IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2024] NZEnvC 033

IN THE MATTER OF	an appeal under s 325 of the Resource Management Act 1991
BETWEEN	DAVID MARTYN YZENDOORN AND BARBARA FRANCES YZENDOORN
	(ENV-2023-AKL-167)
	Appellants
AND	HAMILTON CITY COUNCIL
	Respondent

Court:	Judge M J L Dickey Commissioner Ian Buchanan
Hearing:	12 December 2023 via AVL
Appearances:	J Forret and T Fletcher for the Appellants L Muldowney and S Thomas for the Respondent
Date of Decision:	13 March 2024
Date of Issue:	13 March 2024

DECISION OF THE ENVIRONMENT COURT

A: The abatement notice related to 29 Petersburg Drive, Hamilton is cancelled.

B: Costs are reserved.

REASONS

Introduction

[1] David and Barbara Yzendoorn are the owners of a property at 29 Petersburg Drive, Hamilton. This lot was established as a residential lot by subdivision in 2005. The property is wholly within the Natural Open Space Zone of the Operative Hamilton District Plan (**ODP**) and is partially within a gully hazard area and significant natural area overlays.

[2] Application for resource consent for a duplex dwelling was made by the appellants in August 2020 as a non-complying activity. This application was not heard by the Council until November 2023 and a decision is pending.

[3] On 23 July 2023, the appellants moved a shipping container onto the property on the grassed area adjacent to Petersburg Drive. Other elements were subsequently added to the container to create "the full art installation it is today".[1] We attach photographs of the shipping container/installation.[2]

[4] The stated purpose of the installation is in Mr Yzendoorn's own words: [3]

> The installation is designed to look like a house and has been created to make a visual statement commenting on social issues affecting modern society. The vision was to create something that stimulates thought in the community regarding the lack of adequate affordable housing supplied both in rentals and owned homes. The installation is also an expression of our frustration at the inefficiency and inconsistency of decision-making on resource consent applications.

[5] Following investigation of complaints from nearby residents, on 7 September 2023 the Hamilton City Council (**the Council**) issued an abatement notice under ss 322(1)(a)(i) and (ii), and 322(1)(b)(i) RMA requiring the landowner to cease outdoor storage of the shipping container on the site and to remove it from the property by 22 September 2023. A notice of appeal against the abatement notice

[1] Affidavit of David Martyn Yzendoorn, 27 September 2023, at [16].

[2] Parties and witnesses all had different ways of describing the shipping container: art installation or outdoor storage of a shipping container or modified shipping container.

[3] Affidavit of DM Yzendoorn, at [18].

was filed on 27 September 2023, together with an application for stay.

[6] On 13 October 2023, the Court granted the application for stay pending the outcome of the appeal.[4]

[7] The abatement notice was issued on the grounds that the shipping container was a building, or a relocatable building, as defined by Appendix 1.1.2 of the ODP and required a resource consent to be placed on the property under Rule 15.3. No resource consent has been applied for or granted for the activity.

[8] Additional grounds for the notice are that the storage of the shipping container on the property is inconsistent with community expectations for the zone as expressed in the ODP and that visual impacts are objectionable to the extent of having an adverse effect on the environment.

The Appeal

[9] The key grounds in the appeal are that the shipping container:

(a) meets the definition of a "public art" under the ODP and is therefore a permitted activity in the Natural Open Space zone;

(b) is part of an integrated art installation specifically designed and installed to function as public art;

(c) is not being stored on the property and nor is it functioning as a storage facility on the property;

(d) is one of several components of the public art installation.

[10] The appellants seek cancellation of the abatement notice.

[4] *Yzendoorn v Hamilton City Council* [2023] NZEnvC 217.

