BEFORE THE ENVIRONMENT COURT

ORIGINAL

ENV-2006-AKL-000211

Decision No. W 025 /2008

IN THE MATTER of an appeal under Cl 14 of the first schedule to the Resource Management Act 1991

BETWEEN LAND EQUITY GROUP
Appellant

AND THE NAPIER CITY COUNCIL
Respondent

Court: Environment Judge C J Thompson, Environment Commissioner K A Edmonds, Environment Commissioner W R Howie

Heard at: Napier on 17, 18 and 19 March 2008. Site visit: 18 March 2008

Counsel: I M Gordon and M J Slyfield for Land Equity Group
A McEwan and A L Fraser for Port of Napier Ltd
J K MacRea and A F Buchanan for AFFCO New Zealand Ltd, PPCS Ltd and Napier Sandblasting Ltd – s274 parties
S J Webster for the Hawkes Bay Regional Council – s274 party
M B Lawson for the Napier City Council

DECISION OF THE COURT

Decision issued: 5 May 2008.

A. The appeal is declined

B. Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] In a decision dated 4 November 2004 (*AFFCO New Zealand Ltd v Napier CC* (W082/2004)) the Court allowed an appeal against the Council's grant (through a Commissioner's delegated decision) of a resource consent for the establishment and operation of a large format retail complex on a site owned by a member Company of the Land Equity Group. The site is on the western side of Pandora Road at its intersection with Thames Street, on the western fringe of Napier City. It contains 2.7044 hectares and is rectangular in shape with frontages of 270m to both Pandora Road and Tyne Street, which forms its western edge, and 105m to Thames Street, which is its northern edge. Most of the site is occupied by a former wool store of around 20,000m^2 of which some is presently short-term tenanted for storage-type uses.

[2] A submission by Land Equity on the Council's Proposed District Plan, seeking to re-zone the land from *Main Industrial* to *Fringe Commercial*, had in fact preceded the resource consent application, and had been declined. An appeal against that decision was lodged as long ago as 2004 but it had lain fallow while the resource consent application and ensuing appeal were dealt with. The appeal was later revived, and this is the decision on that proceeding. The relief finally sought is however significantly different from what was originally sought when the appeal was lodged.

Land Equity's position

[3] The relief now sought is not a re-zoning of the land. Land Equity is content for the zoning to remain as *Main Industrial*, but seeks to have the site scheduled, with the *Fringe Commercial* zone's conditions table to apply to it. That would enable large format retailing to be established on the site.

The Council's position

[4] The Council's essential position is that nothing material has changed since the resource consent was declined on appeal. As outlined in that decision, the Council had then been in the rather uncomfortable position of having delegated its decision-making powers on the resource consent application, and had been given a decision to grant the consent; an outcome which its planning officers had recommended against. Its position now is that the same reasons which drove the Court's decision on that appeal continue to apply to the land and the proposed

activity. It opposed this appeal in its original form, and has the same view towards the revised relief now sought.

Other parties' positions

[5] AFFCO New Zealand Ltd, PPCS Ltd, Napier Sandblasting Ltd and Port of Napier Ltd all own industrial land in Pandora. AFFCO and PPCS operate tanneries on their sites. Napier Sandblasting, as its name suggests, has an abrasive blasting and industrial coatings business. Those are all quite close to the Land Equity site. Port of Napier has a substantial block of land at the end of Thames Street which is presently land-banked as a possible future site for off-port container storage. All oppose the relief sought by Land Equity Group.

[6] The Regional Council contends that the proposed changes to the District Plan conflict with its Regional Plan and Regional Air Plan, and opposes them for that reason.

Planning background

[7] The City of Napier District Plan is presently partly operative and, obviously enough, partly Proposed. The land in question is part of the Plan's *Main Industrial* zone, a zoning which applies to three areas of land within the City. The Plan does not create *non-complying* activities, so those which elsewhere have that status are *discretionary* in Napier City. The proposal for large format retailing dealt with in the earlier decision was considered in that way. The evidence in this appeal indicates that there has been a sense that the Napier Plan has not so far dealt with the advent of large format retailing in an entirely satisfactory way, resulting in somewhat ad hoc and scattered responses to demand from businesses seeking that form of outlet. There has been a concern too that the provision of further retail space in the City should not harm the viability of the CBD's retail developments, and the vitality of the City centre.

