IN THE ENVIRONMENT COURT OF NEW ZEALAND
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2022] NZEnvC 128

IN THE MATTER OF	an application for enforcement orders under s 316 of the Resource Management Act 1991
BETWEEN	AUCKLAND COUNCIL
	(ENV-2021-AKL-000159)
	Applicant
AND	TEDDY AND FRIENDS LIMITED
	First Respondent
AND	ANGELA MAREE BEER
	Second Respondent

Court:	Judge D A Kirkpatrick sitting alone under s 279(1)(c) and (e) of the Act
Hearing:	On the papers
Appearances:	K Fraser and J Magrath for Auckland Council B Carruthers for Respondents
Date of Decision:	19 July 2022
Date of Issue:	19 July 2022

DECISION ON PRELIMINARY ISSUE OF INTERPRETATION

Introduction

[1] In this proceeding the Auckland Council applies for enforcement orders against the respondents, Teddy and Friends Limited and Angela Beer, in relation to their operation of a dog daycare service and boarding facility at 165 Bawden Road, Dairy Flat, Auckland, particularly on the basis that the respondents are contravening certain conditions of the resource consent for that activity.

[2] The parties have identified a preliminary issue concerning the interpretation of a definition in the Auckland Unitary Plan – Operative in Part (**AUP-OP**) which is applicable to the activity and the consequential effect of that interpretation on certain standards in the AUP-OP for that activity. The definition is of the term "animal breeding or boarding" to mean "breeding, boarding or daycare centres for domestic pets or working dogs." One of the relevant standards provides that no dogs may be bred or boarded at any time but there is no standard that refers expressly to daycare centres for dogs.

[3] In overview, the Council's position is that the standards of the AUP-OP for animal breeding or boarding apply to a dog daycare centre even if it does not include a boarding component. On that basis the Council says that a dog daycare centre requires resource consent as a discretionary activity and must be operated in accordance with the terms and conditions of that consent.

[4] The respondents say that if a daycare centre for dogs without a boarding element is outside the scope of those standards then it is a permitted activity on the site. If that is held to be the correct interpretation of the AUP-OP, they would take steps to bring their activity within what they say are the relevant standards for operating a dog daycare centre as a permitted activity.

[5] Counsel agree that this issue is substantially a question of law suitable for determination by an Environment Judge sitting alone under s 279(1) of

the Resource Management Act 1991 and that they are content for me to consider the matter on the basis of their written submissions. I have proceeded on that basis.

Background

[6] The property at 165 Bawden Road, Dairy Flat is zoned Future Urban in the AUP-OP. In that zone animal breeding or boarding is a permitted activity under Rule H18.4.1(A16) if it complies with relevant standards in Rule H18.6.11, as required by Rule H18.6. If it does not, it requires resource consent as a discretionary activity under Rule H18.4.1(A17).

[7] The standards in Rule H18.6.11 are:

> **H18.6.11 Animal Breeding or Boarding**
>
> The following standards apply to animal breeding or boarding:
>
> (1) No animal breeding or boarding may operate on a site with an area of less than 2,000 square metres;
>
> (2) No more than 20 cats may be bred or boarded on a site at any one time;
>
> (3) No dogs may be bred or boarded at any time;
>
> (4) No more than 25 domestic pets other than cats or dogs may be bred or boarded on any site at any one time; and
>
> (5) All buildings or areas used for animal breeding or boarding must be located at least 20 metres from any boundary of the site.

[8] The term "animal breeding or boarding" is defined in Rule J1.4 of the AUP-OP to mean "breeding, boarding or daycare centres for domestic pets or working dogs". It is nested under "rural commercial services" in Table J1.3.6 for Rural zones although the definition of that activity makes no reference to it and the relationship, if any, between the two definitions or the corresponding activities was not referred to before me by either counsel.

[9] Rule J1.1 contains rules for interpreting the definitions in the AUP-OP, relevantly including the following:

> (1) The meaning of the provisions in the Plan must be ascertained from all relevant text in the Plan and in the light of the purpose of the Resource Management Act 1991 and any relevant objectives and policies in the Plan;
>
> (2) Words and phrases used in the Plan have the meanings set out in their definitions in this chapter unless the context otherwise requires.

