ORIGINAL

Decision No. C 45/2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a reference under clause 14 of the First Schedule to the Act

BETWEEN NEW ZEALAND HEAVY HAULAGE ASSOCIATION INC
(RMA 497/00)
Appellant

AND THE CENTRAL OTAGO DISTRICT COUNCIL
Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson
Environment Commissioner C E Manning
Environment Commissioner O M Borlase

HEARING at Alexandra: 29 and 30 March 2004. Site visit 30 March 2004

COUNSEL:
P T Cavanagh QC and S J Ryan for the New Zealand Heavy Haulage Association Inc
J E Macdonald for the Central Otago District Council

DECISION

Introduction

[1] There has been a considerable history of the use of relocatable dwellings in the Central Otago District. That arose out of the need to provide relatively short-term accommodation for

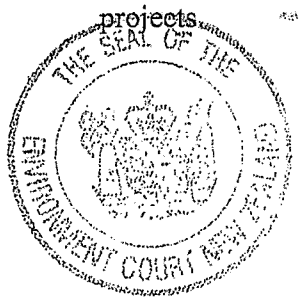
major power construction projects in the area. Those projects concluded in the very early 1990s. More recently, the use of such housing seems to have been at much the same level as elsewhere in the country, with some 27 consents issued for the placement of relocated dwellings over the 3 1/2 years ended December 2003. Of those, 25 were dealt with on a non-notified basis, with one being notified and one being dealt with under the post-2003 limited notification regime. We have come to think that it is the earlier history, rather than identifiable current issues, which lies behind the dispute in this case.

[2] The Central Otago District Council published its proposed plan in 1998 and a revised (decisions) version appeared in 2000. In brief, it makes relocatable dwellings a restricted discretionary activity in both the residential and rural zones; see Rules 7.3.3(iii) and 10.3.3(iii). The New Zealand Heavy Haulage Association referred those provisions to the Court, it having been unable to persuade the Council to adopt the view that such an activity should be a permitted activity or, at worst, a controlled activity in either zone.

[3] The Association mounted its attack on essentially two bases. First, that the Council had failed to undertake an adequate s32 analysis of benefits and costs, alternatives, etc. For that reason alone, the appellant argues, the Rules should be replaced.

[4] Secondly, even if the Rules survive the s32 argument, the appellant argues that they lack support from any identifiable issues, objectives or policies in the proposed plan and have no rational basis. That is said to be so, particularly when compared to the provisions governing the building of houses *'in situ'*.

[5] The Council's position is that it wishes to retain its control over relocatable dwellings at the level at which it could refuse consent in a sufficiently extreme case. It maintains the view that only a restricted discretionary status will give it a sufficient level of control. It argues that such a level of control is justified by its past experiences and the levels of community concern about potential impact on residential amenities of poorly done or uncompleted relocation projects.



Section 32 Analysis

[6] First, we should record that it is common ground that we are to deal with this matter on the law as it existed before the 1 August 2003 amendments to the RMA.

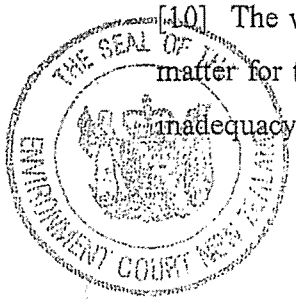
[7] The challenge to the relevant Rules on the basis of non-compliance under s.32(1) has been made in context of a reference under the First Schedule to the Act, and thus complies with s32(3).

[8] Mr Whitney, the Council's consultant planner, is of course correct in saying that the council is not required to produce any specific 'report' detailing its s32 inquiries and considerations. The pre-2003 sections 32(4) and (5) provided as follows:

> *"(4) Every person on whom duties are imposed by subsection (1) shall prepare a record, in such form as that person considers appropriate, of the action taken, and the documentation prepared, by that person in the discharge of those duties.*
>
> *"(5) The record prepared by a local authority under subsection (4) in relation to the discharge by that local authority of the duties imposed on it by subsection (1), in relation to any public notifications specified in subsection (2)(c)(i), shall be publicly available in accordance with section 35 as from the time of that public notification."*

[9] Those provisions make it self-evident that the record need not be contained in any one document, or be in any particular form. If confirmation of that is required, see *Ngati Kahu v Tauranga District Council* [1994] NZRMA 481. But as a minimum the record should contain an adequate audit trail of the Council's considerations of all of the factors in s32(1)(a), leading to it being satisfied that the [in this case] Rule is, in terms of s32(1)(c), necessary in achieving the purpose of the Act and the most appropriate means of exercising the relevant function, having regard to the merits of other means of doing so. The requirement to follow s32 is made the plainer by the provisions of s74(1).

