BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 136

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under Clause 14 of the First Schedule to the Act
AND	of an application for a declaration under sections 310 and 311 of the Act
BETWEEN	HALDON STATION (ENV-2009-CHC-192) AND THE WOLDS STATION LIMITED (ENV-2009-CHC-187)
AND	FEDERATED FARMERS OF NEW ZEALAND (INCORPORATED) MACKENZIE BRANCH (ENV-2009-CHC-193)
AND	FOUNTAINBLUE LIMITED, PUKAKI DOWNS TOURISM HOLDINGS PARTNERSHIP AND SOUTHERN SERENITY LIMITED (ENV-2009-CHC-190) Appellants
AND	MACKENZIE DISTRICT COUNCIL Respondent

Court: Environment Judge J R Jackson
Environment Commissioner J R Mills
(In Chambers at Christchurch)

Submissions received from: J G Hardie for the Mackenzie District Council
J Derry for the Mackenzie Branch of Federated Farmers of New Zealand Inc

Date of Decision: 20 June 2014

Date of Issue: 20 June 2014

DECISION

A: Under section 311 of the Resource Management Act 1991 the Environment Court declares that large pivot irrigators such as Centre Pivot and Linear irrigation systems are not "buildings" within the definition on p 3-2 of the Mackenzie District Plan for the purposes of the policies and rules of the Plan because they are "vehicles" under exception (e) in that definition.

B: There is no order for costs.

REASONS

Introduction

[1] On 4 December 2013 the Mackenzie District Council lodged an application for declaration pursuant to section 311 of the Resource Management Act 1991 ("the RMA" or "the Act").

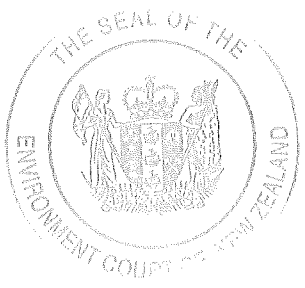
[2] The application is for the following declaration by the Environment Court:

> That large pivot irrigators such as Centre Pivot and Linear irrigation systems are not "buildings" for the purposes of the policies and rules of the Operative Mackenzie District Plan (as amended by Plan Change 13).

The application was supported by an affidavit dated, 25 October 2013, from Mr A R Curtis, Chief Executive of Irrigation New Zealand Ltd.

[3] The Council submitted that large irrigators are not buildings for the following reasons (summarised):

(i) the District Plan does not refer to large irrigators as buildings;
(ii) they fall outside the District Plan definition of 'building';
(iii) they fall within the 'vehicle' exclusion in the District Plan's definition of 'building'; and
(iv) the Council did not intend that large irrigators would be regulated under the District Plan's rules for buildings.



[4] A notice of support was filed by the Mackenzie Branch of Federated Farmers of New Zealand Inc ("the Mackenzie Branch") on 20 December 2013. The notice was supported by the affidavit of Mr P Boyd dated 19 December 2013.

[5] The parties agreed the court could resolve the question on the papers. Both the Council and the Mackenzie Branch lodged submissions supporting the declaration. No party opposed the declaration.

No service and no opposing parties

[6] Initially we were concerned that this application was made within the existing PC13 appeals rather than more generally. However, Mr Hardie, counsel for the Council, observed that the issue has only arisen because of a comment by the court in its first (interim) decision in these proceedings. In that decision[1] the court wrote[2] (obiter):

> Structure is defined in the RMA[3] as meaning "... any building, equipment, device, or other facility made by people and which is fixed to land; ...".
>
> A "building" is defined in the district plan[4] as meaning (relevantly) "... any structure ... whether temporary or permanent, movable or immovable, ...". So a pivot irrigator is a "building" for the purposes of the policies and rules in the district plan. It will therefore be caught by rule 3.1.1.e in respect of sites of natural significance, scenic viewing areas and (now) scenic grasslands.

[7] The application is designed to check that the court's obiter statement is correct, or rather to persuade the court that it was wrong. Accordingly, we were persuaded that the wide Mackenzie community did not need to be notified of the application.

[8] One indirect consequence of the lack of notification is that in fact there is no party opposing the application. The court raised the possibility of an *amicus curiae*, but the Council has such a small rating base it was not enthusiastic about paying for that. Instead Mr Hardie undertook to put the opposing arguments as carefully and fully as he could. In the circumstances — where the court's statement in the First (Interim) Decision is the only source of doubt about how the district plan works in relation to irrigators — we consider that is appropriate.

<u>Modern irrigation systems in the Mackenzie District</u>

[9] In his affidavit Mr Curtis explained[5] how methods of irrigation have changed over time in the Mackenzie District:

> Most of the early irrigation, some of which still remains, was applied through surface methods such as border dyke. Surface irrigation is the least efficient form of irrigation and typically cannot meet modern efficiency standards. Surface irrigation was then superseded with early

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1 [2011] NZEnvC 387.
2 [2011] NZEnvC 387 at [279] and [280].
3 Section 2 of the RMA.
4 Mackenzie District Plan p 3-2.
5 A R Curtis, affidavit 29 October 2013 para 16.