[8] On the eastern side of Pandora Road, partly opposite the Land Equity site, two adjoining sites have been given resource consents for large format retailing since the Court dealt with the Land Equity resource consent appeal. Both sites have buildings on them at present, and the view of the planning witnesses is that the two consents are incompatible and cannot co-exist in their present terms. If that proves to be so, there will plainly need to be further steps taken before the consents can be put into effect.

[9] On the eastern side of Pandora Road, and to the north of Thames Street, is the *Ahuriri Mixed Use* zone, containing an eclectic combination of commercial, retail, residential and semi-industrial activities. So far, that and the *Main Industrial* zone appear to co-exist in reasonable harmony. As part of what is permitted in that zone there has been a substantial apartment complex (The Quadrant) recently completed in Humber Street, some 200 to 250m to the north of the Land Equity site.

The core issue in this appeal

[10] On this site and under its present zoning, Large Format Retailing is a fully *discretionary* activity. Potentially, there is a very wide range of effects that might need to be considered, depending on the exact proposal put forward: - traffic generation, reverse sensitivity, the efficient use of the resources represented by the *Industrial* zoned land and the Council's trade waste sewer, are but some that come to mind. In considering Land Equity's revised position, we have to ask whether all of those potential effects can be managed, in advance and in the abstract, under what would, effectively, be a *controlled* activity status.

[11] That statement of how we see the core issue can perhaps be made a little clearer by some elaboration. At the commencement of the hearing, the proposal in front of the Court and the expert witnesses was that any retail activity with a gross floor area over 500m^2 and complying with *Fringe Commercial* Zone conditions would be a *permitted* activity. Any retail use not complying with all of the relevant *Fringe Commercial* Zone conditions was to be a *restricted discretionary* activity. The restrictions on the discretion were put this way: ... *the Council will have regard to the objectives and policies of the Plan as if the land were zoned Fringe Commercial and will restrict its discretion to:*

- *The matters identified in the second column of the Fringe Commercial Zone condition table* (we note these are the outcomes sought by the Rules).
- *The cumulative effect of non-compliance with more than one condition.*
- *The matters set out in Chapter 1.6.5* (we note these cover financial contributions, bonds or covenants, works or services, administrative charges, duration, lapsing and review conditions).
- *The assessment criteria in Chapter 20 of the Plan where applicable.*

As fully *discretionary* activities, the proposal was for *comprehensive commercial development* (there is a confusing definition of what this might involve in the Plan which the evidence did not really elucidate), retail activities with not more than a 500m^2 gfa, and supermarkets. We

received a number of possible definitions for the term *supermarket* (the Plan currently does not define it) all of which are problematic in some degree. The *discretionary* activity status specified that the consent authority *...will have regard to the objectives and policies of the Plan and the assessment criteria in Chapter 20, as if the land were zoned Fringe Commercial.*

[12] In closing, Mr Gordon for Land Equity proposed a different set of Plan provisions. These would mean that there would be no *permitted* activity status for any retail activity with gfa over 500m^2 and complying with *Fringe Commercial* Zone conditions. Instead that retail activity (with the same conditions) would be a *controlled* activity with the Council exercising control over the following:

- The layout of buildings
- The location of vehicle access driveways
- The imposition of financial contributions for improvements that will mitigate any adverse effects on the adjacent roading network (the amount of financial contribution to be calculated in proportion to the traffic volume generated by the proposed activity as a percentage of total traffic).

The details of how this would work were not clear, given the reference to the Council restricting its discretion to the matters referred to in Rule 23.10 covering *restricted discretionary* activities. However, we shall consider *controlled* activity status on the basis that any such proposal must receive a resource consent, subject only to conditions.

[13] Another change to the relief sought was to have any retailing that involves the display and sale of fresh food - not being a *supermarket* - as a *restricted discretionary* activity. The intention appears to have been to restrict the decision-maker's discretion to those matters identified for any other retail use, (with the addition of *...Reverse sensitivity effects on surrounding permitted activities in the Main Industrial Zone).*

The applicable law

[14] The original application was made to the Council on 11 August 2003. The Resource Management Amendment Act 2003, with its revised version of s32, therefore applies. We shall return to that point shortly.

District planning documents

[15] The Napier City Transitional District Plan was promulgated under the Town and Country Planning Act 1977. Under that Plan the site is within the *Pandora Manufacturing Zone*. There is no provision for a proposal such as the present in that Plan and it would therefore be *non-complying* with no specified assessment criteria.