[10] The weight to be given to an inadequate [or the total absence of a] s32 analysis is a matter for the Court's judgement. It is the substantive and not the procedural effect of any inadequacy or absence that is important. It is the merits of the challenged plan provision that



are to be considered in the light of the s32 inadequacy; the provision itself cannot be declared invalid for that reason. See *Kirkland v Dunedin City Council* [2001] NZRMA 97.

[11] There is nothing in what was produced as the s32 record (Document 116 of the discovered documents) which gives a lead to the Council's thinking on this topic. It was not until the hearing of submissions by the Council that this appellant's name appears in the record. Even then the Council's reasons for adopting the relevant Rules are rather generic. In its decision, the Council appears simply to adopt the reason given for the Rules in the proposed plan as originally published. That stated:

> *"In the past Council has experienced difficulties and expressions of community concern with dwellings relocated to new sites. These buildings sometimes require exterior upgrading and repair and may be left on the site in an unfinished state. Consequently they have a significant adverse effect on local amenity values. Discretionary (restricted) activity status enables Council to consider whether a particular development is appropriate and impose conditions that will ensure amenity standards are maintained. Previously used accessory buildings and garages are not subject to this rule."*

On the 'record' produced to us, we cannot regard the s32 analysis on this topic as being adequate, and we look at the merits of the Rules in that light.

[12] The reasons for decision go on to record as follows:

> *"Relocatable buildings (particularly dwellings) and their effects on the urban environment are a significant issue in the context of the Central Otago District.*
> *The amendment sought by the submitter is not necessary to achieve the purpose of the Act as stated in section 5, is inconsistent with the principles of the Act and the Council's function in terms of section 31 and is not the most appropriate means of exercising relevant functions in terms of section 32."*

General Rationale for Rules

[13] That there were problems 'in the past' was echoed in the evidence of Mr Whitney and Councillor N J Gillespie. We do not doubt that there may have been such problems in the past. But neither witness could point to any example of a relocated dwelling which had caused amenity concerns in the last several years. It is perhaps timely to mention our site

visit. The parties gave us a list of twenty examples of relocated dwellings in Clyde and Cromwell. [One in fact may not have been proceeded with]. We found and viewed virtually all of them. In one or two cases, it was possible to pick them as relocated, even without being told, because they were dwellings of a different period or style from those immediately around them. But in no case did they seem jarring or in any sense an offence to local amenities.

[14] When pressed to define any appreciable difference between relocated and in situ built houses, in terms of possible amenity effects, neither Council witness could point to anything we found at all convincing. Both acknowledged that a partly built in situ house, stalled because the owner had a funding problem, or because the builder had ceased operations, would be an equally unsightly and possibly intractable problem. Their view remained however that the potential for such problems was higher with relocatable houses, and they asserted that there was a public perception to that effect. We have no objective evidence against which to measure that assertion, or that reported perception. There are no identified issues, policies or objectives in the proposed plan itself which objectively support a restricted discretionary status.

[15] We should perhaps pause to observe also that we think there is merit in the appellant's submission that the reuse of dwellings in this way is a benefit to the environment generally. The materials in them would otherwise be burnt or occupy space in a landfill somewhere. The use of relocatable dwellings could be said to contribute to the sustainable management of physical and natural resources in terms of s5. It can also contribute to the s5 purpose by enabling people and communities to provide for their social and economic well-being, in the sense that we were told that a relocated dwelling, as a rough rule of thumb, is usually about one third cheaper than a comparable in situ built house.