Statutory Provisions

[11] The abatement notice is issued under s 322 of the RMA which relevantly provides:

> 322 Scope of abatement notice
>
> (1) An abatement notice may be served on any person by an enforcement officer—
>
> (a) requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer, —
>
> (i) contravenes or is likely to contravene this Act, any regulations, a rule in a plan, or a resource consent; or
>
> (ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
>
> …

[12] Section 325(1) RMA provides rights of appeal. The Court's powers are set out in s 325(5) and (6).

The Council's Position

[13] The Council considers that the modified shipping container does not meet the definition of public art as it is not located in a public space and is not accessible by all users. Consequently, it requires a resource consent as a building[5] or relocated building.[6]

[14] Even if the shipping container is determined to be an art installation meeting the definition of public art, it remains a shipping container placed or stored on the property. As such, it requires a resource consent as an innominate activity.[7]

[15] Finally, if the activity is permitted, the visual impacts are objectionable to the extent that they have an adverse effect on the environment justifying the issue of an

---

[5] Council's opening submissions, 8 December 2023, at [55].

[6] Relocated building "Means a building originally built off site which is repositioned on a site, or relocated – but does not include new buildings or accessory buildings."

[7] Under Rules 15.3 and 1.1.8 ODP.

abatement notice under s 322(1)(a)(ii) RMA.

The Appellants' Position

[16] The installation of the shipping container and its associated artistic components was "intended, conceived and constructed" as a public artwork. As public art, the installation is not a building as defined in the ODP and is a permitted activity.

Issues

Issue 1 - Is the modified shipping container public art?

Plan provisions - definitions

[17] The ODP defines *public art* as:[8]

> Artistic works created for, or located in, part of a public space or facility and accessible to members of the public. Public art includes works of a permanent or temporary nature located in the public domain. A public space means all those spaces which the public has access to or can view. This includes, but is not limited to, parks, streets, squares, gardens, walkways, public plazas and building foyers.

[18] *Public Space* is defined as:[9]

> Any space (whether in public or private ownership) that can be accessed without charge by everyone to use or see. This can include roads, squares, public places, parks and reserves.

[19] A *building* is defined as:[10]

> Any structure of any kind, whether temporary or permanent, moveable or immoveable, and includes:
>
> …
>
> d. Any vehicle, trailer, tent, caravan or boat, whether fixed or moveable, used as a place of accommodation, business or storage.
>
> …
>
> A building does not include:

[8] Appendix 1.1.2 ODP.
[9] Appendix 1.1.2 ODP.
[10] Appendix 1.1.2 ODP.

> …
>
> Public art, floodlights, goal posts, park furniture.

[20] A *relocated building*:

> Means a building originally built off site which is repositioned on a new site, or relocated … but does not include new buildings or accessory buildings.

Natural Open Space Zone rules

[21] *Public art* is a permitted activity in the Natural Open Space Zone.[11]

[22] New buildings, alterations and additions to buildings associated with a permitted activity are provided for as a discretionary activity.[12] Innominate activities are determined by applying Rule 1.1.8.1 ODP, where a flowchart is used to work out the default activity status of a proposal.

Artistic work?

[23] Regarding the artistic element of public art, Mr Yzendoorn states that his motivation in creating the installation was to make a "visual statement", something that "stimulates thought in the community" and an "expression of our frustration" in relation to the housing crisis facing New Zealand.[13] Signage at the property refers to the installation as a public artwork relating to the housing crisis and a request that it be viewed from outside the property boundary.[14]

[24] Mr Yzendoorn's views are supported by Mr Peter Dornauf, a local artist and art historian and by Mr Andrew Bydder, an architectural designer.

[25] On the artistic style, Mr Dornauf observes that the artwork falls within the art style of an "altered readymade". This was invented in the modern era of the twentieth century by Marcel Duchamp to describe prefabricated and often mass produced objects isolated from their intended use and elevated to the status of art

---

[11] Rule 15.3aa of the ODP.
[12] Rule 15.3(b).
[13] Affidavit in reply of DM Yzendoorn, at [5].
[14] Affidavit of Laura Natalie Thomson, 16 November 2023, at [33].

by the artist choosing and designating its new use. In his professional opinion:[15]

> A shipping container redesigned by the Appellants to represent a dwelling with commentary on our social and political systems falls within the category of readymade as intended by Duchamp.

