

WW1&2 consent application

Appendix D

MEMORANDUM

Date: 13 July 2018
To: Michael Durand
From: Philip Maw / Kate Woods

WORLDWIDE FARMS - INTERPRETATION OF "LANDHOLDING" UNDER THE PSWLP

1. You have asked for our advice on how the word "landholding" should be interpreted in the context of applications for resource consent from Woldwide 4 Ltd and Woldwide 5 Ltd (**Woldwide 4 & 5**) and Woldwide 1 Ltd and Woldwide 2 Ltd (**Woldwide 1 & 2**), pursuant to Rule 20 of the proposed Southland Water and Land Plan (pSWLP).
2. In particular, you have asked us to consider whether:
 - a. the support blocks to be utilised by Woldwide 4 & 5 (namely the Gladfield Block and the Horner Block); and
 - b. the support block to be utilised by Woldwide 1 & 2 (the Horner Block),should be considered as part of their "landholding" for the purposes of their respective applications under Rule 20 of pSWLP.

Executive summary

3. In our opinion, the support blocks utilised by Woldwide 4 & 5 and Woldwide 1 & 2 in their applications for resource consent, whether it be the Horner Block and/or the Gladfield Block, should be considered as part of its "landholding" for the purposes of assessing their applications for resource consent under Rule 20 of the pSWLP.
4. This interpretation is consistent with the policy framework implemented by Rule 20, and the interpretation will not result in an absurd result whereby adverse effects resulting from a farming activity can be "exported" to another property owned or controlled by the same group of people, without those effects being appropriately considered.

Background

5. We understand Woldwide Farms Ltd owns several individual farms (Woldwide 1 Ltd, Woldwide 2 Ltd, Woldwide 3 Ltd, Woldwide 4 Ltd, Woldwide 5 Ltd). Woldwide Farms Ltd also owns two support blocks, the Gladfield Block and the Horner Block, which are outside of the farm boundary of Woldwide 1, 2, 3, 4 and 5, but in close proximity to those farms. The land ownership, company shareholdings and directorships are common across the Horner Block, Gladfield Block and Woldwide Farms 1-5 Limited (A & J de Wolde).
6. Woldwide 4 & 5 have lodged a resource consent application to expand land area and utilise the Gladfield Block and the Horner Block as support blocks. Woldwide 4 & 5 will predominantly utilise the Gladfield Block and have modelled this block for the

application. Some sludge from Woldwide 4 & 5 will also be spread on the Horner Block, however this has not been modelled in the application.

7. Woldwide 1 & 2 intend to lodge a resource consent application to expand land area and also increase dairy cow numbers. Woldwide 1 & 2's proposal requires certain farming activities to be undertaken on the Horner Block. For example, the Horner Block will receive some of the farm dairy effluent from Woldwide 1 & 2, provide grazing for young stock, and provide intensive winter grazing. With the exception of the farm dairy effluent discharge, all the activities on the Horner Block are permitted under the pSWLP. Woldwide 1 & 2 do not intend to model the Horner block for the future expansion application.
8. In short, changes to farming practices will be made to ensure the nutrient budget for the Woldwide 4 & 5 and Woldwide 1 & 2 properties remain neutral when cow numbers and/or land area increases. We understand the Council is concerned this may mean that Woldwide 4 & 5 and Woldwide 1 & 2 will be able to "export" the additional effects caused by increased stock numbers and/or land area, to somewhere else in the Region where they are largely permitted under the pSWLP.

Meaning of "landholding"

9. Landholding is defined in the pSWLP as follows:

Landholding

- (a) Any area of land, including land separated by a road or river or modified watercourse, held in one or more than one ownership, that is utilised as a single operating unit, and may include one or more certificates of title; except
- (b) For land with a residential, commercial, industrial, infrastructural or recreational zoning or designation in the relevant district plan means any area of land comprised wholly of one Certificate of Title or any Allotment as defined by Section 218 of the RMA.

