IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2024] NZEnvC 343

IN THE MATTER	of the Resource Management Act 1991
AND	an application for declarations under s311 of the Act
BETWEEN	BRAEBURN PROPERTY LIMITED AND SPECIALISED CONTAINER SERVICES (CHRISTCHURCH) LIMITED
	(ENV-2024-CHC-20)
	Applicants
AND	CHRISTCHURCH CITY COUNCIL
	Respondent

Court:	Environment Judge K G Reid Sitting alone under s309 of the Act
Hearing:	at Christchurch on 23 September 2024
Appearances:	J Appleyard and L Forrester for the Braeburn Property Limited S de Groot for Specialised Container Services (Christchurch) Limited A Green and R Ashton for Christchurch City Council
Last case event:	23 September 2024
Date of Decision:	18 December 2024
Date of Issue:	18 December 2024

INTERIM DECISION OF THE ENVIRONMENT COURT

A: Directions are made for the parties to confer and file a joint memorandum, by 31 January 2025, proposing amended declarations addressing the matters set out at paragraph [165], and this judgement more generally.

REASONS

Background

[1] Braeburn Property Ltd ('Braeburn') is the owner of a 12ha industrial site at 320A Cumnor, Terrace, Woolston, Christchurch ('the site'). Since July 2022 Specialised Container Services (Christchurch) Ltd ('SCS') has been operating a shipping container depot from the site.[1] The site is located on the Christchurch side of the Port Hills in proximity to the Lyttleton tunnel and the Lyttleton seaport.

[2] The activities on the site involve the handling, assessment, maintenance and repair, and temporary storage of empty shipping containers. While being stored, the containers are currently stacked up to six containers high, which makes the stacks up to 23 m in height. Container stacks on the site are clearly visible from the surrounding area including from residences on Gould Crescent, a nearby residential area across the Heathcote River.

[3] The site is zoned Industrial General (Port Link Industrial Park) under the Christchurch District Plan ('CDP'). An area of this zone, which includes part of the site, is subject to rule 16.4.4.2.1 of the CDP. Under this rule "buildings" are subject to an 11 m height limit ('the building hight limit'). Outside the area covered by the building height limit, buildings within the site are unregulated as to height. The area within the building height limit is the nearest part of the site to the residential areas. It is also the area where the containers are stored.

[4] The Christchurch City Council ('the Council') maintains that the container

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1 Braeburn and SCS are joint applicants in these proceedings and are referred to in this decision together as "the applicants".

stacks are buildings and are subject to the building height limit. If this is so, containers would only be able to be stacked three or four high (depending on the type of container being stacked) within the area subject to the building height limit. This would significantly limit the number of containers that could be stored on the site, to the extent that SCS maintains its operation would cease to be commercially viable.[2]

[5] In November 2013 the applicants sought to resolve the issue of whether the building height limit applied to the containers by making an application for a certificate of compliance to the Council on the basis that the storage of containers on the site was a permitted activity. The certificate of compliance application was declined by independent hearing commissioners appointed by the Council.[3] This decision was then appealed to the Environment Court.[4]

[6] Following the outcome of the certificate of compliance application, the Council issued abatement notices to the applicants to enforce compliance with the building height limit rule. These abatement notices were appealed by the applicants.[5] The abatement notices are currently the subject of a stay issued by this court.[6]

[7] These two related proceedings (the appeals against the abatement notices and the appeal against the decline of the certificates of compliance) are currently on hold awaiting the outcome of this proceeding. The parties intend that the current proceeding will be determinative of the core issue in dispute in these related proceedings.

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2 Affidavit of Grant Tregurtha sworn 8 April 2024 at [31].

3 Commissioner Paul Rogers and Commissioner David Caldwell *Decision on Applications for Certificate of Compliance* (20 January 2024).

4 Notice of Appeal against the Council's decision on application for certificates of compliance dated 19 February 2024.

5 Notice of Appeal against abatement notices dated 19 February 2024.

6 *Braeburn Property Ltd v Christchurch City Council* [2024] NZEnvC 46.

Application for declarations and orders sought

[8] The declarations are sought under s311 Resource Management Act 1991 ('RMA'). I have summarised the declarations sought as follows:

> **Declaration 1:**
> In relation to the definition of 'building' (the Definition) in the Christchurch District Plan (the Plan):
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> **Declaration 1(a):**
> That an empty shipping container that is part of the supply chain network and is placed on a site temporarily is not a building for the purposes of the Definition.
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> **Declaration 1(b):**
> That a stack of empty shipping containers (being more than one shipping container stacked on top of the other) that are part of the supply chain network and are placed on a site temporarily are not a building for the purposes of the Definition.
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> **Declaration 1(c):**
> That the outdoor storage of other 'stacked' items (such as palletised goods, baled scrap metal, dismantled/crushed car bodies, haybales, garden supplies, metal, timber, concrete, other raw materials or manufactured products used in construction and civil works, and bundled waste or recycled materials) that are placed on a site temporarily until such time as they are required is not a building for the purposes of the Definition.
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> **Declaration 2:**
> That an empty shipping container, or a stack of empty shipping containers, that are part of the supply chain network and are placed on a site temporarily are "transiting shipping containers" for the purposes of rule 5.4.1.1 P16 of the Plan.
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> **Declaration 3:**
> In respect of rule 16.4.1.1.a:
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> **Declaration 3(a):**
> The rule applies to activities in the Industrial General Zone (Portlink Industrial Park) in sub-chapter 16.4.4 (and the other Industrial General Zones with area-specific rules); and

Declaration 3(b):

The activities listed in paragraphs 1.1(a)-(c) above are not activities that involve "any development".

[9] The declarations are framed as being of general application and are not tied specifically to the activities of the applicants on the site. The applicants say that the reason for this is that the core issue is of wide application and significance. Regardless of the way the application is framed, the applicants accept that the declarations cannot be considered in a vacuum and there needs to be a real issue before the court and an appropriate evidential context.[7] That real issue and evidential context is the dispute regarding the site.

[10] In declarations 1(a), (b) and (c) the applicants are addressing the issue of whether the shipping containers either individually or together as stacks, are a "building" under the CDP, which is the main issue between the parties. The submissions and evidence before me are primarily focused on this issue.

[11] Declaration 2 addresses whether the containers are "transiting shipping containers" under rule 5.4.1.1 of Chapter 5: Natural Hazards of the CDP. This rule imposes a minimum floor level on new buildings within the Flood Management Area identified in the CDP, but "Transiting shipping containers" are specifically exempt from this requirement. The site is located within the Flood Management Area.

[12] Declarations 3(a) and (b) address an alternative argument whereby the applicants seek to avoid the effect of the built form rules in part 16 of the CDP (including the building height limit). Under rule 16.1.1 of the Industrial General Zone ('IGZ') the built form rules only apply to a "development". If what is occurring on the site is not a "development" the container stacks will not need to comply with the building height limit regardless of whether they are "buildings".

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7 Application by Christchurch City Council [1995] NZRMA 129 (PT) at 135.

Evidence of activities on the site

[13] Grant Tregurtha is the co-founder and Chief Executive of SCS. He provided a detailed affidavit outlining the background to SCS and a description of its operations on the site.[8] His factual evidence was not disputed. I summarise the relevant evidence as follows:[9]

(a) the site is 12 ha in area and is located near the Lyttleton seaport with well-established arterial road links. From the site the Lyttleton tunnel and the Lyttleton seaport are easily accessible by road. There are other sites in the locality operating container depot service operations, including Lyttleton Port Company's City Depot;

(b) upon leasing the site, SCS understood that it could stack containers up to a maximum of eight containers high should they choose to do so. Current operations on the site however do not involve stacking containers more than six containers high;

(c) there are industry standard specifications for containers. These specifications include the dimensions, corner fittings, material and quality. The types of containers at the site are standard shipping containers (6.1 m or 12.2 m long, 2.44 m wide and 2.6 m high); and high–cube containers (6.1 m or 12.2 m long, 2.44 m wide and 2.9 m high);[10]

(d) with these standard measurements an 8-container stack of high cube containers would be a maximum height of 23.2 m. A stack of more than 3 high cube containers or more than 4 standard containers would exceed the 11 m building height limit. Stacking containers to 8 high is standard practice at other SCS locations in New Zealand. At the

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8 Affidavit of Grant Tregurtha sworn 8 April 2024.

9 As an aside I was informed that the commissioners considering the applicants' certificate of compliance application did not have the benefit of the information contained in Mr Tregurtha's affidavit or equivalent. *Decision on Applications for Certificate of Compliance* (20 January 2024).