[26] Mr Timothy Lester, a consultant planner called by the appellants, relies on dictionary definitions as to what constitutes art in opining that "the display created by the Appellant could constitute artistic works".[16]

[27] The Council offered no evidence as to whether or not the installation is an artistic work. Its planner, Ms Laura Thomson, considers that the installation does not meet the definition of public art as it is not located in a public space and is not accessible by all users. She considers that "there is no ability for a person with sight impairment to access or interact with a shipping container as a piece of public art".[17] She said that this would also apply to a person with mobility impairment as the footpath does not extend the full length of the property and the signage discourages access.

[28] Ms Thomson relies on the definition of *accessible* in the ODP[18] as "means able to be accessed by all users including those with sight and mobility impairment" in reaching her conclusion that, by not meeting this definition, the installation does not qualify as public art. As a consequence, it is not caught by the exceptions from the definition of building and requires resource consent.

[29] Ms Thomson confirmed her opinion when presented with examples of public art on private wall spaces in the following exchange: [19]

> Q: And the definition of public space means it includes on private, on non-publicly owned land? And you accept that definition allows for viewing from a public space onto that privately owned land?

---

[15] Affidavit in reply of Peter John Dornauf, 27 November 2023, at [11].
[16] Affidavit in reply of Timothy John Lester, 22 November 2023, at [24].
[17] Affidavit of LN Thomson, at [33].
[18] Appendix 1.1.2 ODP
[19] NOE, page 54, lines 23-34 and page 55, line 1.

A: Yes. In terms of the first part of the definition which refers to created for or located in part of a public space or facility, yes I would accept that the further clarification of what public space means does allow for that to be within private ownership but I would read the definition of public space in terms of its location, but if – and accessible to members of the public and that's to me the key part in terms of whether this land use activity meets the definition of public art.

Q: So accessible to effectively touch the public art? Not just view it?

A: Yes.

[30] As to the public context of the installation, Mr Lester notes that even though the display is not located on public land the work can be viewed from a public space, Petersburg Drive, and therefore falls within the definition of public art. He further notes that the definition refers to public space as representing "spaces which the public has access to or can view".[20]

[31] Mr Lester considers that even though the definition of public art requires the site to be accessible, there is a footpath directly in front of the installation that allows for any person to view it. There is no provision in the ODP that requires public art to be able to be physically interacted with. Notwithstanding that there is a notice attached to the installation requesting viewing from outside the site, Mr Lester considers that the evidence from some local residents suggests that the installation site is regularly accessed by members of the public, some with an interactive intent, and there is no physical barrier preventing this. Mr Lester did concede, however, when questioned, that "on the very basis of the defined term 'accessibility', no there is no legal right for people to enter private property and interact physically with the installation, no".[21]

[32] Mr Lester concludes that the installation meets the definition of public art. As such, it is exempt from consideration as a building and is a permitted activity under the ODP.

---

[20] Affidavit in reply of TJ Lester, at [26].
[21] NOE, page 20, lines 23 to 26.

Evaluation

[33] In construing the provisions of a plan, the plain, ordinary meaning of the words must, where possible, be applied together with a purposive interpretation, having regard to the context of the work and the purpose of the plan. Only in cases of doubt should other parts of the plan, such as objectives or policies, be referred to.[22] We approach our evaluation with that in mind.

[34] We observe that the owners' intentions or motivations are not relevant to our determination of whether the installation is public art. The definition makes no mention of that.

[35] It is uncontested that, on the evidence of Mr Yzendoorn, Mr Dornauf and Mr Bydder, the installation is an artwork that has as its primary element a shipping container which is variously adorned to provide a public statement with creative intent. What is contested is whether it is indeed public art as defined in the ODP.