[16] The Proposed District Plan was notified in 2000 and is not yet fully operative, although we understand that the process for public participation is almost at an end and that recommendations *in principle* have been made by the Council's Hearing Committee. We are informed that it is unlikely that there will be any substantial change to the proposed zoning of the relevant site. The Proposed Plan has the site within the *Main Industrial Zone* but it also has Objectives, Policies and Performance Standards which enable a wider range of activities than would be possible under the Transitional Plan. Some limited retail activity would be permitted on the site, but the large format retail proposal would be a *discretionary* activity. There are assessment criteria for assessing non-industrial uses within the zone.

[17] As between the Transitional and Proposed Plans, the Transitional Plan is now approaching 20 years old, and was prepared under the earlier legislation. The Proposed Plan has now progressed to the point where it represents fairly settled thinking on the part of the Council, and its Policies and Objectives about the *Industrial* zones provide useful guidance, as do its assessment criteria. We think predominant weight should be given to the Proposed Plan and we do not understand there to be any substantial argument about that.

Retail Strategy

[18] In October 2003 the Council adopted a Retail Strategy as a framework for the management and sustainability of future retailing patterns and the growth of retail activities across the city. It is the Council's intention, after the statutory procedures have been complied with, to incorporate elements of the Strategy into the Proposed Plan, but that is some way off yet. For the moment the document has no formal status, but it might be taken as at least an indication of the Council's general thinking on the topic. The Strategy recognises a possibility of large format retailing in *Industrial* zones where:

- individual tenancies have a minimum floor area of $500m^2$
- at least 75% of tenancies have a floor area of or exceeding $1000m^2$
- there is a café/and or lunch bar per $10,000m^2$ of floor area.

What is now proposed by Land Equity does not reflect those terms.

[19] In partial implementation of the Retail Strategy, Plan Modification 1 (being a Change of the Operative Plan and a Variation of the Proposed Plan) was notified on 11 February 2008. In brief, it is proposed to rezone 16ha of land on either side of Prebensen Drive to specifically provide for Large Format Retailing, with consequential changes to various Plan provisions. Prebensen Drive is the main road leading to the western hills from the central City, and already has some significant large format retailing on its southern side, established under resource consents on land presently zoned *Industrial*. The land on the northern side of Prebensen Drive is, at its closest point, about 450m from the Land Equity site and is presently in Crown ownership. It is earmarked for possible Treaty claim settlements, but has been leased to the Council for a maximum of 50 years and is available for sublease on the same terms.

[20] Less immediately relevant, but still of some significance, is Plan Modification 2, notified on the same date. This proposes to rezone as *Business Park* (effectively a sub-group of Industrial) some 30ha of the land owned by the Council and known as Lagoon Farm, north-west of the intersection of Prebensen Drive and the Hawkes Bay Expressway. The intention is that this will provide opportunities for light, technology and showroom-type industrial activities, rather than the heavy, wet industry provided for in the *Main Industrial* areas.

Regional planning documents

[21] The Hawkes Bay Regional Council is finalising outstanding references to its Proposed Regional Resource Management Plan. That Plan will include the Regional Policy Statement (which is already operative) and the Operative Regional Air Plan. The Proposed Regional Plan defines the issue of conflicting land use in this way:

> The occurrence of nuisance effects, especially odour, smoke, dust, noise, and agrichemical spray drift, caused by the location of conflicting land use activities. (Section 3.5.1)

[22] The Regional Council's Environmental Regulation Manager, Ms Helen Codlin, confirmed the Regional Council's concern about reverse sensitivity issues, particularly odour. She foresees the possibility that even if there are *no complaint* covenants in the leases, at the time of lease shoppers in retail developments on this site will bring their complaints about odour

to the Regional Council. We have no great enthusiasm for the efficacy of such covenants in any event, but we shall return to the issue of reverse sensitivity shortly.

Traffic

[23] There was consensus (recorded in a joint statement dated 14 March 2008) among the traffic engineers that the local roading network could cope with traffic generated by a large format retail development on the site, with one reservation. That was that the Pandora Road/Thames Street intersection would need a four-arm roundabout, particularly to cope with traffic turning right out of Thames Street. On the face of it, subject to land purchase, that is simple enough. But we were told that Transit New Zealand, under whose jurisdiction Pandora Road falls, has indicated that it would not sanction such a thing. If it ever came to that, one simply has to hope for sanity to prevail, and we proceed on the basis that site-generated traffic would be manageable, so long as the Council could be satisfied that the roundabout could be installed. But in case it cannot be so satisfied, we think that all traffic options should be live, and able to be considered in light of what is specifically proposed for the Land Equity site.

