Duncan Cotterill Plaza
148 Victoria Street
Christchurch
PO Box 5
Christchurch 8140
New Zealand
p +64 3 379 2430
f +64 3 379 7097
duncancotterill.com

Duncan Cotterill

22 August 2019

By Email: Aurora.Grant@es.govt.nz

Environment Southland
Attention: Aurora Grant

Dear Aurora

APP-20191140 Clarification of "Landholding" Issue

1 As you are aware, we act for the Applicants in the above applications. You are aware that a hearing date has been provided for these applications. We write to clarify the "landholding" issue discussed the 9 August meeting and to confirm that it does not give rise to any basis for any further delay. We choose to share this with you now, rather than at the hearing, in the hope that it will assist you with the preparation of your report, and to give you fair notice of our clients' approach.

2 We were a bit surprised to learn that at the 9 August meeting you put forward your view that all the various and dispersed land holdings of the various companies that also have Mr and Mrs De Wolde as directors are a single "landholding" for the purposes of Rule 20 of the PSRLWP. We also understand from your comments at the meeting that you will put this contention to the commissioners presumably with the view that further resource consents are required for this wider landholding and that the process should be further delayed, With respect, we consider there is no basis to support any contention other than that the landholdings are as identified in the applications and Assessments of Effects on the Environment. We explain further below.

Factual Basis

3 Fundamental to all issues concerning the processing of the applications before the Council is that the Council is limited to considering and granting what has actually been sought as part of those applications. That consists of the applications, the AEEs, any subsequent written amendments including in responses to Requests for Further Information under s92. If an applicant in practice goes beyond what was sought in the consent and this associated documentation, then that is a matter for the compliance arm of the Council[1] . The Council is not entitled to use the processing of a consent as an enforcement tool[2]. If you consider there are practices occurring that differ from what is identified in the applications and associated documentation, then that cannot, as a matter of law, alter the application. It simply means that if the application is granted, it is incumbent on the Applicant to ensure that the authorised activities occur in general accordance with the application and associated documents. Our view is therefore based exclusively on the application in its full sense as identified by the footnoted authorities (*Clevedon Protection Society* in particular), which should also be the case for the Council's view.

[1] *Clevedon Protection Society Inc v Warren Fowler Ltd* [1997] 3 ELRNZ 169 (EnvC), *Gillies Waiheke Ltd v Auckland CC* [2004] NZRMA 385 (CA)

[2] *Colonial Homes Ltd v Queenstown Lakes DC* W104/95 (PT)

Interpretation

4 We also understand that you place some considerable reliance on an opinion provided by Wynn Williams regarding the interpretation of the term "Landholding" (but then consider some of its conclusions are incorrect), and the decision of the commissioners in the *Adams* application. First, the *Adams* decision is nothing more than a decision by a consent authority on a very specific set of facts. It has no precedent effect and is certainly not binding on the commissioners who are going to determine this application. Second, we are unsure what the status of the Wynn Williams opinion was in that hearing. The Council was not a submitter, so the opinion cannot have been legal submissions for a submitter. We are unaware that it was commissioned as a report in accordance with s42A or met the other requirements of that section. In any event, we are aware that one of the commissioners in the current application is a lawyer with sufficient expertise to determine interpretation issues and would not need to defer to the expertise of the opinion's author. Third, we do have some reservations as to the approach taken by Wynn Williams to the interpretation of the definition, which we consider is wider than properly supported by the text itself, in the light of its purpose and the scheme and arrangement of the Proposed Southland Water and Land Plan (PSWLP) and the Resource Management Act (RMA) itself.

5 For ease of reference we set out the definition of "Landholding" in full:

(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.

6 The approach to interpreting subordinate legislation (which includes a regional plan) under the Resource Management Act 1991 is subject to the principles of the Interpretation Act 1999[3].