Note: for the purposes of this definition, a "single operating unit" may include, but is not limited by, the following features:

- (a) *It has effective control by any structure of ownership of the same group of people (for example, land that is controlled by a family trust, or beneficiaries of that family trust or a related group of companies, or an estate, or partner, or individual/s or a combination of); and*
- (b) *It is operated as a single business entity.*

10. Therefore, whether the support blocks (Gladfield Block and/or Horner Block) are part of Woldwide 4 & 5's or Woldwide 1 & 2's "landholding" turns on whether the two farms utilise their land, and their support block's land, as a "single operating unit." Some guidance as to whether the land is being utilised as a "single operating unit" can be gleaned from the list of features in the explanatory note below the definition, however, that list is non-exhaustive.
11. Generally, words in an enactment or a plan will be given their plain and ordinary meaning unless there is some ambiguity, uncertainty or it may result in absurdity. Therefore, the starting point is examining the plain and ordinary meaning of the words that make up the phrase "single operating unit."
12. The Oxford English Dictionary contains the following relevant definitions:

Single - Only one; not one of several. Regarded as distinct from each other or others in a group.

Operate – (With reference to a machine, process etc.) function or control the function of. (With reference to organisation) manage or be managed and run.

Unit – An individual thing or person regarded as single or complete but also able to form an individual component of a larger whole

13. Combining and applying those definitions to the present context means that Woldwide 4 & 5 and Woldwide 1 & 2's land, and their respective support block's land, would need to be managed or controlled as a single thing or entity, noting that it is also able to form an individual component of a larger whole.
14. Taking the example of Woldwide 1 & 2's application, the farm and the Horner Block are controlled and owned by the same group of people. It is possible that by moving several aspects of Woldwide 1 & 2's farming activity to the Horner Block, the two farms are being operated as a single entity. The two farms are clearly being managed to the overall benefit of the single owner.
15. We understand that Mr de Wolde considers that as the Horner Block trades with the Woldwide farms group, Woldwide 1 & 2 and the Horner Block are not operated as a single business entity. It is unclear whether the Horner Block trades exclusively with the Woldwide farms group or to other farms as well. Although if this is the case, this may distinguish the Horner Block from other 'support' blocks that may be necessary for farming but are provided by professional winter graziers without common control and ownership. However, in light of the meaning of "unit", whereby a unit can form an individual component of a larger whole, we do not consider it matters if the Horner Block is being used to support other farms.
16. Based on the plain and ordinary meaning of the words comprising the phrase "single operative unit", we are of the opinion that Woldwide 1 & 2 and the Horner Block are being operated as a single operating unit. We consider that this reasoning can be extended to the application by Woldwide 4 & 5. Woldwide 4 & 5 and the support blocks it will utilise (i.e. both the Gladfield Block and Horner Block) are being operated as a single operating unit. However, in order to ensure that that interpretation is correct, it is necessary to consider the purpose of the definition.

Principles of statutory interpretation

17. Plans have the effect of regulations made under the Resource Management Act 1991, and so the principles of statutory interpretation apply. Section 5 of the Interpretation Act 1999 also provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose.

Case law

18. It is accepted that in cases involving a "long and complicated town planning scheme ... A purposive interpretation is particularly called for..."¹ Indeed, in circumstances

¹ *Powell v Dunedin City Council* [2004] NZRMA 49 at [29], citing *Sandstad v Cheyne Developments Ltd* (1986) 11 NZTPA 250, 256.

where the social policy behind a plan may be compromised, the plain and ordinary meaning of a word may be departed from.

19. In *Powell v Dunedin City Council* the High Court helpfully summarised the various approaches to interpretation of planning documents adopted by the courts in different cases, and concluded:²

The cases reveal differing approaches to the interpretation of planning documents. To an extent that reflects the clarity or otherwise of the planning document being considered by the Court and the very circumstances of the different cases. On those authorities I consider it is necessary to take into account the following:

- a) The words are to be given their plain 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 end or it follows as a matter of necessary implication.
- 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 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.
- 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.