[10] The rules in the AUP-OP relating to the use of land are district rules within the meaning of s 43AAB(1) of the RMA. Under s 76(2) of the RMA, every district rule has the force and effect of a regulation under the RMA.

[11] The interpretation and application of legislation is governed by the Legislation Act 2019. Under that Act, legislation means the whole or a part of an Act or any secondary legislation. Secondary legislation includes an instrument (whatever it is called) that is made under an Act if the Act states that the instrument is secondary legislation. I proceed on the basis that s 76(2) of the RMA is a statement that district rules are secondary legislation.[1]

[12] The meaning of a district rule must therefore be ascertained from its text and in the light of its purpose and its context, with its text including the indications provided in the AUP-OP and in the RMA.[2] The context of a rule will include not only its immediate context in the AUP-OP, but also any relevant objectives, policies and other methods and, where any obscurity or ambiguity arises, may include other parts of the AUP-OP.[3]

[13] The process of ascertaining the meaning of legislation in the particular context of the RMA should also be undertaken in a manner that avoids

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1 *Beach Road Preservation Society Inc v Whangarei District Council* [2001] NZRMA 176 (HC) at [34] and Legislation Act 2019, Schedule 1, Clause 3.
2 Legislation Act 2019, Section 10.
3 *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) at [30]-[34].

absurdity or anomalous outcomes, is consistent with the expectations of property owners and is consistent with practical administration of the rule.[4]

[14] There is no argument between counsel about the statutory framework for interpreting legislation or the commentary in case law that I have just summarised.

Submissions for Auckland Council

[15] Counsel for the Council submits that the phrase "bred or boarded" as used in the standards of Rule H18.6.11 must be read consistently with the term "animal breeding or boarding" in Rule H18.4.1(A16) and (A17). Counsel relies on s 18 of the Legislation Act which provides that parts of speech and grammatical forms of a word that is defined in any legislation have corresponding meanings in the same legislation. Applying that provision, counsel submits that the participles "bred or boarded" as used in the standards in the AUP-OP include not only "breeding or boarding" but also daycare centres as used in the AUP-OP's definition of "animal breeding or boarding".

[16] Counsel submits that any ambiguity or obscurity in the wording of the standards is removed by the heading of Rule H18.6.11 and its introductory words, both of which make it clear that all of the standards apply to "animal breeding or boarding" which, in turn, must be interpreted as defined in Rule J1.4 of the AUP-OP to include daycare centres.

[17] Counsel submits that the relevant objectives and policies of the AUP-OP provide limited assistance in ascertaining the purpose of the rules applicable in the Future Urban zone, as the purpose of that zone broadly enables a range of rural activities and services. However, counsel submits that a policy objective of Rule H18.6.11 can be understood from its text as the

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4 *Nanden v Wellington City Council* [2000] NZRMA 562 (HC) at [48].

restriction of the number, concentration and location of domestic animals that can be kept on a property as a permitted activity. Counsel submits that a logical inference can be drawn from the text that the standards in this rule are imposed to avoid or mitigate the adverse effects associated with animal breeding or boarding (such as odour or noise) on the amenity values of neighbouring properties and their occupiers.

[18] Counsel submits that it would be anomalous or even absurd to interpret Rule H18.6.11 as contended for by counsel for the respondents to exclude daycare centres from those controls. In particular, counsel submits that it would undermine the intent of the standards to interpret them as meaning that while no dogs could be bred or boarded on a site without consent, any number of dogs could be kept on a site at any time during the day.

Submissions on behalf of respondents

[19] The essential submission of counsel for the respondents is that the activity of a daycare centre for dogs is not controlled by standard (3) of Rule H18.6.11 because that restriction on dogs being bred or boarded at any time does not extend to include dogs in a daycare centre.