10 At [19].

site containers are only stacked 6 high and there are no plans to change this;[11]

(e) SCS operates the site as an "inland container depot". The primary function of the depot is to support international supply chains by receiving, storing, assessing, and repairing (if required) empty shipping containers that are in transit between the Lyttleton port and either a point of origin or a destination for a consignment of goods or services. SCS does not accept containers for storage that contain any goods – they are always empty;

(f) SCS receives shipping containers at the depot from shipping companies, importers and freight forwarders. The primary customers are shipping companies. Containers are transported to the site on trucks where they are removed using mechanical hauling equipment ('MHE'). Once the containers arrive on the site they are surveyed to assess their condition. Damaged or substandard containers may be repaired or upgraded as necessary and as required by the client;

(g) once the containers are assessed, and if necessary repaired, they are transported (using MHE) to another part of the site to be stacked with other similar containers that are available for supply;

(h) containers are moved around the site using MHE specifically designed for moving shipping containers. The containers cannot be easily moved by an individual person, however the movement and placement of containers using MHE takes place easily and at short notice if required;

(i) while containers are stacked for the purpose of temporary storage, a single container may be moved several times around the site while it is in storage; for example, to undertake assessments or repairs. There are other reasons why containers may be moved within the site, including the need to reconfigure the site in response to fluctuations in site capacity and container demand, or for efficiency purposes to

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11 At [16].

minimise travel distances of machinery;

(j) in terms of the numbers of movements, SCS's model for forecasting movements and volume is premised on a standard three inbound movements per container (i.e. for arrival, assessment and repair, and storage), and one outbound movement per container (i.e. from storage onto a transport truck to be taken offsite);

(k) containers are stored temporarily on the site. The average number of shipping containers stored on the site per month between 1 April 2023 and 31 March 2024 was 2,226 containers. However, the monthly average is variable and subject to the demands of customers and industries;

(l) the average dwell time of a container at the site per month between 1 April 2023 and 31 March 2024 was 25.18 days. Again, the average dwell time is variable and subject to customer demand. Mr Tregurtha's affidavit produced a chart depicting that average dwell time.[12]. During this period average dwell times varied between a low of approximately 17 days per container (August 2023) and a high of approximately 37 days per container (October 2023);[13]

(m) the containers are held down only by gravity. The corner fittings are designed to "nest" on top of each other and provide a stable base for storage, but they are not tied to or fixed to one another in a stack, nor secured to the land or embedded in any way. There are no foundations, support structures, or services, or components fixed to the containers that hold or retain them in place or that enables them to function as anything other than empty shipping containers. Containers are designed to be mobile and are easily moved around and off the site;

(n) Mr Tregurtha produced a copy of an excerpt of the International Maritime Organisation's International Convention of Safe Containers

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12 Between 1 April 2023 and 31 March 2024.

13 Affidavit of Grant Tregurtha sworn 8 April 2024, attached exhibit B.

1972 ('CSC') which defines a definition of 'container' as "an article of transport equipment" which is:

> 1. of a permanent character and accordingly strong enough to be suitable for repeated use;
> 2. specially designed to facilitate the transport of goods, by one or more modes of transport, without immediate reloading;
> 3. designed to be secured and/or readily handled, having corner fittings for these purposes;
> 4. and of a size such that the area enclosed by the four outer bottom corners is either
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> (1) at least 14m² (150 sq ft); or
>
> (2) at least 7m² (75 sq ft) if it is fitted with a top corner fittings.[14]

(o) the size and shape of the designated areas where different activities are undertaken on the site including assessing, repairing, and storage of shipping containers is variable and subject to change;

(p) the layout and height of shipping container stacks is dynamic and ever-changing. The number of shipping containers and the configuration and height of shipping container stacks across the site is in a constant state of flux. What the site "looks like" varies significantly over time;

(q) there are always stacks of containers on the site and the arrangement and height of the container stacks and the length of time that any one container or any one stack is located on the site changes regularly.

[14] Mr Jorgensen provided an affidavit on behalf of the respondent. He is the team leader, RMA monitoring compliance at the Council. His evidence was in summary that:[15]

(a) he was tasked with compliance monitoring in September 2022. Since that time, he has visited the site regularly;

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[14] Affidavit of Grant Tregurtha sworn 8 April 2024, attached exhibit D.

[15] Affidavit of Craig Jorgensen affirmed 3 July 2024.

(b) from his observations his evidence was that the containers that make up the stacks change from time to time, however the container stacks are a constant feature of the site and essentially are in the same or similar configuration. Throughout the period of his observations the container stacks have ranged in height from 10.3 m in height to 15.5 m;

(c) he produced a selection of photographs of container stacks on the site from various positions in the surrounding area.

[15] One of the residents living in Gould Crescent, Ms Good-Geels, provided an affidavit setting out her observations of the site. Her evidence was in summary that:[16]

(a) prior to containers being stacked six high on the site she was able to see unobstructed views of Castlerock and the entire crater rim of the Port Hills from her property. She produced photographs taken before and after the placement of the containers showing that the containers obscure the view of the Port Hills from Ms Good-Geels' deck and living room when they are stacked six high;

(b) while the height of the stacks changes from time to time her view is almost always impacted because of the container stacks;

(c) before purchasing her property in Gould Crescent, she had researched the neighbouring IGZ and noted the 11 m height restriction.

[16] Counsel for the respondent Messrs Green and Ashton, described Mr Tregurtha's evidence that the site is "in a constant state of flux" as an overstatement, given the photographic evidence of Mr Jorgensen showing consistent stacks on the site perimeter over extended periods.[17] However, given Mr Tregurtha's detailed evidence as summarised above, I find that "a constant state

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16 Affidavit of Ezra Good-Geels, affirmed 4 July 2024.

17 Respondent's synopsis of legal submissions dated 16 September 2024 at [3.1](g).

of flux" is a fair description.

[17] Mr Jorgensen's evidence was limited to his observations on the occasions when he visited the site and surrounding area, and the conclusions he draws from these observations. Ms Good-Geels' evidence of the activities on the site was from her observations from her property. Mr Tregurtha's evidence was about the detail of the operations on the site, in the context of SCS' wider commercial operations. None of these witnesses were cross-examined. I do not see the statements made by Mr Jorgensen and Ms Good-Geels as conflicting in any significant way with the evidence of Mr Tregurtha. Any difference in emphasis is not material to the outcome.

Principles for interpreting planning provisions

[18] All the proposed declarations before the court turn on the interpretation of various provisions of the CDP. I turn now to the principles applicable to interpreting plan provisions.

[19] The interpretation of rules in district plans is governed by the Legislation Act 2019.[18] Section 10(1) of that Act requires that the meaning of legislation is to be "ascertained from its text and in the light of its purpose and its context".

[20] The principles of plan interpretation were discussed by the High Court in *Powell v Dunedin City Council* ('*Powell*').[19] This case has been cited as the leading authority on interpretation of planning instruments.[20] In *Powell* the court considered it was necessary when interpreting plan provisions to take into account the following:[21]

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18 *Auckland Council v Teddy and Friends Ltd* [2022] NZEnvC 128 at [11].

19 *Powell v Dunedin City Council* [2004] NZRMA 49 (HC); affirmed by the Court of Appeal in *Powell v Dunedin City Council* [2005] NZRMA 174 (CA).

20 Applicants' synopsis of submissions dated 9 September 2024 at [23] and fn 11.

21 *Powell v Dunedin City Council* [2004] NZRMA 49 (HC) at [35] affirmed by the Court of Appeal in *Powell v Dunedin City Council* [2005] NZRMA 174 (CA) at [12].

(a) the words of a plan are to be given their plain and ordinary meaning unless this is clearly contrary to statutory purpose or the social policy behind the plan and rules, or otherwise produces some injustice, absurdity, anomaly, or contradiction;

(b) the planning document should only affect common law rights where there is an express provision to this and/or it follows as a matter of necessary implication (this factor was not argued to be relevant in the present case);

(c) there is a need for certainty in the description of permitted activities and the operative parts of the plan. But the language used in the plan is to be given its plain and ordinary meaning, the test being "what would an ordinary, reasonable member of the public, examining the plan, have taken from the planning document"?

(d) the interpretation should not prevent the plan from achieving its purpose; and

(e) if there is an element of doubt, the matter is to be looked at in context and it is appropriate to examine the composite planning document.

[21] In the Court of Appeal, the appellant in *Powell* sought to argue that where there is no ambiguity, a rule should be interpreted without looking beyond the rule to the objectives and policies in the plan. The Court of Appeal disagreed and made the following comment:[22]

> while we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this court made clear in *Rattray,* regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20) and, where any obscurity or ambiguity arises, it may be necessary to refer to other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by the rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgement of this Court in *Rattray* or

[22] At [35].

> with the requirements of the Interpretation Act.

[22] *Powell* has been applied by the Environment Court in numerous cases. Counsel for the respondent referred to *Auckland Council v Teddy and Friends Limited*,[23] where the Environment Court described the interpretive exercise as an integrated approach to ascertain the meaning of legislation from its text and in light of its purpose and context:[24]

> The purposive light in which text is to be read and understood cannot be separated from it and so text and purpose must be comprehended together in a unified way rather than treated as dull requirements for a cross-check. Further, the current legislative requirement includes the context of the text, that is, what is with the text. In law, context is everything. All three elements of meaning [text, purpose and context] combine to promote a wholistic purposive approach to the interpretation of legislation.

[23] In *Teddy and Friends* the court did not accept the submission that objectives and policies are of little assistance. The court said:[25]

> I am cautious about inferring a policy objective for a rule from the text of the rule itself. Some rules may be written in such a way that they express both their policy and their regulatory effect, but the framework for planning documents under the RMA is clearly intended to require that those functions are exercised distinctly.