The Text Itself

7 The starting point is the plain and ordinary meaning of the text. It is only to be departed from if it would be clearly contrary to the statutory purpose or social policy behind the plan and its rules[4]. It is to be assumed that the choice of the particular words in the definition above was deliberate. They have a specific meaning:

8 A number of things emerge from the text itself:

8.1 The text refers to an area of land, singular. That is reinforced by the express words "single" and "unit";

[3] *Spackman v Queenstown Lakes DC* [2007] NZRMA 327 (HC)
[4] *Re an Application by Millbrook Country Club Ltd* EnvC C045/97, *Powell v Dunedin CC* [2004] 3 NZLR 721(CA).

8.2 It expressly includes land separated by a road, river or artificial watercourse, but nothing more;

8.3 There is no limitation of the purpose for which it is operated as a unit, such as only for nutrient management purposes.

9 The definition effectively has two parts:

9.1 One single area of land, which can have a road, river or artificial watercourse running through it and can be held in more than one title; **and**

9.2 It must be operated as a "single operating unit".

10 If only the first or only the second requirement is met, but not both, it does not fall within the definition of "landholding". The first requirement strongly suggests a single area of land, separated only by title boundaries, roads, rivers or drains. It in no way contemplates or provides for multiple areas separated by more than simply a road, river or artificial drain to be a single "landholding". The second requirement suggests something that is, when considered overall, in the normal sense of the words, "a single operating unit". It does not restrict it to one aspect, such as nutrient management or definition to suggest that "a single operating unit" is intended to denote something that is used as a unit for a specific purpose, like for instance nutrient management. That is reinforced by clause (b) of the Note, which specifies that it may include something operated as a "single business entity". The words are to be given their plain and ordinary meaning.

11 The "note" relates only to the second requirement. It has no influence over the first. It is distinguished as not being part of the actual definition, but is provided by way of some guidance, which is by no means determinative or exhaustive. Important are the words "may include" and "but is not limited by", as well as the fact that there are two clauses (a) and (b), which are separated by the word "and", not "or", with the latter clause requiring the establishment of a "single business entity". They indicate that the mere fact that certain parcels may be owned by connected companies or be under the effective control of the same people should not of itself be taken as establishing that they form part of a single operating unit, much less that they are one "landholding", because:

11.1 If (a) in the note can be made out on its own, that is not enough, (b) also has to be made out;

11.2 In any event, even if both parts of the note are made out, it then "may" only be a single operating unit;

11.3 Even if both can be made out, they still do not establish that part (a) of the definition is made out, because the note clearly does not relate to that part.

Purpose, Scheme and Arrangement

12 The meaning is also to be derived from the purpose and indicators of meaning include the scheme and arrangement of the enactment[5]. Absurd or unworkable meanings are to be avoided.

13 The purpose of this definition is simply to give certainty to the term "landholding" used in over 20 provisions in this plan, only one of which is Rule 20. **Attached** is a document setting out each such provision. One cannot properly understand that purpose without looking at all of those provisions. With respect to Wynn Williams, our reservations as to its conclusions are based on the fact that it really only focused on Rule 20 and did not consider these other critical uses of the same term.

[5] Sections 5(2)&(3) Interpretation Act 1999, *Powell v Dunedin CC* [2004] 3 NZLR 721 (CA), *Queenstown River Surfing Ltd v Central Otago DC* [2006] NZRMA 1 (EnvC)

14 We note that none of the objectives relies on the term. There is only one policy that uses it, namely Policy 12A, which uses it interchangeably with "site". There is nothing in that policy that suggests, much less requires, that it refers to a wide range of geographically dispersed titles that happen to have some links between those who control the companies that own them. Rather, it suggests a single area within the same location.

15 There are no objectives or policies that provide any indication that the word "landholding" is intended to be used to control possible connections between activities on one site and effects on a different site in a different area. Indeed, Rule 20 does not necessarily require that and importantly, none of the other contexts in which "landholding" is used suggest or require that.