[36] The Council contends that the installation is not *accessible* as referenced in the definition as it cannot be physically accessed by a person who is visually impaired.

[37] We find that the installation is in a public space as described in the definition of public art. It is able to be viewed by the public with the exception of those whose sight is impaired.

[38] The message conveyed by the artwork, together with its position, bulk and nature, is entirely visual. To be appreciated by a person who cannot see it, the installation would have to be described to them by a person who can see it. In this context it can be "viewed". It is difficult to envisage the installation being able to convey its intended message by a tactile interaction alone. This would be true of the majority of public art works that are primarily large and visual in nature. On a purposive reading of the definition, we do not consider that it excludes all such artworks from being considered as public art.

---

[22] *Queenstown Lakes District Council v McAulay* [1997] NZRMA 178 (HC).

[39] We are satisfied that the installation is an artwork which meets the definition of *public art*.

Issue 2 – Even if it is public art, is it also a shipping container stored on the site, requiring consent?

[40] Mr Muldowney submitted that a land use activity often comprises multiple components or elements – some might be permitted while others may be controlled, discretionary or non-complying. He said that for the appeal to succeed, the Court must determine there is only one element to the land use, being public art; that any other elements, even those giving rise to adverse effects, are to be ignored. He submitted that is a contrivance, requiring those experiencing the effects of the land use to suspend reality.

[41] We were referred to case authority that addressed the bundling of activities, which Mr Muldowney said establish that land use activities are not one dimensional. Here, he said, there are two activities; the storage of a shipping container and public art (if that is made out), referring to *Marlborough District Council v Zindia* in support.[23]

[42] Ms Thomson concluded that "the underlying land use remains the outdoor storage of a shipping container. Making superficial additions and calling it public art does not in my planning judgement alter the underlying use".[24]

[43] Ms Thomson states that, based on this underlying use, the installation requires resource consent as a non-complying activity in the Natural Open Space Zone. She notes that while the public art element of the land use activity may be permitted, the storage of the shipping container is not.

[44] Mr Lester does not address this issue beyond his assertion that the container "has been established on the property for the sole purpose of being public art".[25]

[23] *Marlborough District Council v Zindia Limited* [2019] NZHC 2765.
[24] Affidavit of LN Thomson, at [35].
[25] Affidavit in reply of TJ Lester, at [43].

[45] Mr Lester acknowledged in cross-examination that if the installation was considered to be a building that is not exempted in terms of being public art, then it would require a resource consent either as a discretionary activity (if associated with a permitted activity) or non-complying activity.[26] He also acknowledged that if the activity is dealt with not as a building but as a shipping container, it would be an innominate activity and as such default to requiring resource consent as a non-complying activity.[27]

[46] Mr Lester noted at the end of questioning that if the shipping container is only public art then it is a permitted activity. On further questioning, Mr Lester responded that, even though on initial observation the installation may present as a shipping container, in its context and with its adornments and signage it was not fanciful to suggest that something other than a shipping container was presented and this was portrayed by the use of the shipping container to convey a message. [28]

> I think without further context of why it's there the adornments that the container has on it, the signage it has on it, I don't think it's fanciful, I think there's actually a message that's being portrayed here and the –
>
> And that the message to – the message being portrayed is presented via the use in part of a shipping container.

Evaluation

[47] Public art is specifically excluded from the definition of building. It follows that a public artwork installation does not require a resource consent as a building.

[48] We have concluded that the installation is an artwork with a disused shipping container as its central element. Central to the Council's case is the contention that even if the definition of *public art* is met, this is not the only activity to be addressed. There remains the underlying element of a shipping container being stored on the property that is an innominate structure to be considered as a non-complying activity under the ODP.

---

[26] NOE page 15, lines 26 to 30.
[27] Rule 1.1.8 ODP.
[28] NOE, page 18, lines 27 to 32.