[24] I accept counsel for the respondent's submission that in the light of these authorities the context of a rule will include not only its immediate context in the plan but also any relevant objectives, policies and other methods, and where any ambiguity arises may include other parts of the plan. However, it should be borne in mind that the main interpretive issue before me relates to the meaning of the definition of a term (building) contained in the "Abbreviations and Definitions" section of the plan. "Building" is widely used throughout the CDP in a variety of

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[23] *Auckland Council v Teddy and Friends Ltd* [2022] NZEnvC 128.
[24] At [27].
[25] At [28].

contexts, including many different rules in different sections of the plan, with different applicable objectives, policies, and other methods. I come to the significance of this point later in this decision.

[25] Counsel for the applicants referred to the Environment Court case *Calveley v Kaipara District Council*,[26] where in applying *Powell* the court noted that the proper focus is how particular plan provisions fit within their immediate plan context, which is not to be confused with the particular factual context.[27] I accept that this is the appropriate focus.

[26] Both counsel referred to *Nanden v Wellington City Council*[28] ('*Nanden*') where the High Court held that fundamental issues of policy require the interpretive exercise to be undertaken in a manner that:[29]

(a) avoids absurdity or anomalous outcomes;
(b) is consistent with the expectations of property owners; and
(c) is consistent with the practical administration of the plan.

[27] Counsel for the applicants, Mses Appleyard and Forrester, referred to the Environment Court's decision in *Archibald v Christchurch City Council*[30] ('*Archibald*'). This case concerned an appeal against a decision of the Christchurch City Council to decline a resource consent application to establish guest accommodation within an existing dwelling which the applicant had been renting through Airbnb. The question involved interpretation of a provision in the CDP restricting non-residential activities in a residential zone. The court made the following comment:[31]

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26 *Calveley v Kaipara District Council* [2014] NZEnvC 182.
27 Applicant's synopsis of submissions dated 9 September 2024 at [24], referring to *Calveley v Kaipara District Council* at [143].
28 *Nanden v Wellington City Council* [2000] NZRMA 562 at [48].
29 At [48].
30 *Archibald v Christchurch City Council* [2019] NZEnvC 207.
31 At [51].

> A precedent upon which others would seek to rely may well be created based on the court's interpretation. The issue for the City Council, however, is not that a precedent is created but that the use of existing dwellings for guest accommodation, including accommodation marketed through Airbnb, was not identified in the proposed plan as being a significant resource issue for the district. Consequently, the plan provisions may not adequately respond to the demand for this activity. Rather than applying a strained application of plan provisions, the City Council may consider front-footing the issue meeting the demand through initiating a plan change that responds directly to the issue created by the same.

[28] Ms Appleyard argued that these comments are equally applicable in the present case. She submitted that the Council is seeking to manipulate the district plan to address complaints from neighbouring property owners about the use of the site. She argued that the Council is inappropriately trying to resolve this issue by adopting a strained and manufactured interpretation of the definition of "building" to address a factual situation that was never raised or considered at the time the CDP was drafted.

[29] I come to the relevance of *Archibald* to the current factual and legal context in due course.

Declaration 1(a), (b) and (c)

[30] Rule 16.4.4.2.1 is one of a small number of area-specific built form rules applicable to the Industrial General Zone (Portlink Industrial Park) (IGZ-PIP). The rule provides that:

> a. the maximum height of any building within the '11 m building height limit area' defined on the development plan and appendix 16.8.3 shall be 11 m.

[31] The area-specific rules of the IGZ-PIP are stated to be in addition to the built form rules for the wider IGZ. Within these rules, rule 16.4.2.1 provides for a building height limit of 15 m within 20 m of any residential zone. This rule does not apply to the applicants' site because it is not within 20 m of a residential zone.

The nearest residential zone is further away across the Heathcote River.

[32] Other than rules 16.4.2.1 and 16.4.4.2.1 there are no height limits for buildings within the IGZ. Outside of the limited areas covered by these rules, buildings within the IGZ are uncontrolled as to height.

The definition of "building" in the CDP

[33] The Abbreviations and Definitions chapter of the CDP starts with a statement that the listed definitions apply where identified in the "ePlan, dotted underline with hyperlinking". In all other instances "words and phrases are best defined using their ordinary dictionary meaning".

[34] The term "building" in rule 16.4.4.2.1 is hyperlinked so that the definition in the interpretation section applies. The definition is as follows:

> **Building**
>
> means as the context requires:
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> a. any structure or part of a structure, whether permanent, moveable or immoveable; and/or
> b. any erection, reconstruction, placement, alteration or demolition of any structure or part of any structure within, on, under or over the land; and
> c. any vehicle, trailer, tent, marquee, shipping container, caravan or boat, whether fixed or moveable, used on-site as a residential unit or place of business or storage; but
>
> excludes:
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> d. any scaffolding or falsework erected temporarily for maintenance or construction purposes;
> e. fences or walls that have no structural function other than as a fence or wall for boundary demarcation, privacy or windbreak purposes, of up to 2 metres in height;
> f. retaining walls which are both less than $6m^2$ in area and less than 1.8 metres in height;
> g. structures which are both less than $6m^2$ in area and less than 1.8 metres in height;

h. utility cabinets;

i. masts, poles, radio and telephone aerials less than 6 metres above mean ground level;

j. any public artwork located in that part of the city contained within Bealey, Fitzgerald, Moorhouse, Deans and Harper Avenues;

k. artificial crop protection structures and crop support structures; and

in the case of Banks Peninsula only, excludes:

l. any dam that retains not more than 3 metres depth, and not more than 20,000 m^3 volume of water, and any stopbank or culvert;

m. any tank or pool (excluding a swimming pool as defined in Section 2 of the Fencing of Swimming Pools Act 1987) and any structural support thereof, including any tank or pool that is part of any other building for which building consent is required:

   i. not exceeding 25,000 litres capacity and supported directly by the ground; or

   ii. not exceeding 2,000 litres capacity and supported not more than 2 metres above the supporting ground; and

n. stockyards up to 1.8 metres in height.

Advice note:

1. This definition of building is different from the definition of building provided in Sections 8 and 9 of the Building Act 2004, and the effect of this definition is different from the effect of Schedule 1 of the Building Act 2004 in that some structures that do not require a building consent under the Building Act 2004 may still be required to comply with the provisions of the District Plan.

[35] There are two issues before me arising out of this definition:

(a) first, whether the items listed in subclause (c) (one of which is "shipping containers") that are not "used onsite as a residential unit or place of business or storage", nevertheless fall to be assessed under the definition of building in subclauses (a) and/or (b) (**the interpretation question**),

(b) second, if shipping containers on the site fall to be assessed under (a) and/or (b) are they "fixed to land" thereby making them a structure

and therefore a building under these subclasses (**the application question**).

Meaning of the definition of "building" in the CDP – the interpretation question

[36] On the interpretation question the applicants' position is that the specific reference to shipping container in subclause (c) should be interpreted so as to exclude consideration of shipping containers under subclauses (a) and (b).

[37] The respondents' position is that both subclauses (a) and (b) in the definition of "building" apply to "any structure" that falls within those clauses. The reference in subclause (c) to shipping containers for particular uses does not exclude other configurations or uses of containers from falling within the broader categories in (a) and (b).

[38] I summarise the parties' respective submissions as follows:

Applicants' submissions

[39] The applicants submit that the plain and ordinary meaning of the text of the definition is that shipping containers that are not used onsite as a residential unit, place of business or for storage (so not covered under subclause (c)) cannot be buildings under (a) and/or (b).

[40] The applicants point particularly to the use of the conjunctions "and/or" between (a) and (b) whereas the conjunction "and" is used for subclause (c). The contrast in connections means that (c) is only additional to (a) and (b) and not an alternative to those subclauses. The applicants submit that the starting point for interpretation in this case is the interpretative principle "specific provisions must

override general ones" (*specialia generalibus derogant*).[32]

[41] Counsel submits that to interpret subclause (c) any other way would render the subclause "nugatory", as any item listed in subclause (c) could be deemed a building under subclause (a) and (b) irrespective of whether it was being used onsite as a residential unit, place of business, or place of storage.

[42] Counsel submitted that the respondent's position (that the more general subclauses (a) and (b) may also be applicable to the items listed in subclause (c)) would result in absurd outcomes. These were submitted to include the potential for vehicles, trailers and tents within camping grounds, rental car/campervans at depots and cars on sale at car sales yards being deemed as "buildings" under the CDP (on the basis that those items might also be "structures" under the broad definition provided by the RMA).[33] Absurd or anomalous outcomes should be avoided in interpreting plan provisions on the authority of *Mount Field Limited v Queenstown Lakes District Council.*[34]

[43] In support of the submissions that the specific overrides the general in the context of plan provisions, the applicants referred to the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Limited*,[35] *Transpower New Zealand Ltd v Auckland Council*,[36] and *Tauranga Environmental Protection Society Inc v Tauranga City Council.*[37] These cases are all situations where the higher courts have referred to the interpretive principle in the context of interpreting policies and objectives contained in various planning instruments.

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32 Applicants' synopsis of submissions dated 9 September 2024 at [34].

33 Affidavit of Jeremy Phillips affirmed 8 April 2024, attached Exhibit D.

34 *Mount Field Ltd v Queenstown-Lakes District Council*, HC Invercargill CIV-2007-425-700, 31 October 2008 at [36], relying on *Nanden* at [48].

35 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*, [2014] 1 NZLR 593, [2014] NZSC 38 at [80].

36 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [78].

37 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] NZRMA 492 at [115] and [125].

