The extent to which the activity requires a rural location in terms of scale, use of or relationship to rural resources, effluent disposal requirements, or potential adverse effects on an urban environment.

[66] In its decision, the Court listed the eight assessment matters, including (d) and (e), and said:

> [91] Although the expert witnesses addressed all of these assessment matters, the primary concerns of the appellants and s 274 parties related to scale of the activity, noise, visual impact, traffic, and amenity. Matters relating to outdoor storage, rural activities and resources, and soils were not seriously at issue.[49] Accordingly, although we have considered all of the assessment matters, we concentrate our assessment on the contested matters which are contained in criteria 8.3.2(x)(a),(c),(g) and (h).

[49] Mr Anderson, Rebuttal at [4], [5] and [6].

[67] The footnote reference in that paragraph is to the rebuttal statement of Mr Anderson, the planner called by the school.

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9 Queenstown Lakes District Plan, s 104.

[68] However, Mr Anderson's rebuttal statement does not completely support the statement in the text of the Court's decision. That is because his rebuttal statement only says there was general agreement as to the scale and nature of the buildings, outdoor storage of materials and equipment and the life-supporting capacity of the soil. Mr Anderson's rebuttal statement says nothing about there being any general agreement as to assessment matters (d) and (e), rural activities and resources. Those matters were put into issue by Mr Brown, the planner called for the residents.

[69] Accordingly, the residents argue that the Court made a finding (about matters relating to rural activities and resources not being seriously at issue) that was not available to it on the evidence.

[70] The error is said to have been a material error because, according to the residents, it resulted in the Court failing to have regard or any real regard to assessment matters (d) and (e).

[71] As I have already indicated, I accept that the footnote reference is not accurate and does not completely support the proposition for which it is cited. On the other hand, while Mr Brown's evidence certainly mentions (d) and (e), it is only in passing. He only devotes two or three paragraphs to them in a 32-page witness statement.

[72] Furthermore, Mr Ray says that the Council's planner agreed with Mr Brown's conclusions regarding (d) and (e), and although Mr Anderson does not address (d) and (e), his silence in a rebuttal statement suggests he does not dispute Mr Brown on those points either. Accordingly, to that extent, there was agreement amongst the experts.

[73] That is hardly surprising, because in my view the application of both (d) and (e) to the facts were self-evident. In that sense, it can fairly be said that both were not seriously at issue. It was obvious that once the school was established, the site would not be dominated by rural activities. It in fact had a history of visitor accommodation and was zoned Rural Residential with a visitor accommodation overlay. Equally obviously, schools do not require a rural location. It could not be seriously argued otherwise.[10]

[74] Notwithstanding the Court's incorrect footnote reference, I therefore do not agree that its finding about (d) and (e) not being seriously at issue was necessarily made in error.

[75] The more fundamental question is whether the Court did in fact disregard the two assessment matters, regardless of how or why it came to do that.

[76] Both were factors favouring the residents' opposition, and I accept that even if they were not seriously at issue, they should still have been taken into account.

[77] Mr Gardner-Hopkins says that other than the reference to the two assessment matters not being seriously at issue, they are not mentioned again in the decision. In particular, they do not feature at all in the Court's evaluation.

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10 Counsel advise that there was evidence about unsuccessful attempts to find an alternative urban location. However, in my view, that is not what is meant by assessment matter (e).

[78] The difficulty for the residents is that the Court expressly states that it has considered all the assessment matters, including those it regarded as not being seriously at issue. It made sense for the Court to concentrate on the contested matters. It may not have expressly mentioned (d) and (e) again, but in my view, in the circumstances, it would be wrong for me to infer that (d) and (e) were ignored when the Court expressly states that it has taken them into account. That is particularly so when they were matters on which the Court would in any event have been entitled to place little weight, because of the provision in the Plan that "Rural activities are not likely to remain a major use of land in the Rural Residential Zone or a necessary part of the rural residential environment".[11]

Did the Court fail to have regard to and apply the specific wording of assessment matter 8.3.2(x)(a)?

[79] Assessment matter (a) is:

> The extent to which the scale of the activity and the proposed use of buildings will be compatible with the scale of other buildings and activities in the surrounding area.

[80] The Court structured its discussion of assessment matter (a) in a way which Mr Gardner-Hopkins described as thematic. Mr Gardner-Hopkins conceded this was an acceptable approach, but submitted that it resulted in the Court overlooking the specific wording of assessment (a). In particular, it resulted in the Court focusing exclusively on the "scale of the activity" and failing to pay genuine attention and thought to the word "use".

[81] I agree the Court does not expressly employ the word "use" in its discussion. However, when I asked Mr Gardner-Hopkins to identify any evidence about the proposed use of the buildings which had been ignored, he was unable to point to any.

[82] In my view, this argument is a purely semantic one and without merit. There has been no error, and certainly not a material error.

Did the Environment Court err in stating that a school was "provided for" in the zone?

[83] The "Conclusions" section of the Court's decision begins with the statement:

> [120] We have found that a school, along with a wide range of community-type activities, are provided for in the Rural Residential zone as restricted-discretionary activities.

[84] Earlier in its decision, the Court had found that "within the Rural Residential zone, a wide range of community activities are provided for such as health services, community centres, halls, churches, day care facilities, schools, and educational facilities".[12]

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11 Queenstown Lakes District Plan, s 8.2.
12 At [99].

[85] Mr Gardner-Hopkins submitted the Court may have erred in law if its use of the phrase "provided for" was intended to convey "encouraged or anticipated" in the zone.

[86] However, in my view, it would be wrong to ascribe any connotation of encouragement. The sentence is simply a correct statement of the activity classification status of the proposal under the Plan.