Reverse sensitivity

[24] As we described in the earlier decision, it is almost inevitable that industries of various kinds and scales may produce effects on their surrounding environments, or at least people believe they do. In turn, reactions to those effects, or perceived effects, by way of complaints or similar action can give rise to pressures on the industries that can stifle their growth or, in an extreme case, drive them elsewhere. That stifling, or that loss, may be locally, regionally or even nationally significant. When effects-sensitive activities seek to establish within range of a lawfully existing effect-emitting industry or activity management may become difficult. This is the concept known as *reverse sensitivity*. It is worth repeating the definition of the concept from an article by Bruce Pardy and Janine Kerr: *Reverse Sensitivity – the Common Law Giveth and the RMA Taketh Away*: ((1999) 3 NZJEL 93, 94)

> Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

[25] We also noted in the earlier decision that history does not suggest that there is a major problem with this issue. The closest parts of the residential area of Napier Hill are of the

order of 200m from the Pandora zone boundary, but there is only a modest history of complaint from residents about adverse effects from odour or dust. We have mentioned also that the *Ahuriri Mixed Use* zone, containing what seems a surprising combination of commercial, retail, residential and semi-industrial activities, commences on the other side of Pandora Rd and Thames St from the Main Industrial Zone. So far as we are aware, the establishing of The Quadrant apartment complex, also a matter of 200 – 250m from the zone boundary, has not so far produced problems.

[26] While unconvinced that it is a major issue, we must acknowledge the possibility of reverse sensitivity issues arising from the non-industrial use of the Land Equity site, and would be concerned if they could not be considered on a case-by-case basis, depending on exactly what was proposed.

Non-Industrial Use of Industrial Zoned Land

[27] This could be said to be a strategic planning issue. In contrast to what we were then told about there being a dire shortage of *ready-to-use* industrial land, particularly in larger lots, in Napier City the situation now seems improved. Larger lots within the Pandora *Main Industrial* zone have changed hands in the last year or so, and one large lot in Severn Street was subdivided into smaller parcels after failing to sell as a single unit. As well, an area of some 11ha at Awatoto has since had a *Deferred Industrial* zoning removed, conditional upon services being provided. So perhaps the need to preserve Industrial zoned for that sort of activity is not as pressing as it was.

[28] The Council's trade waste sewer still featured in evidence. It has a good deal of unused capacity yet and, although not yet actually connected to the site, it could be without unreasonable cost. Utilising it for *wet* industry is certainly something to be considered as part of the efficient use of a physical resource, and the general duty to mitigate adverse effects.

Evaluation of the revised proposal

[29] The decision in *Eldamos Investments Ltd v Gisborne DC* (W047/2005) revised the well-tested *Nugent* criteria in the light of the 2003 amendments to s32. According to *Eldamos*, in evaluating a proposed policy, rule or other method, we should consider whether:

1 it is the most appropriate way to achieve the objectives of the plan – s32(3)(b)

2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act – s72.

3 it is in accordance with the provisions of Part 2 – s74(1)

4 (if a rule) it achieves the objectives and policies of the plan – s76(1)(b).

What was finally proposed by Land Equity was a rules-based regime, leaving the underlying zoning in place but overlaying a borrowed set of controls for the specific site. The use of overlays of that kind is not in itself necessarily a bad thing – as we had occasion to comment in *Marist Holdings (Greenmeadows) Ltd v Napier CC* (W013/2007). The issue is whether the specific proposal measures up against the *Eldamos* criteria, and how it does so compared to the current regime.

[30] We begin by considering whether the proposed rule regime would achieve the objectives and policies of the Proposed District Plan. There are a number of relevant objectives and policies for industrial zones throughout the City. These are:

Objective 22.2

To enable the continued use and development of industrial activities and resources through:

- The identification of defined zones for industrial activity.
- The provision of clear and certain environmental performance standards within, or in some cases adjacent to those industrial zones.
- The restriction of sensitive land uses in defined industrial zones.

Policies

To achieve this objective, the Council will:

Continue to zone the Pandora, Onekawa, Awatoto, and Port of Napier areas for industrial activities (22.2.1).

Enable and provide for the use and development of physical industrial resources without unnecessary restriction (22.2.2).

Ensure the avoidance, remediation or mitigation of adverse environmental effects associated with the establishment and location of sensitive land uses within the identified industrial areas (22.2.4).