[44] Counsel cited and distinguished *Vortac NZ Ltd v Western Bay of Plenty District Council*[38] ('*Vortac*') where the Environment Court considered whether the inclusion in the definition of "building" of a "fence or wall exceeding 2 m in height" precluded a fence or wall of less than 2 m also being considered as a building (and structure) under the wide plain and ordinary meaning of those terms. Counsel submitted that the court's comments in *Vortac* were obiter, made in a different factual and planning context and in any event, not a binding precedent (being a decision of the Environment Court).[39]

[45] Turning to context. Counsel for the applicant acknowledged that in *Powell* it was appropriate to consider the particular rule in question in the context of the objectives and policies which the rule is intended to implement. Counsel argued that the current context is different. The interpretation question relates to a definition with broad application across the entire district plan. The definition has application across a range of objectives, policies, and rules from a range of different chapters and zones. In this context the approach in *Powell* is submitted to be less relevant.[40]

[46] If reference is required to objectives and policies (the applicants submit it is not), all objectives and policies in zones where the term "building" is used should be considered. Neither of the planning witnesses had carried out a planning review on this scale.

[47] The applicants submitted however that the broader strategic objectives contained in the plan (which are applicable to all zones) are relevant. In particular, objective 3.3.2 which provides:

> **3.3.2 Objective – Clarity of language and efficiency**
>
> a. The District Plan, through its preparation, change, interpretation and

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38 *Vortac New Zealand Limited v Western Bay of Plenty District Council* [2022] NZEnvC 176, (2022) 24 ELRNZ 239.

39 Applicants' synopsis of submissions dated 9 September 2024 at [42].

40 Applicants' synopsis of submissions dated 9 September 2024 at [54].

implementation:

i. Minimises:
   A. transaction costs and reliance on resource consent processes; and
   B. the number, extent, and prescriptiveness of development controls and design standards in the rules, in order to encourage innovation and choice; and
   C. the requirements for notification and written approval; and

ii. Sets objectives and policies that clearly state the outcomes intended; and

iii Uses clear, concise language so that the District Plan is easy to understand and use.

[48] The applicants submitted that its interpretation is in line with this objective, in that its interpretation reflects a plain and ordinary meaning which minimises transaction costs and the reliance on resource consent processes.

[49] Mr Phillips gave expert planning evidence for the applicants. In his evidence he sought to identify the implications for the applicants if shipping container(s) are a "building" and also constitute "development" (under rule 16.4.1.1.a). The height limit rule would not be the only issue. The containers would be subject to the Industrial General Zone built form standards (rules) for buildings and other rules in the wider plan. Mr Phillips identified the following rules that would trigger consent requirements:

(a) rule 16.4.4.2.1 – prescribing a maximum height for any building of 11 m within the building height limit area;
(b) rule 16.4.2.9 – requiring provision for sufficient water supply and access to water supplies for firefighting for all buildings;
(c) rule 7.4.3.2 – requiring cycle parking facilities at a rate of one visitor space/1000m^2 gross floor area (GFA) and one staff space/500m^2 GFA of buildings;
(d) rule 7.4.3.3 – which requires loading facilities at a rate of one heavy vehicle bay per 1000/m^2 GFA;

(e) rule 7.4.3.1 – which requires a minimum number of mobility parking spaces where the activity contains buildings of a total GFA of more than 2500m^2.[41]

[50] The non-compliance with these rules would necessitate a resource consent application and approval. Mr Phillips said that it would be impracticable to assess compliance with the rules which require assessment on a per GFA basis because the number of containers, and therefore the total GFA, fluctuates on a daily basis.

[51] In addition to assessing the implications for the applicants, Mr Phillips assessed the wider implications of defining shipping containers as "buildings", in other contexts within Christchurch. He gave the examples set out in paragraph [42] above and produced photographs of potential examples. His evidence was that if these types of items are regarded as buildings and "development" they would be subject to built form standards requiring reticulated water supply for firefighting, and built form standards requiring cycle parking, loading and mobility parking based on floor area.[42]

[52] Additionally, for some industrial and commercial zones, Mr Phillips said that the identified sites would be subject to any relevant building height limits, building height to boundary limits, building setbacks and in some cases building coverage limits.[43]

[53] Mr Phillips said that the application of rules in this way would impose unreasonable constraints on activities involving transitory objects requiring the activities to be authorised by resource consent. This outcome would be illogical and supported the view that the items listed in (c) (including shipping containers)

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41 This list is not exhaustive and other district-wide provisions may also trigger consent requirements.

42 Affidavit of Jeremy Phillips affirmed 8 April 2024 at [46]-[47].

43 Affidavit of Jeremy Phillips affirmed 8 April 2024 at [48].

of the definition of "building" were not intended to be treated by the plan as buildings.[44]

Respondent's submissions

[54] The respondent's counsel submits that the applicants' approach conflicts with the well-established case law on plan interpretation as it attempts to elevate the interpretive principle that the specific overrides the general to an inflexible rule.[45] Referring to the Court of Appeal's comments in *R v Pora*,[46] counsel emphasises the importance of context and that care should be taken in the application of that principle.

[55] The RMA cases cited by the applicants for the application of the principle concerned the interpretation of policy statements which contain potentially conflicting directives. In the present case there is no need to reconcile any tension or conflict between subclauses (a), (b), and (c) of the definition of "building". Subclause (c) can and should be read as an addition to the general and overarching subclauses (a) and (b).

[56] Counsel submits that *Vortac* is directly applicable and should be followed in this case.

[57] Counsel submits that the applicants' approach, of seeking to show how the respondent's interpretation might produce anomalies and absurdities in other factual circumstances to which the definition might apply, was designed to divorce the interpretation of the definition of building from the actual plan context in which the dispute between the parties arises.[47]

[58] The respondent submitted that the planning purpose and context do not

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44 Affidavit of Jeremy Phillips affirmed 8 April 2024, at [50].

45 Respondent's synopsis of legal submissions dated 16 September 2024 at [6.3].

46 *R v Pora* [2001] 2 NZLR 37.

47 Respondent's synopsis of legal submissions dated 16 September 2024 at [6.15].

support the applicants' interpretation that the activity on the site should be unregulated as to height, and is contrary to the expectations of landowners in nearby residential area in terms of *Nanden*.[48]

[59] Mr Francis White gave expert planning evidence for the respondent. His evidence was that, according to the Council's interpretation, stacked shipping containers on the site are considered buildings based on their size, degree of permanence, and the degree of affixation to the ground. Consequently, other stacks of material in different zones within Christchurch may also be classified as buildings, depending on a site and context-specific assessment of their size, permanence, and degree of affixation.[49]

[60] Mr White agreed with Mr Phillips that if the shipping containers are subject to the built form standards in rule 16.4.2 of the Industrial General Zone, these rules would need to be complied with unless a resource consent was obtained to depart from the standards.[50]

[61] The container stacks would be subject to requirements as to cycle parking, car parking, mobility parking, and loading space requirements assessed on a GFA basis. However, he did not consider any of these requirements onerous or anomalous or as representing an absurd outcome. Mr White did not consider that the assessment relating to transport standards was impractical. This could be done (for example) on a monthly average volume of the shipping containers basis (about which evidence was given by Mr Tregurtha).[51]

[62] Mr White noted that in all cases where standards are not met and a resource consent is required, the Council's discretion is limited. In relation to the minimum

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[48] Respondent's synopsis of legal submissions dated 16 September 2024 at [6.16]-[6.19].
[49] Affidavit of Francis White sworn 8 April 2024 at [11.12].
[50] Affidavit of Francis White sworn 8 April 2024 at [10.14].
[51] Affidavit of Francis White sworn 8 April 2024 at [10.46]-[10.47].

number of cycle parking facilities, the Council's discretion is limited to matters including:[52]

> whether the number of cycle parking spaces and end of trip facilities provided are sufficient considering the nature of the activity on the site and the anticipated demand for cycling.

[63] There are similar directions as to the exercise of the Council's discretion in granting consent in relation to mobility parking spaces and the minimum number of loading spaces required.[53]

[64] Mr White pointed out that breaching a standard does not signal whether an activity is appropriate or not, but rather provides an opportunity to assess the effects of an activity in terms of assessment criteria and the plan objectives and policies, if relevant. He noted that in some cases, such as the requirement to provide cycle parking facilities on a GFA basis, the Council's interpretation may mean that the district plan requirements may exceed what is necessary in relation to the activity undertaken on the site. In such a case, demonstrating that the required standard exceeds what is required might be straightforward.

[65] Mr White acknowledged that applying for resource consent is likely to add complexity, but again did not consider this an absurd or anomalous outcome in the context of the plan seeking to manage effects. His view was that while the outcome of any particular resource consent application cannot be predetermined, if the proposal does not result in adverse environmental effects and is not contrary to the relevant policy framework, obtaining a resource consent is likely to be straightforward.[54]

[66] Mr White's evidence overall was that the Council's approach may result in additional consenting requirements for some activities, in circumstances where the

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52 Affidavit of Francis White sworn 8 April 2024 at [10.53](b).