[49] The Council has separately established, including through responses from Mr Lester under cross-examination, that the installation also presents – particularly at first sight – as a disused shipping container. The pertinent question therefore is; - when is a shipping container not a shipping container?

[50] Ms Forret addressed this in her reply submissions: [29]

> The District Plan excludes public art from the definition of building. In our view that is a complete exclusion that applies to public art which involves any form of a structural element. There are no performance standards applying to public art that apply in the NOSZ.

and[30]

> The context of the container and the elements intended to represent the housing activity that could otherwise be undertaken on the site, together constitutes the public artwork.

[51] We agree. Taking into account the nature of the installation as an artwork, we accept that for the purpose of consideration under the ODP this is a single activity, that of public art. In short, even though it may retain the look of a shipping container, it can no longer be considered as such. It has been repurposed as an art installation.

[52] In reaching this conclusion, it has not been necessary for us to "suspend reality" as suggested by Mr Muldowney.[31] The only activity is the installation of an artwork, which is expressly provided for as a permitted activity in the ODP. There is no innominate component that, in other circumstances, would constitute it as a building triggering the need for a resource consent. The container is not occupied or otherwise used.

---

[29] Appellant's Legal Submissions in reply, 15 December 2023, at [13].
[30] Appellant's Legal Submissions in reply, at [14].
[31] Council's Opening Legal Submissions, at [62].

Issue 3 – If it is a permitted activity, is the installation objectionable to the extent of having an adverse effect on the environment?

ODP – Objectives and Policies

All Open Space Zones

[53] A general objective[32] is that:

> Development and activities must complement the functions and values of the particular open space and the surrounding environment.

[54] Supporting provisions include:

> Policy 15.2.1b
> Buildings and structures shall be designed and sited to be compatible with the function and predominant purpose of the open space.
>
> Objective 15.2.4
> Open spaces are used and developed in a way that minimises adverse effects on the surrounding environment.
>
> Policy 15.2.4b
> The amenity of the surrounding environment shall not be adversely affected by the scale of buildings or activities on open space.

Natural Open Space Zone

[55] The Plan provides:

> Objective 15.2.5
> Activities within the Natural Open Space Zone are consistent with and contribute to the conservation and restoration of natural character.
>
> Policy 15.2.5a
> Development and use of sites in the Natural Open Space Zone shall
> …
> ii. Minimise the number and scale of buildings.

Chapter 25.9 Public Art

[56] We were referred to the objectives and policies in the city-wide provisions – Chapter 25.9 Public Art. This chapter outlines objectives and policies that apply to public art. There are no rules.

---

[32] Objective 15.2.1.

[57] Chapter 25.9.1 describes the purpose of public art:

> a. Public art provides an opportunity to create a sense of place, and to add to an aesthetically attractive and vibrant City. The District Plan can contribute to the inclusion of public art in public places through bulk and location standards and incentives. It is noted that questions of artistic style or taste are not addressed in the District Plan. Furthermore, art in public places will require approvals outside of processes of the Act.

[58] The objective is for increased provision of art throughout the City that is reflective of the character and diversity of the Hamilton community.[33] The objective is supported by five policies, including that public art is to be encouraged in public spaces and on private land that is easily visible from public places and has relevance to the site, history, the environment or has cultural significance.[34] Further, that public art shall be compatible with the amenity of the existing locality[35] and that it does not affect the safety or efficiency of the transportation network.[36] The Explanation notes that the District Plan relies upon approval processes that are outside the Act to endorse the location and form of public art.

Section 322 powers

[59] Section 322(1)(a)(ii) addresses an activity that may be offensive, objectionable or noxious, and enables the Council to require it to be abated. There are limits on this power if a person is acting in accordance with a rule in a plan.

[60] Mr Muldowney submitted that the "storage of the container" gives rise to unacceptable adverse effects that are objectionable. Ms Thomson, however, described them as offensive and objectionable.