> spray irrigation methods such as travelling irrigators (hard and soft hose guns and booms). It is challenging to operate these irrigation systems to meet modern efficiency standards due to their high application intensity and low distribution uniformity. In recent times, the pastoral, arable and vegetable irrigators have moved to modern centre pivot or linear move irrigation systems. These, when designed, installed, operated and maintained well, are the most efficient form of broad-acre spray irrigation available.

[10] Aspects of the efficiency of the modern systems include low intensity application of the water and the capacity to water large areas uniformly or at deliberately variable rates[6].

[11] Generically, it appears from Mr Curtis' affidavit that irrigation systems have two parts[7]:

- a reticulation system and supply structure
- an application system

[12] The reticulation system and supply structure starts with the taking of water. In the Mackenzie District about 90% of irrigation water supply is from surface water takes, and only a small amount from bores[8]. Water is then conveyed, usually by gravity, through buried pipes or sometimes in open channels to the paddocks where it is to be used[9]. The supply structure then includes a pump (either in a small shed[10] or powered by a stationary tractor[11]). Various headworks are usually necessary — valves, filters, gauges and water meters[12]. The reticulated water is then pumped up a pipe called a riser into a "central tower".

[13] The second, and in this context, most important component of the irrigation systems is the application system. This application is concerned with the use of centre pivot and linear move irrigators in the Mackenzie country. These[13]:

> ... consist of metal spans (that support the central water pipe) with mobile 'A-frame' towers on motorised wheels between them (to keep the water pipe suspended 2.5 – 4.5m above the ground). Typically they are of 40 – 50m spans but can range between 30m and 80m. Over recent years their overall length in NZ has been commonly capped at 600m (12 – 15 spans). This is due to water application efficiency issues negatively impacting upon production through excessive application intensity when longer overall lengths are used. Each tower is driven (powered) through individual electric or hydraulic motors. Each individual tower's movement is controlled by a central operating system that uses sensors to ensure the spans move at the desired speed and do not 'get out of alignment'.

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6 A R Curtis, affidavit 29 October 2013 para 15.
7 A R Curtis, affidavit 29 October 2013 para 24.
8 A R Curtis, affidavit 29 October 2013 para 22.
9 A R Curtis, affidavit 29 October 2013 para 23.
10 A R Curtis, affidavit 29 October 2013 para 22(e).
11 P Boyd, affidavit 19 December 2013 para 6.2.
12 A R Curtis, affidavit 29 October 2013 para 22(d).
13 A R Curtis, affidavit 29 October 2013 para 24.

[14] Specific aspects of linear move irrigators were described as follows[14]:

> These irrigators typically operate in two parallel straight runs. Once they reach the end of one they are towed across and return to where they started in the other. The water supply is either from a central race or from regularly spaced pressurised hydrants — typically 400m apart. All sprinklers are of the same nozzle size, pressure regulators before the sprinkler are also common, particularly if there are topographical height differences along the irrigator length.

[15] Mr Curtis then distinguished two types of centre pivot irrigators[15] — towable and fixed. In respect of the former he wrote:

> Towable Centre Pivots irrigators typically have a central concrete pad with a water hydrant located beside it. The central tower end of the towable irrigator is temporarily anchored to the pad using chains. ... The irrigator then pivots around the anchor to irrigate. Other options exist for anchoring towable pivots that do not require concrete pads, for example earth anchors and free standing skid assemblies. A towable centre pivots anchoring requirements are predominantly driven by the irrigator length.
>
> The water supply is connected to the irrigator through a removable connection between the central towers riser pipe and the water hydrant. The central tower[']s pivot point design varies between manufacturers, however in generic terms it comprises of a riser pipe that slots into a pivot elbow and bearing assembly. ...
>
> Towable pivots are usually anchored for 3-5 days before they move to their next location for a similar time frame. It is uncommon for more than two locations to be used unless the system capacity (the depth of water that can be applied per hectare per day) is increased from the 4-5mm per day typical of NZ centre pivots. ...

[16] Mr Boyd described a fixed centre pivot as follows[16]:

> A fixed centre pivot consists of a steel frame of approximately 3m in height which is bolted to a concrete pad. The concrete pad sits at ground level, and is approximately $3m^2$ in area. The reason this is bolted down is to stop the frame from moving from the point of the riser. The pivot remains connected to the riser and rotates around this riser.

[17] Mr Curtis then explained the difference between towable centre pivots and fixed centre pivots as being that[17] in a fixed centre pivot:

> ... their central tower and water supply is permanent. The central tower is generally between 3.5 – 4.5m high and is bolted to the same concrete pad as outlined above for towable centre pivots. The connection of the spans to the centre tower is by the same method as a towable centre pivot — a riser pipe and pivot elbow and bearing assembly.

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14 A R Curtis, affidavit 29 October 2013 para 26.
15 A R Curtis, affidavit 29 October 2013 paras 27 - 29.
16 P Boyd, affidavit 19 December 2013 para 8.
17 A R Curtis, affidavit 29 October 2013 paras 30 – 31.