53 Affidavit of Francis White sworn 8 April 2024 at [11.50].

54 Affidavit of Francis White sworn 8 April 2024 at [11.75]-[11.77].

application of standards may not be entirely apt. These additional consent requirements are not considered to be absurd or anomalous outcomes given the environmental effects and values that are sought to be managed. In general terms, the relevant policy and assessment framework that would apply to such applications are directed at a balance between enabling industrial and commercial activities and managing potential effects on the environment and community.[55]

[67] Mr White discussed the objectives of the Industrial General Zone and considered that these favoured the respondent's interpretation of the definition.

Discussion

[68] I deal first with the text and immediate context of the definition of "building".[56] The definition is made up of two sections:

(a) the first part ((a), (b) and (c)) are circumstances that are expressly *included* within the definition;
(b) the second part ((d)-(k)) is a list of items that are expressly *excluded* from the definition, whether or not those items would otherwise be included within (a), (b) and (c).

[69] Within the first part of the definition, subclauses (a) and (b) both apply to "any structure". Subclause (a) relates to physical structures, whereas (b) concerns changes to structures and activities related to changing structures. Subclauses (a) and (b) are framed on a wide and inclusive basis.

[70] There is no definition of "structure" in the district plan and the definition requires reference to the RMA. The RMA defines "structure" as:

> any building, equipment, device, or other facility made by people and which is

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55 Affidavit of Francis White sworn 8 April 2024 at [5.6].
56 The definition is quoted at [34].

fixed to land; and includes any raft.

[71] Again, the definition is wide and inclusive. Each of the items listed in the words "any building, equipment, device, or other facility", represents a broad category of items which are included within the definition if they are "made by people" and "fixed to the land".

[72] In determining whether an item is a structure, the issue that often arises is whether the item in question is "fixed to the land". Resolving this question involves a case-by-case assessment of the facts focused on the degree of annexation to the land and the object or purpose of annexation in each case.

[73] Turning to subclause (c) of the definition. The first thing I note is that the list of items in (c) (any vehicle, trailer, tent, marquee, shipping container, caravan, or boat whether fixed or movable) are items that would not usually be buildings or structures in that they would not usually be "fixed to the land".

[74] Subclause (c) in effect extends the application of subclauses (a) and (b) to items that are generally not fixed to land. On the face of it, subclause (c) has wide application – for example to a vehicle (such as a truck) that is temporarily on a property and is being used as a place of storage. By virtue of (c) the concept of a building is extended to include the items in (c) in the specific circumstances set out in the subclause – when the items are used as a residential unit, as a place of business or for storage.

[75] Subclauses (a) and (b) are separated by the conjunction "and/or" whereas the applicable conjunction for (c) is "and". The applicants submit that this means first that (c) is additional to (a) and (b) and second, if the specific list of items is not used in the way set out in the clause, they are not to be treated as falling within (a) and/or (b). The contrast between "and/or" and "and" means that (c) is to be treated as *only* additional, and not an alternative to (a) and (b).

[76] It was also submitted that subclause (c) overrides subclauses (a) and (b) on

the basis of the interpretive principle "specific overrides the general".[57] As discussed, it was submitted by the applicants that because subclause (c) is more specific it will "prevail" over subclauses (a) and (b).[58]

[77] The effect of the applicants' arguments based on the wording of the conjunctions between the subclauses and the interpretive principle, is that subclause (c) operates to *exclude* the listed items from the definition of building *unless* they fall within the circumstances set out in that clause.

[78] I do not read subclause (c) as an exclusion. To read subclause (c) as an exclusion would be contrary to the inclusive framing of the subclause. It would also be inconsistent with the structure of the overall definition which contains inclusionary provisions of which (c) is one, and a specific list of excluded items in (d)-(k).

[79] In my view, the plain and ordinary meaning of the first three subclauses of the definition is that they overlap. They are partly co-extensive so that a particular circumstance may fall into one or more of the categories. Subclause (c) is partly co-extensive with (a) and (b) because there may be circumstances in which a "vehicle, trailer, tent, marquee, shipping container, caravan or boat" is "fixed to the land" (so as to be covered by (a)) but not used as a residence or a place of business or for storage (so not covered by (c)). One example would be shipping containers securely fixed to the land as part of a permanent or semi-permanent structure providing protection from rock falls (as were placed around Christchurch after the 2011 earthquakes).

[80] I find the applicants' resort to the interpretive principle that specific overrides the general to be unhelpful and unnecessary. I agree with the respondent that the use to which the principle is normally put in an RMA context, is to assist in resolving a conflict between competing policy provisions. In my view, in this

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57 Applicants' synopsis of submissions dated 9 September 2024 at [34].

58 Applicants' synopsis of submissions dated 9 September 2024 at [37]-[38].

case the words of the definition do not call for an application of the principle. Subclauses (a), (b) and (c) can and should be read together in such a way that they do not conflict.

[81] Further, I agree with the respondent that the applicants' approach seeks to elevate the interpretive principle that specific overrides the general into an inflexible rule. Indeed, as I see it, it is reference to the principle that creates rather than resolves, the purported conflict between subclauses (a) and (b), and subclause (c).

[82] The Environment Court in *Vortac* considered the definition of building in the Western Bay of Plenty District Plan and addressed a similar argument to that presently advanced by the applicants. The argument was that the specific inclusion of a fence or wall exceeding 2 m in height excluded the general definition of "building/structure" under the plan definition. The court said:[59]

> the definition of building/structure specifically includes a fence or wall exceeding 2 m in height. On the principle of interpretation that the expression of one thing excludes its alternative, by implication that inclusion in the definition might exclude a fence or wall below that height from being a building. The specific inclusion is, however, expressed to be in addition to the ordinary and usual meaning of building\structure. Those two words have very broad ordinary and usual meanings and, like other words of the broad meaning and common usage, normally take their particular sense from the purpose for which and the context in which they are used. In this case that sense must be considered in terms of the objectives and policies of section 8 of the district plan.

[83] The definition of "building" in *Vortac* is rather different to the definition of building that I am considering. Notably, under the *Vortac* definition, the words "building/structure" were to be given their "ordinary and usual meaning". However, I consider the court's comments as they relate to the usefulness of the

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59 *Vortac New Zealand Limited v Western Bay of Plenty District Council* [2022] NZEnvC 176, (2022) 24 ELRNZ 239 at [40].

interpretive principle (specific overrides the general) equally apt in the present case. In this case the specific inclusion of the words "shipping container" in limb (c) does not exclude a shipping container from being a building under limbs (a) and/or (b) where one or other of those limbs also apply.

[84] Further, I do not find the applicants' reliance on *Archibald* helpful. In that case the court found that marketing accommodation through Airbnb was not identified in the proposed plan as a significant resource management issue for the district. The court held it was not appropriate to adopt a strained interpretation to cover the unanticipated factual circumstances it was considering. In the present case I do not agree with the respondent's interpretation of the plan as "strained". That is so, even though shipping containers being stored within Christchurch were not identified as a significant resource management issue for the district.

[85] I also note the remarks in *Archibald* upon which the applicants rely, are at the end of the decision under the heading "outcome". The interpretive analysis itself, found at paragraphs [33]-[45] of the decision, is a conventional application of *Powell* and does not appear to refer to and place weight on whether the factual circumstances arising had been in the contemplation of the plan writers.

[86] I have a clear view as to the correct interpretation of subclauses (a), (b) and (c) in the definition of "building". I have come to this view based on the text of these subclauses in the context of the overall definition. In accordance with *Powell*, words are to be given their plain and ordinary meaning, unless this is clearly contrary to statutory purpose or social policy behind the plan and rules, or what otherwise produces some injustice, absurdity, anomaly, or contradiction. As noted in *Powell*, the interpretive exercise does not occur in a vacuum. I now consider that in the wider context.

[87] The parties' positions differed on the weight and relevance of the IGZ's objectives and policies in interpreting the definition of "building". The respondent proceeded on the basis that these objectives and policies were highly relevant. The

applicants considered they were less relevant, or not relevant at all, because the definition is widely used throughout the plan and should have a consistent meaning. The applicants therefore consider the IGZ's objectives and policies are no more relevant than other objectives and policies in chapters of the plan where the term "building" appears.

[88] I accept that the term "building" as it is used in the definition section of the CDP, is intended to have a common and consistent meaning throughout the plan. The plan explicitly states how definitions are to be used. The definitions list starts with the following statement on how definitions apply:

> This part of the district plan explains the extended meaning of words and phrases developed specifically for, and used in the context of, it. The definitions herein replace the ordinary dictionary meaning of the subject word or phrase.
> Definitions only apply where identified via the following means:
> 1. In some cases, a qualifier in the definition (i.e. "X in relation to why, means…"); and
> 2. in the eplan, dotted underline with hyperlinking.
>
> In all other instances words and phrases used in the district plan are best defined using the ordinary dictionary meaning.

[89] The specific and mandatory identification of when the expanded definitions in the interpretation section are to be used (when hyperlinked) is in my view a clear indication that the defined words have a common and consistent meaning across the plan.

[90] That approach to interpretation is also consistent with objective 3.3.2.[60] This objective applies throughout the plan and (together with objective 3.3.1) has priority over all other objectives and policies.[61] This objective is unusual and comes out of the specific circumstances and statutory planning context in which the CDP was developed; namely recovery after the Canterbury earthquakes.[62]

[91] Objective 3.3.2 is headed 'clarity of language and efficiency', and states that the plan through its "preparation, change, interpretation and implementation" … "uses clear, concise language so that the district plan is easy to understand and use". Common and consistent definitions achieve this objective.