20. On appeal, the Court of Appeal endorsed this approach:³

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 the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in *Rattray* or with the requirements of the Interpretation Act.

Application to this context

21. The overall purpose of the pSWLP is to provide direction and guidance regarding the sustainable use, development and protection of water and land resources in the Southland region. The pSWLP also commences the process of giving effect to the National Policy Statement for Freshwater Management, as amended in 2017 (**NPSFM**), that requires, among other things, that water quality is maintained and, in circumstances where it is degraded, it is improved.

² *Powell v Dunedin City Council* [2004] NZRMA 49 at [35].

³ *Powell v Dunedin City Council* (2005) 11 ELRNZ 144, [2004] 3 NZLR 721, [2005] NZRMA 174 at [35].

22. The pSWLP seeks to better manage rural land use activities that are considered to contribute a disproportionate amount of contaminants (nitrogen, phosphorus, sediment, and microbes) to the environment. In particular, the pSWLP introduces additional land use controls in respect of intensive winter grazing, cultivation and further intensification or establishment of new dairy farms.
23. Rule 20 of the pSWLP is one of these controls. One of the key purposes of Rule 20 is to control the intensification of existing dairy farms (i.e., by requiring resource consent) to manage the discharge of contaminants that may affect water quality. The discharge of contaminants is assessed and calculated with reference to the farming activity's landholding. The Rule does not anticipate that certain adverse effects of the farming activity may be able to be transferred somewhere outside of the landholding in order to minimise the farming activity's discharge of contaminants.
24. The High Court's comments in *Powell v Dunedin City Council*, namely that words are to be given their plain 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, are particularly relevant here. Adopting an interpretation of landholding that enables a farming operation to "export" the additional effects arising from intensified farming activities to somewhere else in the Region may thwart the underlying purpose of Rule 20 and the pSWLP. It could also lead to absurd results whereby farmers could purchase separate "support blocks" and shift some of their farming activity to the support block and in doing so may be able to artificially reduce nutrient losses on their primary farm.
25. Further, the interpretation of landholding advocated by Woldwide 4 & 5 and Woldwide 1 & 2 would not achieve the relevant objectives and policies in the pSWLP. Of particular relevance are Objective 6 and Policy 16:

Objective 6

There is no reduction in the overall quality of freshwater, and water in estuaries and coastal lagoons, by:

- (a) maintaining the quality of water in waterbodies, estuaries and coastal lagoons, where the water quality is not degraded; and
- (b) improving the quality of water in waterbodies, estuaries and coastal lagoons, that have been degraded by human activities.

Policy 16 – Farming activities that affect water quality

1. Minimising the adverse environmental effects (including on the quality of water in lakes, rivers, artificial watercourses, modified watercourses, wetlands, tidal estuaries and salt marshes, and groundwater) from farming activities by:
 - (a) discouraging the establishment of new dairy farming of cows or new intensive winter grazing activities in close proximity to Regionally Significant Wetlands and Sensitive Waterbodies identified in Appendix A; and
 - (b) ensuring that, in the interim period prior to the development of freshwater objectives under Freshwater Management Unit processes, applications to establish new, or further intensify existing,

dairy farming of cows or intensive winter grazing activities will generally not be granted where:

- (i) the adverse effects, including cumulatively, on the quality of groundwater, or water in lakes, rivers, artificial watercourses, modified watercourses, wetlands, tidal estuaries and salt marshes cannot be avoided or mitigated; or
- (ii) existing water quality is already degraded to the point of being overallocated; or
- (iii) water quality does not meet the Appendix E Water Quality Standards or bed sediments do not meet the Appendix C ANZECC sediment guidelines; and

....