[61] The Council relied on evidence from local residents Ms Thomson and Ms Upperton.

[62] It also relied on the objectives and policies that apply to the Open Space Zones relating to buildings and amenity, and on the objectives and policies applying

---

[33] Objective 25.9.2.1.
[34] Policy 25.9.2.1a.
[35] Policy 25.9.2.1c.
[36] Policy 25.9.2.1e.

to Public Art. It asserts that the shipping container is inconsistent with the amenity expectations associated with public art, among others.

[63] Local residents Mr Peter Storey, Mr William Botherway, Mr Gavin Donald, Ms Robyn Weal and Mr Alexander McClennan described the adverse effects of the installation, primarily its visual impact on open space and neighbourhood amenity, noise generation, stress generated by anti-social behaviour, traffic risk and impacts on health and wellbeing. Prior to the shipping container being moved onto the property, they had pleasant views of the gully vegetation and natural open space. Several said that they now have direct views of the rusty shipping container from within their homes and outside on their properties.

[64] Based on the resident's statements and on its siting, bulk and scale, Ms Thomson considers that the installation "significantly detracts from the high amenity values of the neighbourhood".[37] As a consequence, the installation is "clearly inconsistent" with the public art provisions in the ODP and those related to amenity in the Natural Open Space Zone.[38]

[65] Ms Thomson concludes that the installation "is both offensive and objectionable".[39] This, along with the lack of compliance with the ODP's provisions, was one of the reasons for the issue of the abatement notice.

[66] Ms Candice Upperton, the Planning Compliance and Monitoring Team Lead at the Council, concluded from complaints she received from neighbouring residents and her own observations that the outdoor storage of the shipping container gave rise to significant adverse effects. She referenced the same effects as are outlined above for the neighbours. She also considered that it rises to the level of objectionable and offensive, with the effects "growing more impactful over time as the duration of outdoor storage of the shipping container continued over a series of months".[40]

---

[37] Affidavit of LN Thomson, at [40].
[38] Affidavit of LN Thomson, at [44].
[39] Affidavit of LN Thomson, at [49].
[40] Affidavit of CE Upperton, 17 November 2023, at [32].

[67] Mr Lester does not directly assess the severity of any effects beyond agreeing with Ms Thomson that the installation "does not present a classically aesthetic display".[41] As a permitted activity, amenity effects are not a consideration in his opinion. His view was reinforced in cross-examination on the consistency or otherwise of the installation and its setting with the amenity related objectives and policies for the Natural Open Space Zone and public spaces. While agreeing that public art needed to be consistent with these provisions, Mr Lester observed that the activity was permitted, so "by their very nature permitted activities would be taken to adhere to objectives and policies".[42]

Evaluation

[68] As noted earlier, Ms Thomson and Ms Upperton assert that the installation is offensive and objectionable based on the effects they observed, the effects on neighbours, and its inconsistency with the objectives and policies for the Natural Open Space Zone and Public Art.

[69] For s 322(1)(a)(ii) to be applicable we must determine whether the activity is offensive or objectionable.

[70] We see no need to examine ODP objectives and policies and the consistency or otherwise of the activity with those provisions. This is not a resource consent application.

[71] We accept, however, that the ODP provisions inform the Council's expectations for the Zone and for Public Art. Having said that, public art is provided for as a permitted activity. To that extent, the effects of public art can be said to have been identified and anticipated at the time the ODP was developed. We address this matter later.

[72] In *Zdrahal v Wellington City Council*[43] the High Court applied the following test for what is offensive or objectionable:

---

[41] Affidavit in reply of TJ Lester, at [57].
[42] NOE, page 22, line 10.
[43] *Zdrahal v Wellington City Council* HC Wellington AP99/93, 16 December 1991, at page 14.

> If it is objectively offensive or objectionable this is as if reasonable ordinary persons would be offended or find it objectionable then it does affect the environment of those people and of any other such people living in the vicinity who are likely to be so affected.