[92] The definition of "building" commences with the words "means as the context requires". This contrasts with almost all the other definitions in the interpretation section, which simply state what the word "means". The respondent argued these words dictate that the meaning of "building" is to be ascertained from the context as it appears in the plan, in this case the objectives and policies of the IGZ.

[93] In my judgment these words should not be interpreted as indicating that the "building" is to have a variable meaning depending on the context of the word in the plan. That approach would be contrary to the clear overall intent to the interpretation section as I have discussed. In my view, the words are intended to indicate that depending on the context, one or other of the subclauses in the definition may be more applicable.

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60 Cited at [47].

61 See CDP, policy 3.3 – Interpretation which states "For the purposes of preparing, changing, interpreting and implementing this District Plan … All other objectives within this Chapter are to be expressed and achieved in a manner consistent with objectives 3.3.1 and 3.3.2; and …The objectives and policies in all other Chapters of the District Plan are to be expressed and achieved in a manner consistent with the objectives in this Chapter.

62 Section 71 of the Canterbury Earthquake Recovery Act 2011 and the Canterbury (Christchurch Replacement District Plan) Order 2014. The particular circumstances of CDP are discussed in full in chapter 3: 3.2 Context.

[94] The objectives and policies of the IGZ are in my judgement of lesser relevance in this case. In *Vortac* and *Teddy*, the Environment Court considered the interpretation of definitions which had potential application outside of the particular rural context being considered. In the case of *Vortac* the definition of "building" was at issue, while in *Teddy* it was the interpretation of "animal day care" at issue. The term to be interpreted had a much more limited application in *Teddy* than that in *Vortac*. The approach to interpretation adopted in each of these cases focused on the objective and policy framework relevant to the rule in question. As I have indicated in this case, the plan prioritises common and consistent meanings for defined words. I place weight on objective 3.3.2 and the overall structure of the definition section of the plan, which is the specific plan context within which the definition appears.

[95] In any event in the particular circumstance of this case, it is unnecessary for me to engage in a detailed review of the objectives and policies of the IGZ because I have reached the view that the shipping containers on the site are not "fixed to the land" and are therefore neither "structures" nor "buildings". On that basis neither interpretation on the definition of "building" effects the substantive outcome and neither interpretation better achieves the policy direction of the objectives and policies of the IGZ.

[96] I consider that the consequences that Mr Phillips identifies of interpreting the rule in the way argued for by the respondent, are overstated. He identified vehicles, trailers and tents within camping grounds, rental car/campervans at depots and cars on sale at car sales yards being deemed as "buildings" if the respondent's interpretation were to be adopted.

[97] The wider impact of adopting the respondent's interpretation, as I have done, is likely to be limited. Before one of the items listed in (c) can fall within (a) or (b), it still needs to be "fixed to the land". This factor would rule out most of the situations Mr Phillips refers to. It is difficult to envisage a case where caravans or boats in a sales yard (for example) would ever be "fixed to the land" in terms

of the criteria I go on to discuss.

[98] Mr White's evidence was that where an object is determined to be "fixed to land" so as to be a building under (a) and/or (b) triggering a consent requirement, the plan sets out appropriate and flexible assessment criteria. Mr White did not consider any of the possible consent requirements onerous or anomalous or as representing an absurd outcome. I agree with Mr White in general terms, although in this case my finding below is that the containers on the site do not trigger any consent requirement.

[99] For completeness I record that the parties made submissions about the status of containers within the Specific Purpose (Lyttleton Port) Zone. However, as Ms Appleyard explained this zone is subject to a different plan preparation process to the rest of the CDP. The definition of "building" in the wider CDP does not appear to apply as it is not hyperlinked. I have therefore not found it helpful to consider these zone provisions.

Are the shipping containers "fixed to land"? – the application question

[100] On the basis of the interpretation, I adopt above, shipping containers (or stacks of shipping containers) on the site are a "building" if they are:

> (a) any structure or part of a structure, whether permanent, movable or immovable; and/or
> (b) any erections, reconstruction, placement, alteration or demolition of any structure or any part of any structure within, on, under or over the land …

[101] The term "structure" is not defined in the CDP, but the RMA defines the term as "any man-made building, equipment, device, or other facility that is fixed to the land, including rafts".

[102] Both parties agreed that shipping containers on the site are to be considered

"equipment" and/or "a device" made by people, therefore the only question arising under the definition of "structure" is whether the shipping containers are "fixed to land".

[103] The respondent submitted that the stacks of shipping containers are "fixed to the land" in such a way as to be "structures", while the applicants submitted that single shipping containers and stacks of empty shipping containers that form part of a supply chain network and are temporarily stored on the site, are not "fixed to the land" and not structures as defined by the RMA.

[104] Four Environment Court authorities were referred to by both parties in *Ohawini Bay Ltd v Whangarei District Council*[63] (where a sea wall was considered); *Antoun v Hutt City Council*,[64] *Beachen v Auckland Council*,[65] and *Tasman District Council v Schaeffner*[66] (each concerning tiny homes). Those cases dealt with the issue of what constitutes being "fixed to the land" in the definition of structure.

[105] On the basis of these authorities, the parties agree that the court should approach the issue of whether the shipping containers are fixed to the land by considering:

(a) first, the degree of annexation to the land, noting that in some cases something can be fixed to the land simply by gravity; and
(b) second, the object or intent, of the annexation to the land.

Applicants' submissions

[106] The applicants emphasise various aspects of the transitory and short-term nature of the storage of the shipping containers and their presence on the site in the context of the wider supply chain, rather than any purpose that implies a level

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63 *Ohawini Bay Ltd v Whangarei District Council* ENC Auckland A068/06, 31 May 2006.
64 *Antoun v Hutt City Council* [2020] NZEnvC 6.
65 *Beachen v Auckland Council* [2023] NZEnvC 159.
66 *Tasman District Council v Schaeffner* [2024] NZEnvC 180.

of permanence. The stacks of shipping containers were submitted to be distinguishable from the other Environment Court cases: *Ohawini* involved a sea wall specifically designed to be permanent and embedded in the ground (so not easily moved), the tiny homes cases all involved permanent occupation with connection to services (or intended connection to services in the case of *Antoun*), with significant practical and legal difficulties in moving the tiny homes.[67]

[107] The applicants contended that the respondent's submissions confuse the shipping containers or stacks of shipping containers themselves, which are temporary and transitory with the *activity* on the site, namely container storage.[68]

Respondent's submissions

[108] The respondent focused exclusively on whether the *stacks* of shipping containers were fixed to land (as distinct from the shipping containers themselves).

[109] In terms of the degree of annexation, the respondent submitted that the stacks are placed in designated places, and as shipping containers are designed to be uniform and standardised, they fit together seamlessly in various configurations and onsite are interlocked in stacks. Due to the weight of the shipping containers they cannot easily be moved and require MHE such as a crane, forklift, straddle, carrier to shift them. The respondent considers the stacks are a permanent feature of and presence in, the environment held firmly in place by gravity.

[110] The stacks of shipping containers can be seen as having a high degree of annexation in the sense that, while their constituent parts change from time to time, the stacks themselves are in effect a permanent feature of the environment.[69]

[111] The object of the annexation is storage and repair/maintenance. The

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67 Applicants' synopsis of submissions dated 9 September 2024 at [58]-[60].

68 NOE p 147 l 6-19.

69 Respondent's synopsis of legal submissions dated 16 September 2024 at [5.11]-[5.16].

intention is to stack the shipping containers up to a maximum of 23.2 m (eight containers high). Thousands of shipping containers are stored on the site. The shipping containers may be stored on the site for an indefinite period depending upon consumer demand. In any event, "the facility or container storage activity" is intended to be long-term or permanent, rather than temporary or transitory.[70]

Discussion

[112] In line with the Environment Court authorities where the definition of "structure" has been considered, I analyse the facts on the basis of the two factors borrowed from property law: *the degree of annexation* of the shipping containers (and stacks of containers) to the land, and the *object of annexation* – that is the intent of the annexation.[71]

[113] Dealing first with the degree of annexation, there are no foundations, attachments or other support structures which fix the shipping containers in place.

[114] The respondent submitted that the shipping containers "interlock" while stacked. I took this to mean that they are connected to each other by some coupling mechanism. However, there is no evidence to that effect. Mr Tregurtha's evidence was that the shipping containers nest on each other only by gravity; they are not tied or fixed to each other nor to the ground while in stacks. That is also what the photographs show.[72] I therefore find that the shipping containers both individually and when stacked, are held in place only by gravity.[73]

[115] The case law indicates that the word "fixed" does not exclude objects that are held down solely by gravity.[74] Of the cases that were referred to me, the only

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70 Respondent's synopsis of legal submissions dated 16 September 2024 at [5.18].

71 In the following discussion I leave to one side *TDC v Schaeffner* as at the time of issuing this decision it was the subject of an appeal to the High Court. I place no reliance on the facts and outcome in that case.