(emphasis added)

- 26. An interpretation of "landholding" in this context that seeks to exclude from consideration, the effects of the discharge of additional nutrients into the environment, would not be consistent with Objective 6 and Policy 16. That is because the cumulative effects on the quality of groundwater may not be avoided or mitigated.
- 27. For these reasons, a purposive approach to interpretation leads to the same outcome as giving the words within the definition their plain and ordinary meaning. As such, we consider that:
 - a. both the Gladfield Block and the Horner Block should be considered as part of Woldwide 4 & 5's landholding; and
 - b. the Horner Block should be considered as part of Woldwide 1 & 2 's landholding.
- 28. For completeness, even if it can be successfully argued that the Gladfield and Horner Blocks are not part of Woldwide 4 & 5's and Woldwide 1 & 2's "landholding", we consider Environment Southland would still need to consider all effects of the farming activity, including the effects of any farming activity undertaken on the Gladfield and Horner Blocks, when assessing the respective applications for consent.
- 29. The Environment Court has previously held that when assessing an application for resource consent, it may be appropriate to take into account consequential effects on the environment that might flow from allowing the activity for which consent is sought, if not too uncertain or remote.⁴ In this case, the effects of the farming activities are clearly going to extend to the Gladfield and Horner Blocks (as stated in the applications) and therefore it is appropriate to take those effects into account when assessing the respective applications for consent

⁴ *Beadle v Minister of Corrections* Decision No. A 74/2002 Sheppard PEJ presiding (EC); *P & E Ltd v Canterbury Regional Council* [2015] NZEnvC 106.

ADDENDUM

UPDATE TO OPINION FOLLOWING CLARIFICATION OF UNDERLYING FACTUAL SITUATION

8 October 2018

1. Following the provision of our legal opinion on 13 July 2018, Woldwide Farms has clarified some of the underlying facts relating to the applications for resource consent from Woldwide 4 & 5 and Woldwide 1 & 2. Woldwide Farms' advisor provided some written comments and clarifications on our opinion on 19 July 2018.
2. Accordingly, you have asked us to review those comments and advise whether Woldwide Farms' clarifications change our opinion recorded above at paragraph 27 that:
 - a. both the Gladfield Block and the Horner Block should be considered as part of Woldwide 4 & 5's landholding; and
 - b. the Horner Block should be considered as part of Woldwide 1 & 2's landholding,

for the purposes of assessing their respective applications for resource consent under Rule 20 of the pSWLP.
3. We set out the amended factual situation and our revised analysis below.

Woldwide 4 & 5's application

4. Initially you asked whether the support blocks to be utilised by Woldwide 4 & 5 (namely the Gladfield Block and the Horner Block) should be considered as part of Woldwide 4 & 5's "landholding" for the purposes of their respective applications under Rule 20 of pSWLP. Woldwide 4 & 5 have lodged a resource consent application to expand its land area.
5. We had understood that Woldwide 4 & 5's application included the use of the Gladfield Block and the Horner Block as support blocks, specifically:
 - a. Woldwide 4 & 5 would predominantly utilise the Gladfield Block and this had been included in the modelling for the application.
 - b. Some sludge from Woldwide 4 & 5 will also be spread on the Horner Block, although this had not been modelled in the application.
6. However, Woldwide Farms denies that some sludge from Woldwide 4 & 5 will also be spread on the Horner Block, meaning the Gladfield Block will be the only support block use by Woldwide 4 & 5. Woldwide Farms has also confirmed that the Gladfield Block is owned and operated under direct control of Woldwide 4.
7. Accordingly, we consider the Gladfield Block only should be considered as part of "landholding" for the purposes of assessing Woldwide 4 & 5's applications for resource consent under Rule 20 of the pSWLP. The Horner Block should not be considered in the context of Woldwide 4 & 5's application.