For fixed centre pivots the riser pipe has a permanent connection to the reticulation system instead of a temporary connection to a water hydrant. The sprinkler package is also identical to the towable centre pivot.

Definitions in the Mackenzie District Plan

[18] The definition of a "building" in the plan[18] is as follows:

> Building: for the purposes of this Plan, means any structure or part of a structure whether temporary or permanent, movable or immovable, but does not include:
>
> a. Any scaffolding or falsework erected temporarily for maintenance or construction purposes.
>
> b. Fences, walls or retaining walls of 2m in height or less not used for advertising or for any purpose other than as a fence, retaining wall or wall.
>
> c. Structures less than $5m^2$ in area and in addition less than 2m in height.
>
> d. Masts, poles, radio and television aerials (excluding dish antennae for receiving satellite television), less than 7m above ground level.
>
> e. Any vehicle, trailer, tent, caravan or boat whether fixed or movable unless such vehicle, trailer, tent, caravan or boat shall be used as a place of accommodation, business or storage. [Underlining added].

[19] "Structure" is not defined in the plan, but is defined in the RMA as follows:

> Structure means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft.

[20] The plan's definition of "building" has an exception, and that relates to a "vehicle". Counsel referred to the definition of a vehicle in section 2 of the Land Transport Act 1998, which states that a "vehicle":

> (a) Means a contrivance equipped with wheels, tracks, or revolving runners on which it moves or is moved ...
>
> ...
>
> (c) does not include
>
> ...
>
> (vi) a pedestrian-controlled agricultural machine nor propelled by mechanical power:
>
> ...
>
> (ix) any other contrivance specified by the rules not to be a vehicle for the purposes of this definition.

[18] Section 3: Definitions [Mackenzie District Plan p 3-2].

[21] Perhaps more relevantly *The New Zealand Oxford Dictionary* defines a "vehicle" as[19] (relevantly):

> 1. Any conveyance for transporting people, goods, etc, esp. on land.

Based on that definition a sledge or a gondola would be a "vehicle", but usually a vehicle would, as the Transport Act definition suggests, have wheels. The essential component is that a vehicle transports something from one place to another.

[22] The issue arose in the First (Interim) Decision because the method of dealing with pivot irrigators in PC13 as notified reads as follows:

> ...
> **Implementation Methods for all policies**
> ...
> To encourage placement of various temporary farm structures such as irrigators and wrapped feed back from roads and state highways, through preparation and distribution of guidelines to landowners and managers.

[23] Mr Hardie submitted for the Council that at the time of the plan being drafted the Council had not turned their mind to the issue of whether irrigators are classified as a building. The Council had contemplated however in notified PC13 that pivot irrigators would be dealt with by means of guidelines yet to be developed, which would indicate that they were not regarded as being covered by the existing rules.

Consideration

[24] Counsel argued the case as one of interpretation, citing sundry principles for us to take into account. However, we consider they have misconceived the situation. It does not usually make much sense to consider the purpose of a definition in a district plan — the purpose is simply to identify what a word means when used in the plan.

[25] In this case the task is to assess whether or not the travelling irrigators are "vehicles". As the Supreme Court stated in *Air Nelson Limited v The New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc*[20]:

> ... the issue is not one of construction but of application.

[26] We were given quite extensive argument as to why pivot irrigators are not "vehicles" within the meaning of the definition. The difficulty is that a pivot irrigator is fixed to the ground at the point where it is connected to the riser. That suggests it is a structure. On the other hand a modern irrigator is movable — and does move — which

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19 *The New Zealand Oxford Dictionary* [OUP, 2005] p 1250.

20 *Air Nelson Limited v The New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc* SC78/2009; [2010] NZSC 53.

suggests it may be not be a building. We do not find the arguments to resolve that paradox particularly convincing either way.

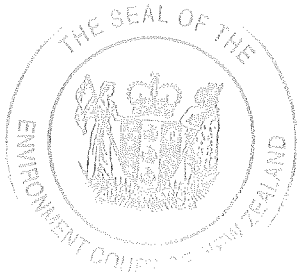
[27] However, the Council had an alternative line of attack. Mr Hardie submitted on the basis that the water delivery system and the pivot irrigator can be classified as two separate structures that the pivot structure should be classed as a "vehicle", bearing in mind they are excluded from the definition of "building".

[28] As a preliminary point we observe that Mr Hardie's division is unnecessary, because the exception to the definition refers to vehicles whether they are movable or fixed.

[29] A pivot irrigator conveys water from the riser at the end of the supply system to where it is to be sprayed on to the land. It also has wheels. Because it has wheels and carries something, it is a vehicle. Similarly if one looks at paragraph (e) of the Land Transport Act 1998 definition, it is quite obvious that pivot irrigators are vehicles: they are "contrivance(s) equipped with wheels" (on which they move). Nor do they come within the exception (to the exception).

Result

[30] Under section 313 of the RMA, we intend to make the declaration as sought by the Council with some minor modifications.



J R Jackson
Environment Judge

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