72 NOE, pp 104 l 21-105 l 20.

73 Affidavit of Grant Tregurtha sworn 8 April 2024 at [18](e).

74 *Ohawini* at [24].

one where the object in question was simply resting on the ground without being embedded or having some other physical attachment or connection to the ground, was *Antoun*.[75] In *Antoun* the tiny home was held in place solely by its obvious weight and bulk. These factors meant that it could not easily be moved. In the present case the containers are heavy, the stacks of containers even more so. Whether this makes the containers difficult to move needs to be seen in context. The individual shipping containers (and the stacks of containers) on the site are (by design) easily transportable around the site, and on and off the site, at short notice with specialist equipment that is readily available (MHE).

[116] The length of time the object in question has been in place has been relevant to the degree of annexation in other cases.[76] In this case the length of time the shipping containers are on the site in one locations is (on average) in my judgement, extremely short. The dwell time on the site averaged 25.18 days over the course of the 2024 financial year. Within that average, individual shipping containers will be onsite for longer and shorter periods.

[117] This average dwell time does not account for internal reshuffling and reordering of containers within the site. Mr Tregurtha's evidence was to the effect that SCS's internal model allows for an average of four movements per container.

[118] The time the individual shipping containers are stationary in one place on the site bears no comparison to the other cases. The seawall in *Ohawini* was a permanent feature, the partly completed tiny home in *Antoun* had been in place for 18 months, and the tiny home in *Beachen* had been present without movement, for three years.

[119] The respondent places emphasis on the degree of permanence of the stacks, in contrast to the individual shipping containers. I have already set out the detail

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75 *Antoun* at [54]. In *Beachen* (at [45]) the court found that the tiny home was embedded in the land, physically connected to services and was integrated into the site. In *Ohawini* the seawall was partly buried in the ground.

76 For example, *Beachen* at [45].

of Mr Tregurtha's evidence about the movement of the containers in and out of and within the site, and his evidence about the stacks of containers within the site. I have accepted Mr Tregurtha's evidence that the configuration and height of the container stacks across the site is in a "constant state of flux". In my view therefore the stacks are not permanent, they are highly changeable.[77]

[120] The respondents submitted that even though the constituent parts of the stacks change from time to time, the stacks themselves "are in effect a permanent feature of the environment".[78] If I understand the submission correctly, the respondent is emphasising the purported appearance of permanence over the physical reality on the site.

[121] In line with all the cases to which I was referred, the issue of the degree of annexation involves a careful consideration of the physical qualities of the object in question and its association with the ground. To regard the appearance of the permanence of the stack as relevant in assessing the degree of annexation, as distinct from the reality (which is that the stacks are impermanent), would in my view be a fiction.

[122] These factors lead me to the conclusion that the degree of annexation of the containers both individually and when stored in stacks is low.

[123] Turning to the object or intent of annexation. The purpose of the containers and the stacks of containers on the site is temporary storage.

[124] The respondent submits that the container storage activity is intended to be long-term or permanent. I accept the applicants' submission that this confuses the question of whether the shipping containers or the stacks of shipping containers are a structure with the *activity* of storage on the site. The applicants' activity of operating a container storage depot which includes the stacking of

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77 Applicants' synopsis of submissions dated 9 September 2020 at [60.2].

78 Respondent's synopsis of submissions dated 16 September 2024 at [5.16].

shipping containers, is no doubt intended to be continuing and long term. That is quite a different issue to whether shipping containers that are on the site at any given time, or the stacks of shipping containers, are in one place permanently or for the long term.

[125] The activity of storage on the site is subject to separate controls in the IGZ. These controls include requirements as to setback and screening.[79] In my judgement the rules in the plan concerning outdoor storage are the appropriate place for controls on the outdoor storage of shipping containers. If the provisions in the CDP, dealing with outdoor storage in the IGZ are inadequate, that is a matter that the Council can only address via a plan change.

[126] In determining the object or intent of annexation, it is in my view significant that the shipping containers on the site retain their character as shipping containers. They remain, in the words of the CSC convention, "articles of transport equipment" specifically designed to "facilitate the transport of goods". Each container on the site is being stored temporarily awaiting the next assignment. As the applicants put it, they are part of a "supply chain network"[80] and remain part of this network while on the site.

[127] This is not a situation where the shipping containers have been converted to a different use to that for which they were originally designed. They have not, for example, been used for a wall to protect against rock fall or used as part of the structural elements of a building. Rather, the reason for having the shipping containers temporarily on the site is as part of their intended purpose and function as articles of transport equipment.

[128] For these reasons I find that the shipping containers stored on the site, whether individually or in stacks, in the manner that has been described in the

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79 See 16.4.2.2 Minimum building setback from road boundaries/railway corridor, 16.4.2.3 Minimum building setback from the boundary with a residential zone and 16.4.2.7 Visual amenity and screening.

80 Applicants' synopsis of submissions dated 9 September 2024.

evidence before me, are not fixed to the land and are therefore not structures under the RMA nor buildings under the CDP.

Declaration 2

Rule 5.4.1.1 – are the shipping containers "transiting shipping containers"?

[129] The applicants seek a declaration to the effect that empty shipping containers (that are part of a supply chain network) are transiting shipping containers for the purposes of rule 5.4.1.1, P16 of the CDP. This rule provides for "Outdoor Storage of transiting shipping containers in commercial and industrial zones" as a permitted activity within the flood management area.

[130] Rule 5.4.1.1 applies in the context of minimum floor level requirements within flood management areas as identified in planning maps. The applicants' submit, and I agree, that the purpose of the rules in chapter 5 is to avoid activities that increase the risks associated with natural hazards to people, property and infrastructure.[81]

[131] Rule 5.4.1.1 indicates that the district plan anticipates that shipping containers that are not transiting may require compliance with minimum floor levels in circumstances where the containers are otherwise a "building" under the definition in the district plan. As I have found it, that is in circumstances where the container is affixed to the land so as to be a structure (under (a) and/or (b) of the definition of building) or being used as a residence, place of business, or for storage (in terms of (c)).[82]

[132] The CDP does not define the term "transiting". The introduction to the

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81 Applicants' synopsis of submissions dated 9 September 2024 at [81].

82 As an aside I have considered whether rule 5.4.1.1, which I'm told is the only provision referring to "transiting shipping containers" in the CDP, assists with the interpretation of the definition of building. The exemption and rule 5.4.1.1 P16 is equally consistent with limb (c) being exclusive of limbs (a) and (b) as it is inclusive.

definitions list in chapter 2 "Abbreviations and Definitions" states that undefined definitions are "best defined using their ordinary dictionary meaning". The applicants rely on the following dictionary definitions of 'Transit(ing)':[83]

> **Cambridge dictionary**
> To pass through or cross a place, an area, or a country on a way to somewhere else.
>
> **Merriam-Webster dictionary**
> to pass over or through

[133] The applicants rely on the shipping containers being on the site temporarily as part of a supply chain network. Each container passing over/across the site, "transiting while on a journey" in terms of the dictionary definitions set out above. The placement of the containers on the site is temporary, and just one stop on its way to its destination(s).[84]

[134] As an aside, I record that shipping containers that are in transit would unlikely be classified as a "building" under the district plan definition, as shipping containers of that nature would not be "fixed to land".

[135] The respondent refers to dictionary definitions as follows:[85]

> **Transit**
> The action of passing across or through; passage or journey from one place or point to another.
> A way for passing; a river crossing.
> The passage or carriage of people or goods from one place to another; public transport.
> …

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83 Applicants' synopsis of submissions dated 9 September 2024 at [78].
84 Applicants' synopsis of submissions dated 9 September 2024 at [85].
85 Respondent's synopsis of legal submissions dated 16 September 2024 at [9.3].

Transit:

(1) Conveyance of persons or things from one place to another.

(2) Usually local transportation especially of people by public conveyance

An act, process, or instance of passing through or over.

Transiting:

As in traversing; to make one's way through, across or over.

[respondent's emphasis]

[136] The respondent submits that the shipping containers on the site are not "transiting" because:[86]

(a) they are not conveying goods. Reference is made to the Australian Federal Court case *NEC Australia Pty Ltd v Gamif Pty Ltd* ('*NEC*')[87] where the court held that goods in that case "ceased to be in transit … once they had been unloaded and stacked in the … depot";

(b) they are no longer on a journey from origin to destination. Instead, they have reached their destination and are being stored until they are required for the next journey.

[137] Having considered the submissions, I conclude that the site is being used for the storage of transiting shipping containers. I discount reliance on the *NEC* case as it concerned an insurance contract that only covered goods that were "in transit". Quite different considerations apply here.

[138] The respondent focuses on the term "transiting". However, this word does not occur in isolation. Rule 5.4.1.1 expressly contemplates that transiting shipping containers may be stored. The respondent's interpretation makes no sense as it adopts the interpretation of the term "transiting" which excludes the possibility of transiting shipping containers being stored.

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86 Respondent's synopsis of legal submissions dated 16 September 2024 at [9.7].

87 *NEC Australia Pty Ltd v Gamif Pty Ltd* FC, 31 May 1993.

[139] Neither party provided a detailed contextual and purposive analysis of rule 5.4.1.1. From my review of the objectives and policies of Chapter 5: Natural Hazards, I discern that the purpose of the rule is to introduce additional floor level requirements so as to protect people from harm, and property and infrastructure from damage. Requiring higher floor levels on temporarily stored shipping containers such as those on the site, would not serve this purpose in any way.

[140] For these reasons, I find that the activity on the site falls within the definition of the *outdoor storage of transiting shipping containers* under rule 5.4.1.1 of the CDP.