[73] We were also referred to *Invercargill City Council v Carlaw*[44] where the Court adopted definitions from the Oxford Online Dictionary. 'Offensive' is defined as:

> Causing someone to feel resentful, upset or annoyed.

and 'objectionable' as:

> Arousing distaste or opposition, unpleasant or offensive.

[74] Mr Muldowney, relying on the evidence of Ms Thomson and Ms Upperton submitted:[45]

> In light of the relevant ODP provisions that set the amenity expectations for the subject property and surrounds and the evidence of the neighbours that establishes that they are experiencing significant adverse amenity effects and the potential safety effects, the shipment container generates adverse effects which meet the threshold of being offensive and objectionable.

[75] In response, Ms Forret submitted that the complaints primarily relate to visual amenity effects generated by an artwork that may or may not be to everyone's liking but which is contemplated by the ODP and indeed provided for as a permitted activity. As such, the perceived effects do not reach a level that engages s 322(1)(a)(ii).

[76] Ms Forret submitted: [46]

> … the language of the complaints and of the affidavits themselves does not reach the level of disgust or annoyance greater than might be generated as the result of an unappreciated residential adornment or lively antics of teenagers or pranksters.

[77] We agree. The test is whether reasonable ordinary persons would be offended by the installation or find it objectionable. Those who provided evidence of effects of the installation on them are clearly upset with it. We do not accept that the

---

[44] *Invercargill City Council v Carlaw* [2016] NZEnvC 134, at [44].
[45] Council's Opening Legal Submissions, at [77].
[46] Appellants' Legal Submissions in reply, at [26].

adverse effects of noise generation, anti-social behaviour, traffic risk and impacts on health and wellbeing rise to the level of offensive or objectionable. The events described are limited in number and duration. The residents' primary issue with the installation is its visual impact. They clearly regard it as detracting from their and the wider neighbourhood's amenity. While it cannot be said to be aesthetically pleasing, we find on an objective basis that its effects do not rise to being offensive or objectionable.

[78] We find that the installation is not impacting on the amenity or safe use and appreciation of the local environment to an extent that is offensive or objectionable.

Issue 4 – Precedent

[79] Ms Thomson raised a concern that approval of the use of the shipping container as public art without considering that storage of the container itself on the property is a non-complying activity could create a potential precedent for others to follow the same path. She thought that this could "open the floodgates" for avoidance of the consent process by referring to a land use activity as public art.

[80] Mr Muldowney argued that:[47]

> This anomalous outcome must be avoided if the purpose of the sustainable management of natural and physical resources is to be achieved.

[81] We disagree. To qualify as public art and be a permitted activity under the ODP, an activity must comply with the ODP definitions. Art may take various forms and be appreciated by the public in various ways. As Ms Forret submitted in closing:[48]

> … not every container will be public art, but some may be in some contexts.

[82] We accept that in its context the art installation, which has as its central component a disused shipping container, is public art and therefore a permitted activity. The real anomaly would be to require the various elements of the artwork

[47] Council's Opening Legal Submissions, at [11].
[48] Appellant's Legal Submissions in reply, at [35].

to be subject to a non-complying resource consent process. This same principle would apply to anyone establishing a public art installation in the future. If it resembled any other structure, on the Council's approach it would require consent.

Issue 5 – Section 325 RMA

[83] Under s 325(5)(a) the Court is constrained in confirming an abatement notice where a person is acting in accordance with a rule in a plan, in this case Rule 15.3aa providing for public art as a permitted activity, unless the adverse effects of that activity were not recognised when the plan was approved.

[84] Ms Forret submitted that:[49]

> … the District Plan does specifically contemplate that public art works may not be to everyone's taste and explicitly records that questions of artistic style or taste are not addressed. That deliberate omission is consistent with having a permitted activity rule that does not have any performance standards.

[85] We accept that submission. We note we had no evidence on this point.