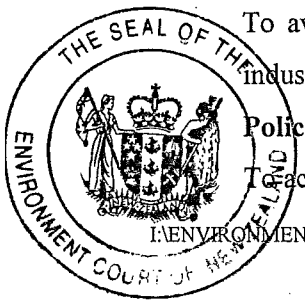
Ensure that all land uses within Industrial Zones undertake all reasonable steps to avoid adverse effects beyond their site boundaries (22.2.5).

Objective 22.3

To avoid, remedy or mitigate the adverse effects on the environment of land uses within industrial areas of the City.

Policies

To achieve this objective, the Council will:



Ensure that land uses are managed to avoid, remedy or mitigate any adverse effects on the environment and people's health, safety and wellbeing (22.3.1).

Control retailing land uses to retain the existing amenity of industrial zones and to manage the adverse effects on the environment, particularly the roading network (22.3.2).

Control the establishment of sensitive land uses within the City's industrial areas (22.3.3).

Ensure that non-industrial activities do not compromise or limit the efficient and effective use and development of existing lawfully established industrial activities, or new industrial activities (22.3.4).

Objective 22.4

To enable the ongoing operation, maintenance and development of the Port, while avoiding, remedying, or mitigating adverse effects on the environment.

Policies

To achieve this objective, the Council will:

Recognise the Port's importance to the social, economic and cultural wellbeing of the region (22.4.1).

Recognise and provide for the operation, maintenance and development of the Port of Napier as a regional physical resource that is primarily industrial in its nature and character (22.4.2).

Manage the adverse effects of Port-related land uses through plan provisions and other non-regulatory methods (22.4.3).

[31] Mrs Sylvia Allan, consultant planner for Port of Napier Ltd, and Mr Matthew Holder, consultant planner for the s274 parties, considered the proposed rules would not align with these objectives and policies for the Industrial Zones although Mr David Haines, Land Equity's consultant planner, held a contrary opinion. Mrs Allan went so far as to say the change to the rules proposed would create a significant disconnect in the Plan in terms of integrity. Overall, we agree with the Allan/Holder view that what is proposed is incompatible with the Proposed Plan's objectives and policies.

[32] We find that the land use rules contained in the District Plan affording LFR *discretionary* activity status mean that any proposal for LFR could be appropriately assessed. That assessment would not just comprise its effects but also consider the planning framework for the Industrial Zone as well as other Plan provisions and Part 2 of the Act. We are not satisfied that the rule regime proposed by the appellant would achieve the objectives and policies.

[33] For a more restricted status than *controlled*, the proposed regime also effectively displaces the Industrial Zone. The proposal spells out that the consent authority *...will have regard to the objectives and policies of the Plan and the assessment criteria in Chapter 20, as if the land were zoned Fringe Commercial.* We find that this would cut across the objectives and policies of the Industrial Zone and not ensure that adequate consideration could be given to any LFR proposal.

[34] In our view what is proposed cannot be an *appropriate* way to achieve the relevant objectives of the plan – ie those mentioned in para [30]. Having a situation where, as a *controlled* activity, a retail proposal could not be declined no matter what its size or permutation, or its effects, or sensitivity to effects, is self evidently not a better option for achieving the objectives of the plan than a *discretionary* status would be.

[35] For the same reasons, rather than assisting the territorial authority to carry out its functions, in our view the proposal would be a hindrance. And, if it is an inferior means of attempting to achieve the purpose of the Act, it cannot possibly be in accordance with Part 2.

Result

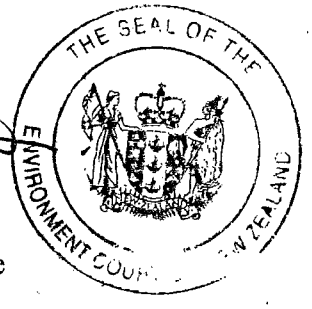
[36] For the reasons we have outlined, we are not at all convinced that the purpose of the Act will be promoted by Land Equity's proposed planning overlay for the site; certainly not in comparison to the existing *discretionary* regime applying to retail activities. The appeal is declined, and the decision of the Council is confirmed.

Costs

[37] The general view is that costs are not usually awarded on Plan appeals, but if there is to be an application it should be lodged within 15 working days of the issuing of this decision, and any response lodged within a further 10 working days.

Dated at Wellington this 5th day of May 2008

For the Court



C J Thompson

Environment Judge