Declaration 3(a) and (b)

Are the activities on the site a "development" under rule 16.4.1.1 of the CDP?

[141] The built form rules of the IGZ (including the 11 m height limit) only apply to the "development" of the site. The applicants seek a declaration to the effect that the shipping containers and stacks of shipping containers are not a "development". The argument upon which this declaration is based is an alternative to declaration 1, and is relevant only if the shipping containers on the site are structures and buildings. I have found in this case that the shipping containers on the site are neither structures nor buildings. I go on to address the arguments that have been put to me as to the application of the definition of "building".

[142] Chapter 16 provides for industrial and other compatible activities to be undertaken within three industrial zones including IGZ. Part 16.4.1 is within the IGZ and contains a series of rules and associated tables specifying the activity status (permitted, controlled, restricted discretionary, discretionary, and non-complying) of various activities.

[143] Rule 16.4.1.1a. provides:

> The activities listed below are permitted activities in the Industrial General Zone if they meet the activity specific standards set out in this table and the built form standards in Rule 16.4.2. Note, the built form standards do not apply to an activity that does not involve any development.
>
> [court's emphasis]

[144] The IGZ's built form standards are set out in 16.4.2 of the CDP as referenced in rule 16.4.1.1.a.

[145] The applicants argue that, for the industrial zones, the built form standards do not apply to an activity that does not involve any "development".[88]

[146] The term "development" is not defined in the CDP nor in the RMA. As mentioned above, the introduction to the definitions list in chapter 2 instructs the use of the terms "ordinary dictionary meaning" when that term is not specifically defined (and hyperlinked). The applicants and the respondent each referred to, and relied solely upon a number of dictionary definitions. Neither the applicants nor the respondent provided a contextual or purposive interpretation of the definition of "development".

[147] The applicants provided definitions from Collins dictionary, Cambridge dictionary, and Miriam Webster dictionary and submit that it is clear from these definitions that "development" requires an aspect of building (used as a verb) or construction of something on land that would be considered an improvement that would increase the underlying capital of that land. On this basis, the applicants argue that the activities undertaken on the site do not involve the "development" of land for the purposes of rule 16.4.1.1.a.[89]

[148] The applicants argued that the placement of shipping containers on the site

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88 Applicants' synopsis of submissions dated 9 September 2024 at [94].

89 Applicants' synopsis of submissions dated 9 September 2024 at [91]-[100].

was in itself not an improvement; the containers do not represent a feature of the site that adds value.

[149] The respondent referred to the following dictionary definitions of "development" as follows:[90]

> **Collins English Law Dictionary New Zealand Edition**
>
> - an area or tract of land that has been developed;
> - Develop: to improve the value or change the use of land, as by building.
>
> **Cambridge Dictionary**
>
> - an area on which new buildings are built in order to make a profit
> - The process of growing and changing and becoming more advanced.
>
> **Merriam Webster Dictionary**
>
> - the state of being developed;
> - a tract of land that has been made available or usable: a developed tract of land *especially*: one with houses built on it.
>
> **Black's Law Dictionary Ninth Edition Bryan A. Garner**
>
> - … 1. A substantial human-created change to improved or unimproved real estate, including the construction of buildings or other structures;
> - An activity, action, or alteration that changes underdeveloped property into developed property.
>
> **Lexis Advance Fourth Edition Words and Phrases Legally Defined Volume 1 A-K Development of property**
>
> - "… development means the carrying out of building, engineering, mining, or other operations in, on, over or under land, or the making of any material change in the use of buildings or other land". - (Town Country Planning Act 1990).

[150] A number of the definitions refer to "building" and "structures". It is clear

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90 Respondent's synopsis of legal submissions dated 16 September 2024 at [10.3].

to me that had I determined that the shipping containers or the stacks of shipping containers on the site were "structures" or "buildings" then the activity of placing them on the site would have been a "development". However, I also consider that the concept of "development" goes beyond the placement of buildings and structures.

[151] In my view of the dictionary definitions set out above, the one offered by Black's most closely reflects the way that "development" would be commonly understood in the context of an industrial site as, "an activity, action, or alteration" that "changes" undeveloped property into developed property.

[152] I hesitate to add to the already long list of dictionary definitions cited by the parties. However, the Concise Oxford English dictionary's definition of "develop", to which the definition of "development" refers, seems to me to also encompass what would generally be understood in this context. The definition as far as relevant is:

a. construct new buildings on (land);
b. convert (land) to a new purpose so as to use its resources more fully.

[153] In this definition the distinction between a confined interpretation (as argued for by the applicants) and the broader interpretation (as argued for by the respondent) is represented in the alternatives a. and b. I consider the second part of the definition set out above is most relevant.

[154] The concept of "development" is a broad term which encompasses activity, action or alteration that results in a "change" to the undeveloped site. Equally, the "conversion" of land to a new purpose, encompasses what is involved and the "development" of land for the purposes of the CDP.

[155] In this case the use of the site for shipping container storage in my view involves an alteration and a change to the property. Various physical changes to the site have been undertaken, which have enabled the storage to occur, including

the development of hard stand and ancillary components of the container storage depot.

[156] In February 2024 Braeburn (the landowner) obtained resource consents for a three-lot fee simple subdivision, earthworks and industrial activities on the site. When the consent was originally applied for, it sought to enable the stacking of shipping containers beyond the 11 m height limit. However, this aspect of the application was withdrawn on the basis that no consent was required for that activity.

[157] The consent nevertheless imposed various conditions relating to the shipping containers (and other matters for which consent was not sought). Braeburn objected to these conditions on the basis that they were outside the scope of conditions that could lawfully be imposed. The court was provided with a copy of the decision of the hearing commissioner appointed to determine the objection.[91]

[158] In the objection decision the commissioner finds that no specific activities were included within the application that gave rise to noise, or height effects that required management through consent conditions, and that the conditions relating to height therefore did not reasonably relate to the activity for which consent was sought. The noise and height conditions were therefore deleted from the resource consent as issued.

[159] The placement of shipping containers on the site has nevertheless proceeded.

[160] Ms Appleyard submitted that the consent and objection process showed that any physical developments that have taken place on the site were generic, could be used for multiple other activities and were unrelated to the storage of

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91 The court's understanding of the consent and objection process, as set out herein, is from a reading of this decision.

shipping containers.[92]

[161] I do not accept this argument. It is clear to me from the objection decision that various activities have been undertaken on the site, some of which required resource consent and some of which did not. These activities have included the creation of a hard stand area that would be necessary for container storage. The hard stand area might well be able to be used for other alternative activities (rather than container storage) but I find that it is nevertheless part of the activity established on the site.

[162] Overall, I find that the conversion and change of the site to a container storage depot which has involved physical changes to the site, such as the hard stand area, and the storage of shipping containers on the site, is a development for the purposes of rule 16.4.1.1a.

Form of declaration

[163] The declarations sought in this application were summarised at [8]. The declarations as framed are broad and general in nature. The applicants' request that declarations be made that determine the application of the relevant rules broadly throughout the area covered by the CDP. I am not prepared to make declarations on this basis. My consideration of plan rules in this case has been confined to the context of the facts and affidavit evidence before me.

[164] It is appropriate that I make declarations to resolve the real issues between the parties. Before I can do so, appropriate declarations need to be drafted on a more confined basis.

[165] At the conclusion of the hearing, I indicated to the parties that if I determined it was appropriate to make declarations, I would give them the opportunity to discuss and, hopefully agree on the final form of those declarations.

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92 Applicants' synopsis of submissions dated 9 September 2024 at [102]-[107].

Directions are made to that effect. To assist the parties in their drafting exercise, I record the following observations:

(a) Declarations 1(a) and 1(b) should be combined so that a single empty shipping container and a stack of empty shipping containers is covered by one declaration. That rephrased declaration should be worded to make clear that the declaration is specific to the circumstances of the applicants' site by referencing the location, and briefly describing the factual circumstances that have led to this determination. I note my view that if there is a significant change in the manner the shipping containers are dealt with on the site (e.g. permanently storing the shipping containers in the same place on the site), the court's view may well differ on the question of whether the shipping containers are "fixed to land";

(b) I am not prepared to make the generalised declaration sought as Declaration 1(c);

(c) similar to Declaration 1(a) and (b), Declaration 2 should be rephrased to make it clear that the declaration to be made is specific to the circumstances of the applicants' site rather than having general application;

(d) Declaration 3(a) sought to clarify the application of rule 16.4.1.1a to activities in the IGZ-PIP and the other IGZ zones with area-specific rules. I have found that the activities on the site do constitute "a development". Given my findings in relation to declaration 1(a) and (b), that determination does not affect the outcome for these parties. I doubt there is any utility in making the declaration sought as 3(b), however the parties, in particular the respondent, can address me on that issue if there is a view that some form of declaration should be made;

(e) during the hearing Ms Appleyard indicated Declaration 3(c) was not needed, accordingly, I am not prepared to make that declaration and have not addressed it in this decision.

Outcome and directions

[166] I direct the parties to confer and file a joint memorandum, by 31 January 2025, proposing amended declarations addressing the matters set out in paragraph [165], and this judgement more generally.

[167] The court will then proceed to issue a final decision on the amended declarations in due course.

K G Reid
Environment Judge