[86] Section 325(6) empowers the Court to confirm an abatement notice, if appropriate, having regard to the time that has elapsed or a change in circumstance since the ODP was approved.

[87] Ms Forret addressed s325(6) in relation to the issue of the abatement notice and any changes in circumstance since then. We had no evidence directly related to time elapsed or changes in circumstances since approval of the ODP. We find that s325(6) does not apply.

Outcome

[88] We allow the appeal because we find that the shipping container:

(a) in its present form is public art, as that term is defined in the ODP, which activity is permitted; and

---

[49] Appellant's Legal Submissions in reply, at [28].

(b) does not otherwise require consent as an innominate activity under the ODP;

(c) is not offensive or objectionable under s 322(1)(a)(ii) of the RMA; and

(d) even if it were offensive or objectionable, s 325(5) prevents the Court from ordering its removal because there was no evidence that the Council did not anticipate the effects of public art at the time it approved the ODP; and

(e) we had no evidence that s 325(6) applied.

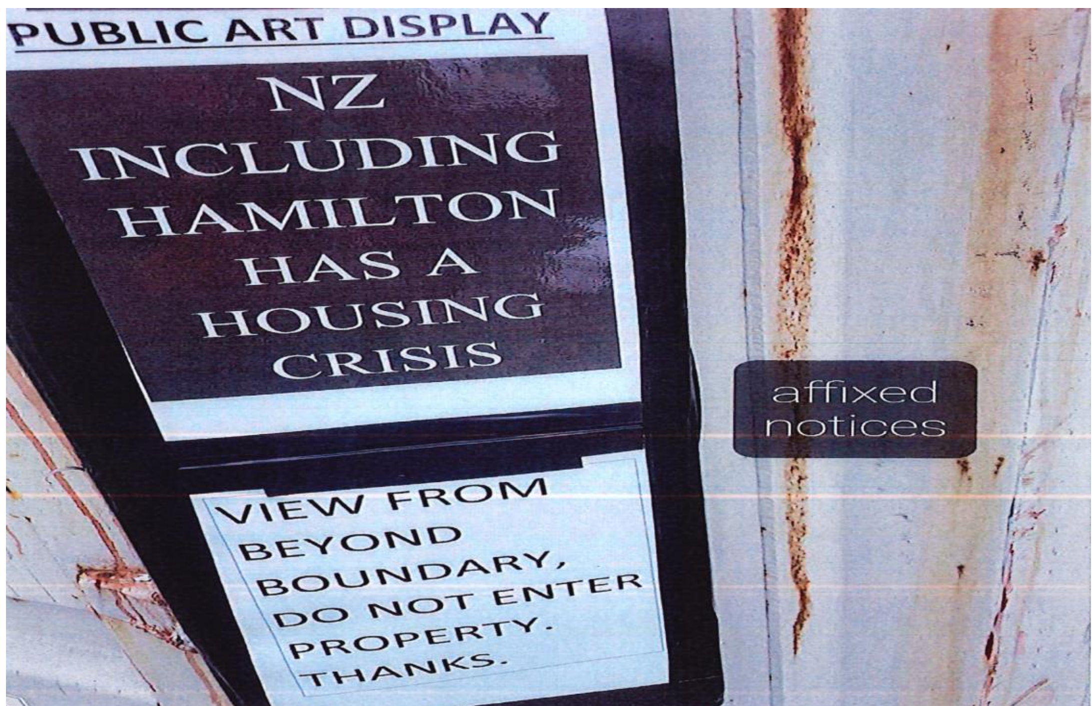
[89] The appeal is upheld, and the abatement notice is cancelled.

[90] Costs are reserved. Any application for costs are to be filed within 10 working days and any response within a further 10 working days.

For the Court:

MJL Dickey
Environment Judge

Affidavit of DM Yzendoorn, dated 1 December 2023, at "A".



Affidavit of AM Yzendoorn, dated 27 September 2023, at "E".