16 On the contrary, there are a number of provisions that would be undermined or unworkable if it were given a meaning other than the plain meaning we address above. Examples are:

16.1 Rules 26 and 43: Septic tanks and Farm landfills. A group of companies with sufficient connection could create one large farm landfill on a property owned by one of these companies, to take all the rubbish or domestic effluent from all the properties, as being from the "same landholding";

16.2 The definition of Cleanfill site would become rather wider than it appears to have been intended to mean, as would be the case for "on-site wastewater system";

16.3 Rules 49 and 54 would both become completely unworkable, because they would effectively apply the permitted water take volumes as a maximum across all properties that had common directors and/or shareholders, irrespective of their location and whether they actually formed one physical unit.

17 Also significant is that the relevant definition, which is contained in clause (a) of the definition itself (as opposed to clause (a) of the note) is followed by clause (b), which makes it clear that this definition only applies to rural production land, while for all other land, whether it is part of the same "allotment" or "title" is determinative. That suggests again a physical proximity and one actual physical unit.

18 When all of these matters are properly considered, then it becomes clear that the true purpose of the definition was to acknowledge the reality that often a single "farm" can cover more than one title boundary and can even straddle a road, river or drain. That is both:

18.1 Restrictive, for example, to ensure that limits on permitted activities (e.g. Rules 20, 49 and 54) cannot be circumvented by subdividing the same farm into a number of titles to be vested in separate companies;

18.2 Enabling, for example to ensure that a person who runs a single farm on two adjacent lots can use a single rubbish pit for the entire property (e.g. Rule 43), or does not need to adhere to setbacks from title boundaries within the actual farm (e.g. Rule 35A(iii)(4), Rule 41(iii)(2)).

Other Considerations

19 A regional plan is subordinate legislation. It cannot amend an Act of Parliament. Both the Companies Act and s2 of the RMA, in its definition of "person", uphold the separate legal status of companies as "persons" in their own right. One should be very reticent to read into provisions of subordinate legislation meanings that undermine that separate legal personality and ignore the fact that groups of parcels are owned by separate legal persons.

Proper Meaning

20 The proper meaning is really that "landholding" denotes one single physical "farm". Whether it is or is not is primarily a matter of fact. A person alleging that it is a single landholding must establish that:

20.1 There is one single area of land;

20.2 Only separated by a title boundary, river, artificial drain or road;

20.3 That constitutes a single operating unit;

20.4 It is controlled by a structure of ownership of the same group of people;

20.5 It is also operated as a single business entity.

21 Because of the word "may" in the note to the definition, if all of these matters can be made out, then the area of land "may" be a single landholding. If one of them cannot be made out, then it cannot be a single "landholding".

Application to the Facts

22 As indicated above, the consent authority's role when determining applications for resource consents is quite distinct from, and occurs on a different basis to, its enforcement role. The consent authority is required to assess an application submitted in paper, with such additional information as is provided in paper by amending the application or answering requests for further information under s92, and evidence in writing or given orally, at a consent hearing. This information addresses something that is intended to occur in future, once the consents are granted and commence.

23 What the Council has before it is:

23.1 Multiple resource consent applications;

23.2 By four separate legal persons;

23.3 To authorise activities required to undertake four distinct dairy platforms, of which only two (WW1 & WW2) are sufficiently connected to be treated as a single landholding;

23.4 Each owned by a separate company;

23.5 Operated as independent business units.

24 There is no application relating to the independent landholding known as "Woldwide 3".

25 It should be noted that the Applicants have openly sought to have two properties (WW1 & WW2) processed as forming part of one "landholding". The Applicants have been co-operative and pragmatic in this regard. We are unaware of any information properly before the Consent Authority that would enable you to demonstrate that they have been misleading as to this aspect of any of the other the applications.