Woldwide 1 & 2's application

8. Initially you asked whether the support block to be utilised by Woldwide 1 & 2 (the Horner Block) should be considered as part of Woldwide 1 & 2's "landholding" for the purposes of its application under Rule 20 of pSWLP.
9. We had understood Woldwide 1 & 2 intended to lodge a resource consent application to expand its land area and increase dairy cow numbers. Also, we had understood that Woldwide 1 & 2's proposal required certain farming activities to be undertaken on the Horner Block, including that the Horner Block would receive some of the farm dairy effluent from Woldwide 1 & 2, provide grazing for young stock, and provide intensive winter grazing for Woldwide 1 & 2 stock. Woldwide 1 & 2 did not intend to model the Horner Block as part of its future expansion.
10. However, Woldwide Farms has informed Environment Southland that Woldwide 1 & 2's proposal only requires farm dairy effluent discharge to be spread on the Horner Block and this will be covered by a separate discharge permit. Woldwide 1 & 2 will not use the Horner Block for grazing of young stock or for intensive winter grazing.
11. Woldwide Farms has also advised that the Horner Block is owned and operated as part of Woldwide Farm Ltd operations. Woldwide Farms Ltd is a trading/commercial entity completely separately run from Woldwide 1 & 2, undertaking feed trading, contracting, logistics, supply management, machine hire, office support and knowledge support.
12. We consider that these changes affect our opinion that the Horner Block is part of Woldwide 1 & 2's "landholding." It is unlikely that by only exporting one aspect of its farming operations to the Horner Block (i.e. the discharge of sludge), Woldwide 1 & 2 is utilising the Horner Block as part of a "single operating unit." This is different than if Woldwide 1 & 2 was intending to utilise the Horner Block for multiple aspects of its farming operations and if its use of the Horner Block was central to its overall farming operation.
13. Accordingly, we consider that the Horner Block is not part of Woldwide 1 & 2's "landholding" for the purposes of their respective applications under Rule 20 of pSWLP.
14. We consider that this situation is more analogous to the scenario that was assessed in our advice dated 27 July 2018. In that advice, you asked us to consider whether Environment Southland could consider, as part of a resource consent application to increase cow numbers, part of the farming activity, e.g. intensive winter grazing, where it was proposed to be carried out off-farm (under the control of a third party).
15. In that case, where the intensive winter grazing activity is to be operated and managed separately from the rest of the farming activity, we consider the activities do not constitute a "single operating unit" and therefore do not meet the definition of "landholding" for the purposes of assessing an application for resource consent under Rule 20 of the pSWLP.
16. However, we consider that Environment Southland can still consider all effects of the farming activity, including the effects of any part of that farming activity that is undertaken on a different landholding (i.e. the off-site intensive winter grazing), when assessing the respective applications for consent under section 104 of the RMA.

17. As noted in our opinion dated 27 July 2018, the effects of the farming activity that is undertaken on a different landholding can be considered where these activities may also require other resource consents under the pSWLP.
18. The Courts have held that under section 104, the scope of the effects to be considered is not restricted and the effects from allowing an activity may include those effects which inevitably follow, including where these activities / effects may be the subject of another resource consent application.⁵
19. Applying our reasoning to this situation, we consider that Environment Southland can consider all effects of the Worldwide 1 & 2 farming activity, including the effects of the spread of sludge on the Horner Block, when assessing the applications for consent.
20. For completeness, we note that Rule 20(d) of the pSWLP provides that the use of land for a farming activity, including an increase in cow numbers (in certain circumstances) is a restricted discretionary activity provided certain conditions are met. The assessment of the relevant contaminants and the Farm Environment Management Plan required under Rule 20(d) are both restricted to the relevant "landholding" itself, and not the off-site land.
21. However, where an application to increase cow numbers is made under Rule 20(d), we consider that the effects of any off-site discharge of sludge can be considered under matter of discretion (5) which restricts the Council's discretion to:
 - (5) the potential effects of the farming activity on surface and groundwater quality and the sources of drinking water...
22. Other applications to increase cow numbers will be a discretionary activity under Rule 20(e), and all relevant effects will be able to be considered under section 104 of the RMA.

⁵ *Auckland City Council v Auckland Regional Council* EnvC Auckland A101/97, 25 August 1997 at 7, *Pukenamu Estates Ltd v Kapiti Environmental Action Inc* HC Wellington AP106/02, 1 July 2003