[20] Counsel characterises the change from the use of "breeding or boarding" in the definition to the use of "bred or boarded" in the standards as a conversion. On that basis she submits that a distinction can be made between whether the references to breeding and boarding in the definition have been converted or whether the use of breeding and boarding in the defined term has been converted. That distinction, she submits, results in two possible interpretations:

(a) on the definition approach, the activity of a daycare centre is excluded from standards (2) – (4); while

(b) on the defined term approach, all three activities are included so

> that a daycare centre for dogs cannot be a permitted activity regardless of its size or intensity.

She submits that the definition approach is correct.

[21] Counsel submits that if it were the purpose or intention of those standards to restrict the activity of a daycare centre for domestic dogs, they could have easily been drafted to do so, for example by omitting the words "may be bred or boarded" entirely from standard (3). On that basis, counsel submits that there was no need to use the defined term "animal breeding or boarding" or any grammatical form of it in any of the individual standards. However, a form of the term having been used, regard must now be had to the fact that it was.

[22] On that basis, counsel submits that the text of the AUP-OP is clear at least insofar as:

(a) dog daycare centres must meet standards (1) and (5) of Rule H18.6.11 in order to be a permitted activity under Rule H18.4.1(A16); and

(b) kennels where dogs are bred or boarded cannot meet standard (3) of Rule H18.6.11 and therefore will require consent as a discretionary activity under Rule H18.4.1(A17).

[23] Counsel submits that the respondents can meet standards (1) and (5) and seek a ruling that they do not need to meet standard (3) in respect of a dog daycare centre.

[24] Counsel acknowledges that in addition to meeting standards (1) and (5) of Rule H18.6.11, the noise from a dog daycare centre must be within the limit set by Rule E25.6.3(1) in order to be a permitted activity and submits that expert evidence shows that the respondents' activity complies with that

rule. The general Rule C1.1(2) in the AUP-OP provides that no person may undertake any activity in a manner that contravenes a rule in the AUP-OP unless expressly allowed or is an existing use. Any relevant noise rule will also apply to the respondents' activity, but I have not heard any evidence in relation to the noise effects of that activity and so this decision makes no comment about or finding on that issue.

Evaluation

[25] While the argument before me concentrates on the meaning of the standards in Rule H.18.6.11, the source of the issue is to be found in the definition of "animal breeding or boarding" and its extension to refer to daycare centres. This case is an example of how a seemingly innocuous definition can produce unlooked for complexity. The textual argument of counsel for the respondents seeking to distinguish the definition from the defined term demonstrates how linguistic arguments can sometimes end up being more concerned with the peculiarities of signifiers than with the substance of what is signified.

[26] Under the Legislation Act 2019, s 10(1) requires the meaning of any statutory provision, including a definition, to be ascertained from its text and in the light of its purpose and its context. Even that provision must be interpreted. There is guidance from the Supreme Court, given in *dicta* in *Commerce Commission v Fonterra Co-operative Group Ltd* in relation to the earlier version of that provision in the Interpretation Act 1999, that the reference to purpose serves as a cross-check to the text as they are dual requirements (footnotes included):[5]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment[6] must be ascertained from its text and in the

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5 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36 at [22]

6 "Enactment" means "the whole or a portion of an Act or regulations": see s 29 of

> light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.[7]

[27] Without doubting the weight that should be given by this Court to *dicta* of the Senior Courts, I respectfully consider that describing the interpretive exercise as a process of cross-checking against dual requirements may obscure what appears to me to be a requirement for an integrated approach to ascertaining the meaning of legislation from its text and in the light of its purpose and its context. 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 dual 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.[8] All three elements of meaning combine to promote a wholistic purposive approach to the interpretation of legislation.

[28] Seeking a purposive light in which to read the text and looking closely at the associated context, I do not accept the submission that the objectives and policies of the Future Urban zone are of little assistance in this case. 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. In particular, the evaluation of proposed plan provisions under s 32 of the RMA clearly requires separate consideration of the

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the Interpretation Act 1999.

7 See generally *Auckland City Council v Glucina* [1997] 2 NZLR 1 at p 4 (CA) per Blanchard J for the Court, and Burrows, *Statute Law in New Zealand* (3rd ed, 2003), p 146 and following.