26 They have assessed parts of the runoff block some 20 km distant as part of the same "landholding" as the three respective units. However, we are informed that this was done only to provide you with the information you indicated you required in order for the applications to progress. We do note that in the *Adams* decision the Commissioners noted that they could also take into account consequential effects. Either way, the effects that may arise on other landholdings have been properly addressed. The Commissioners have all the information they require in order to assess the effects of the proposals before them. There is no basis for a further delay on this issue.

27 The proper application of the facts as properly before the consent authority for the purposes of these applications is that these applications relate to no less than three distinct "landholdings", but that the applicants have agreed to have two of them treated as a single landholding at ES's request. Please also note that it is up to the Applicants to ensure that all the information is correct, as it is they who bear the risk of either enforcement action if they depart from the

application or a review under s128(1)(c) if the information they provided as part of the application was inaccurate.

28 If you wish to contend that all of the individual Woldwide farms (One, Two Three, Four and Five, or any other properties for that matter) form one "landholding", the burden lies on you to establish that, based on the applications properly before the consent authority, which states and establishes that not less than three landholdings form part of these applications. You will have to establish all five of the matters in paragraph 20 from the application information. That information excludes this possibility.

Issues Arising

29 We trust that the above analysis will demonstrate that the matters you raised in your recent meeting with our clients cannot properly establish that all of the separating operating units are one single landholdings. We do not propose to respond to all of them, but we deal with a few of them to illustrate this point:

29.1 We acknowledge that there is a significant overlap between ownership and directorship of the distinct companies that own each separate unit. Only in the case of WW1 and WW2 is there an acceptance that these two should be treated as a single landholding for the purposes of these applications. However, neither these applicants, nor the other applicants have in any way reqeusted or agreed that all independent units with an overlap in directors and shareholdings can or should be treated as a single landholding. The applicants for WW4 and WW5 have indicated that there is a connection, but these applications make it clear that they neither seek nor agree to be assessed as part of the same landholding. Their indication of a connection does not of itself show that the effective control is not at the management level of the two independent operating units that are WW4 and WW5, much less that none of the other Woldwide properties have such autonomous management and control. Even if you could establish that, then you would still need to establish that all the individual farms are one "operating unit", including that the companies are operated as a single business entity. The information properly before the Council does not allow that conclusion. Even if that were established you would then need to establish that this is a single area of land, which is not possible. All these issues become evident from our analysis at and preceding paragraph 20 above.

29.2 There are some minor overlaps between the resource consents of some of the separate units. However, this does not establish that all the separate farms are indeed one landholding. There is nothing to suggest that for example, two separate operating units cannot rely on the same resource consent. The practice of "global consents" for, for example, stormwater discharges, demonstrates this well. It is also fairly common for someone other than the land owner to hold a consent to undertake a particular activity on a part of a property, that is not part of the operations of the owner of that property. In any event, in relation to the ability to dispose of some of the effluent from WW3 on WW5, this has never been given effect, which illustrates clearly that these are separate and autonomous units. This issue cannot establish even one, let alone all of the matters in paragraph 20.

29.3 While there are arrangements between individual companies within the associated group as to grazing, this is far from something that establishes that all units are therefore one single unit. It is very commonplace for the owners of quite distinct units, who have some connection and who are in the same general area, to enter into arrangements with each for wintering or grazing of some stock. This does not make them part of the same operating unit. Taking that approach almost amounts to reading into the definition a requirement that such arrangements can only be entered into between complete strangers who have no connection with each other. It is simply efficient and normal farming practice that the managers of the distinct units, who know each other, enter into such arrangements with each other. That does not render them part of the same operating unit. It certainly does not establish all the matters in paragraph 20.

29.4 While WW3, WW4 and WW5 are neighbouring properties, that again is not proof that all three, or any combination of two of them, are a single area of land operated as a single operating unit. The application information makes it clear that they are actually each independent operating units. Again, the proximity of these properties does not establish all of the matters that must be established in the definition, as set out in paragraph 20.