Did the Court err in its consideration of Part 2 matters by looking to Part 2 solely for additional benefits of granting consent?

[87] Part 2 of the Act is designed to govern the exercise of every function and power under the Act.[13] It consists of a statement of the purpose of the Act and relevant principles.

[88] In this case, the Court did not expressly refer to Part 2 when evaluating the proposal against the assessment matters. It only considered Part 2 after it had concluded its evaluation, and then solely for the purpose of looking at benefits to the school if consent were granted.

[89] The Court said it was taking that approach in reliance on the High Court decision of *Auckland City Council v John Woolley Trust*.[14]

[90] However, Mr Gardner-Hopkins submits the Court has misinterpreted *Woolley* and taken it out of context.

[91] I agree.

[92] *Woolley* concerned an appeal from an Environment Court decision. The Environment Court had granted consent to the applicant to remove a large tree from its residential property for reasons relating to the health and well-being of the occupants. Under the relevant District Plan, the application for consent was required to be by way of an application for a restricted-discretionary activity. The plan did not contain any assessment criteria relating to health and safety matters, and there was accordingly no support for the application when assessed against that criteria. The Environment Court, however, held that it was entitled to take into account health and safety matters under Part 2, and that these outweighed the conservation issues under the Plan.

[93] On appeal, the High Court upheld the Environment Court's decision, finding that Part 2 does apply to applications for consent for restricted-discretionary activities.

[94] However, the Court also held that because of s 77B(3)(c), a consent authority could not take Part 2 matters into account as additional grounds for declining a consent as opposed to granting it. The pre-2009 version of s 77B(3)(c) provided that the power of a consent authority to decline an application for a restricted-discretionary activity is limited to the matters in which it has restricted its discretion in the plan.[15] To permit Part 2 matters to be taken into account as additional grounds to decline consent for a restricted-discretionary activity would be inimical to the very nature of such an activity and the strictly confined powers available to the consent authority.

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13 *Te Runanga-A-Iwi 0 Ngati Kahu v Far North District Council* HC Whangarei CIV-2010-488-766, 29 September 2011 at [74].

14 *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC).

15 *Woolley* at [44].

[95] The Court went on to say:[16]

> But, subject to this proviso, the provisions of Part 2 may be taken into account by virtue of s 104(1) in deciding to grant the application.

[96] There is thus no question that for the purposes of applying Part 2, *Woolley* does draw a distinction between granting a consent and declining it.

[97] However, the High Court made that distinction in the context of a situation where the particular Part 2 matters being relied upon raised different or additional issues to the matters reserved in the Plan.

[98] What *Woolley* prohibits is the use of a Part 2 matter as an *additional* ground to decline consent, that is, additional to the matters for discretion. To put it another way, Part 2 cannot extend the range of grounds for declining a consent beyond those specified in the Plan. It cannot bring additional matters into play, except when it comes to granting a consent.

[99] That is in my view a very different thing from saying the consent authority is prevented from looking at Part 2 to assist in its interpretation of the matters reserved for discretion and guide its evaluation of those matters. *Woolley* is not authority for such an absolute proposition. *Woolley* did not say the only use that could ever be made of Part 2 in the restricted-discretionary context was for the purpose of identifying the benefits of granting the consent. On the contrary, *Woolley* notes:[17]

> Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.

[100] It follows that in this case the Environment Court was obliged to have regard to any Part 2 matters which related to the matters over which the council had reserved its discretion. Its view that Part 2 was relevant for the sole purpose of identifying benefit was erroneous and based on a misinterpretation of *Woolley*.

[101] Mr Gardner-Hopkins submitted the error was material because Part 2 includes s 7(c) and (f):

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (c) The maintenance and enhancement of amenity values:
>
> ...
>
> (f) Maintenance and enhancement of the quality of the environment:

[102] In Mr Gardner-Hopkins' submission, had the Court considered s 7(c) and (f) it would have specifically turned its mind to the key issue of maintaining and enhancing amenity values and the effects of

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16 At [45].
17 At [47].

the proposed school on those values arising out of the breach of the 40 sq m floor area Site Standard.

[103] Elsewhere in his submissions, Mr Gardner-Hopkins characterised the result of the error as being that the Court failed to take into account the effects on the amenities of the area from a grant of consent, and failed to take into account the emphasis placed on amenity values by Part 2.

[104] I do not accept that submission because, although the Court did not expressly refer to Part 2, its consideration of the assessment matters was made within the wider context of the Plan. Significantly, the Court specifically considered the issues, objectives and policies for the rural living areas, including the importance of protecting amenity and environmental values such as privacy, rural outlook, spaciousness, clean air and, at times, quietness.[18] Its discussion is specifically structured around adverse effects on amenity,[19] and its general discussion of the issues indicates a recognition of the need for maintenance and enhancement of amenity values. What the Court found, in effect, was that the residents were overstating the adverse effects on amenity values.

[105] In those circumstances, I am satisfied that while the framework might change if the Court were directed to reconsider its decision by including consideration of Part 2, the substantive analysis would not change, and nor would the outcome.

Result

[106] As will be readily apparent, Mr Gardner-Hopkins has said all that could possibly be said on behalf of the residents, and he has said it well.

[107] However, while the residents have persuaded me that the decision of the Environment Court contains two errors of law, I am not persuaded that, viewed individually or collectively, they were material errors.

[108] The appeal is therefore dismissed.

Costs

[109] As regards costs, my expectation is that these should be the subject of agreement, without the need to involve the Court. If, however, agreement is not possible and I am required to make an award then Mr Cavanagh and Mr Ray are to file submissions within 15 working days, with submissions from Mr Gardner-Hopkins 10 working days thereafter.

Reported by: Kerry Puddle, *Barrister and Solicitor*

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18 At [96].
19 At [93].