8 *R (Daly) v Secretary of State for the Home Department [*2001] 2 AC 532 at [28]; *McGuire v Hastings District Council* [2001] NZRMA 557 (PC) at [9]

appropriateness of objectives to achieve the purpose of the RMA and the appropriateness of other provisions to achieve the objectives.

[29] Reviewing the provisions of section H18 of the AUP-OP in relation to the Future Urban zone, I note that it is described in section H18.1 of the AUP-OP as a transitional zone which may be used for general rural activities pending rezoning for urban purposes. Its objectives and policies are framed accordingly. Considering the circumstances of this case, I refer in particular to objectives H18.2(2) and (3):

> (2) Rural activities and services are provided for to support the rural community until the land is rezoned for urban purposes.
>
> (3) Future urban development is not compromised by premature subdivision, use or development.

[30] A relevant policy to achieve those is policy H18.3(6)(e):

> (6) Avoid subdivision, use and development of land that may result in one or more of the following: . . .
>
> (e) give rise to reverse sensitivity effects when urban development occurs;

[31] I note that the standards for animal breeding or boarding in the Future Urban Zone are the same as those in Rule H19.10.8 for the various Rural zones. The activity does not appear to be provided for in any of the Residential Zones. It is referred to in the standards of the General Business zone and of the Business Park zone for activities within 30m of a residential zone, but it is not provided for in the activity table for either of those zones and does not appear to be provided for in any other of the Business zones. It is generally permitted in the Light Industry zone when more than 30m from a residential zone and is a restricted discretionary activity within that distance. It is a non-complying activity in the Heavy Industry zone.

[32] From those provisions of the AUP-OP I discern a purpose of protecting the Future Urban zone from any land use changes which would compromise coherent integrated urban planning and a context in which the establishment of an animal breeding or boarding facility in the Future Urban zone could be inconsistent with what may be appropriate when the area is rezoned for urban activities. That purpose and context support the classification of animal breeding or boarding beyond the restrictive permitted standards of the AUP-OP as a discretionary activity.

[33] I turn now to consider the interpretation of the definition of animal breeding or boarding as it relates to the particular activity of daycare centres for dogs in light of the purpose and context of that definition. In that light I read the definition as putting daycare centres in the same class as breeding and boarding in order to restrict any of those activities from establishing in a manner that may compromise future urban planning.

[34] Turning to the standards for the defined activity, I am required by s 18 of the Legislation Act to give the participles "bred and boarded" a corresponding meaning to the definition of "animal breeding and boarding" unless, as allowed by s 9(1)(b) of that Act, the context requires a different interpretation. I do not find anything in the context of the standards which requires a different interpretation to the defined meaning.

[35] I accept, as counsel for the respondents submitted, that the standards could be worded differently to achieve that result but that argument, generally at least, is better addressed to the Council when considering whether the AUP-OP should be changed rather than to the Court when considering how the AUP-OP as written should be interpreted. I consider that counsel for the Council advances a stronger argument that if the boarding of dogs is to require a resource consent, then a daycare facility for them may reasonably also require a consent, especially where there are otherwise only minor limits on the extent of a daycare facility.

[36] For those reasons I conclude that the standards in Rule H18.6.11 all apply to animal breeding and boarding, including daycare facilities. On that basis, a daycare facility for dogs does not meet standard (3) and requires resource consent as a discretionary activity under Rule H18.4.1(A17).

Conclusion

[37] All the standards in Rule H18.6.11 for the Future Urban zone of the AUP-OP apply to animal breeding and boarding, including daycare facilities.

[38] A daycare facility for dogs does not meet standard H18.6.11(3). Such a facility requires resource consent as a discretionary activity under Rule H18.4.1(A17).

[39] The parties should now consider what the next steps ought to be in relation to the substantive application for enforcement orders.

[40] I direct that a judicial telephone conference be convened as soon as practicable for the next steps to be discussed and decided on.

D A Kirkpatrick
Chief Environment Court Judge