The Way Forward

30 We trust that the above has made it clear that these applications are not capable of being treated as applications that all relate to a single landholding. Importantly, we consider that this analysis addresses that issue and cannot form any basis for any further delay of the hearing, nor does it provide a proper basis for a recommendation for refusal of the consents. In particular, we address the sections which may arise in relation to possible further delays:

30.1 Section 21, which requires the Council to avoid unreasonable delay;

30.2 Section 91, which makes it clear that a decision not to proceed with the hearing under that section can only occur if there are reasonable grounds to believe that other resource consents will be required for the proposal to which the application relates, and these applications will lead to a better understanding of the proposal. First, the proposal includes nothing for which additional consents would be required.[6] Second, the consent authority now has all the information before it that it would reasonably require to understand the effects of the proposal;

30.3 Section 91A, which, as we have already indicated, can only be exercised at the applicant's request. That request is not made by these applicants;

30.4 Section 92, which commences with the words "at any reasonable time before the hearing". It is particularly surprising that this matter has only been raised at this very late stage, given how long the applications have already been before the Council and the fact that they were receipted and notified without any mention of this issue. This is not a "reasonable time". We also remind you that s92 is not to be used for ulterior purposes[7]. For completeness, we do not consider that it would be necessary to commission a further report on this issue, such as for example a further Wynn Williams opinion. The Panel includes a very experienced and senior specialist Resource Management and Public Law Barrister whom we would not expect to require advice from Wynn Williams on the interpretation issues above.

30.5 Section 88C, which excludes the ability to suspend the processing timeframes at this stage of processing;

30.6 Section 36(5), which makes it clear that any additional charges over and above fixed fees payable for the application, must be "actual and reasonable costs in respect of the matter concerned". We do not consider that any further cost incurred by the consent authority in commissioning a further report or endeavouring to establish the "single landholding" issue as a grounds for refusal or delay, would be actual or reasonable. This is particularly so where the Panel, whose costs the Applicants have to bear, already includes someone who has all the expertise that might be required to make a ruling on this matter, without further advice.

31 We would expect therefore that this letter will satisfy your concerns about the application of the term "landholding" and clarify that there are no grounds for any further delays.

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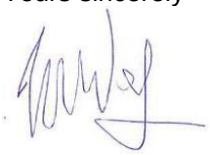
[6] It is acknowledged that the current operation on WW2 does include a monitoring bore (E45/0622) that has been found to require an upgrade to comply with the applicable permitted activity rule. ES has confirmed that this is not an issue that is sufficiently connected with the effects of the proposal to warrant deferral of the hearing.

[7] *Reuters Homes Ltd v Wanganui DC* [2011] NZRMA 357 (HC)

32 We do wish to record that nowhere in the entire policy framework is there a blanket prohibition on or discouragement of increases in cow numbers per se. It was open to the Council to insert provisions with that express approach, if that had been the most appropriate means of giving effect to the superior planning framework as per the tests in s32. What has instead been chosen quite deliberately is a strong direction not to authorise increases in cow numbers only in certain circumstances. If consents are granted for a proposal that results in an increase in cow numbers because (amongst other reasons) this is shown not to give rise to the circumstances in which such an increase is to be avoided, then the policy direction of both the PSLWP and the superior documents and legislative provisions to which it must give effect will have been achieved. Our clients simply seek a fair opportunity to demonstrate through evidence before the hearing commissioners that these proposal does not result in the circumstances in which increases in cow numbers are discouraged, but achieves outcomes that are in line with the policy framework and overarching legislative requirements.

33 We trust this will assist you with the preparation of your s42A report.

Yours sincerely



Hans van der Wal
Special Counsel

d +64 3 372 6459
m +64 21 376 459
jamie.robinson@duncancotterill.com

Cc: The Hearings Commissioners (APP-20191052 & 20191140)