[16] The fact that there have not been any identifiable problems with relocated houses for some years is, we acknowledge, open to two interpretations. The first is that there is not really a problem at all. The second is that the present restricted discretionary regime prevents problems arising. The Council inclines to the second, and points to it as a justification for continuing as it is. In that regard, the proposed Rules are, effectively, a roll-over of the provisions in the transitional [and pre-RMA] plans in the District.

[17] But the context has changed, post-RMA. The Council has at least an evidential burden of justifying its proposed Rules in terms of predictable and identifiable effects, rather than the prophylactic lists of authorised uses in earlier schemes.

[18] Here, we see nothing in terms of building safety that meaningfully differentiates relocatable from in situ built houses. All relevant issues can equally be dealt with under the Building Act 1991. Equally, now that the concentrated movement of big numbers of relocatable houses into, out of, and within the District has ceased, we have heard nothing that indicates there is a meaningful difference between the two categories in terms of identifiable effects on neighbourhood amenities. We note that the explanation to Policy 7.2.1 states that '...buildings themselves are of a varied design'. We incline to the view that the Council is struggling to support its position because it has somewhat over-focussed on an issue that is 'yesterday's problem'.

[19] We think it must follow from that conclusion that the proposed restricted discretionary Rule really cannot be justified on any of the relevant statutory criteria, summarised in *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481, 484 as requiring that a:

> *'...Rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan'.*

Appropriate activity status

[20] We are conscious of the desirability of letting local people decide, within the parameters of the law, what they wish to see in their local planning documents. That said, the statutory criteria must be satisfied, and there is advantage in a body such as the Court, with no preconceptions at all, being able to look afresh at an issue and to ask whether there really is a problem that needs attention. There is no evidence here that there is a problem with relocated houses that is different in kind from those which might arise with in situ built houses. That leads inevitably to the question of whether, therefore, there is any justification for giving them

different planning status. Put another way, that leads to the conclusion that in terms of the *Nugent* tests, the proposed Rule is not necessary to achieve the purpose of the Act, does not assist the territorial authority to carry out its functions, and cannot be an appropriate means of carrying out that function. There is no visible link between the proposed Rule and the objectives and policies of the proposed plan. The only justification we can see for that is that possibly the problems of the two types of housing might be different in degree, to the extent that different standards, and possibly conditions, might be justifiable to manage any identifiably different effects.

[21] We can see no justification for conditions which control the finished appearance of the building. The Council's controls should be neutral about that aspect and, height, bulk and similar issues aside, there is no means of control of the appearance of an in situ built house. We do note that many new subdivision developments frequently impose covenants prohibiting the use of second-hand materials. That is a matter of private contract on which we offer no view. But local authority planners are not necessarily good arbiters of taste.

[22] Nor does the Council have ability to impose a bond for compliance with standards on the owner of an in situ built house. Of the 19 relocated houses on the site visit list which are definitely in place, all were reportedly subject to a bond. The amounts are noted as varying between $3,000 and $40,000. There is no explanation why the amounts varied so widely, but the information on the list is very cryptic and not intended as an explanation. A bond can only be imposed as a condition under s108 [or, post 1 August 2003, s108A] which would mean that the activity would have to have at least controlled status, and the building of a new house is a permitted activity. If there is no ability to impose a bond on a newly built project, there needs to be a reason, in effects management terms, to impose one on a relocation project. We have already indicated that we heard no coherent evidence pointing to such a reason. We conclude therefore that there can be no justification for imposing a bond on a relocation project, where there can be no similar requirement for a newly built project.

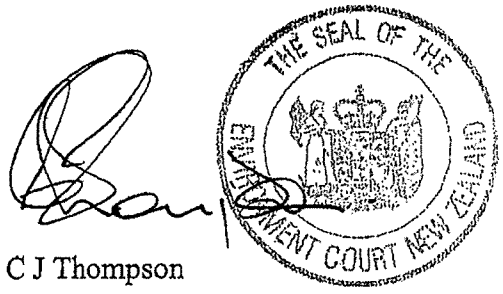
Result

[23] All of which leads us to the view that, in the absence of identifiable differences in effects, there is no objective reason to treat relocatable housing differently, in terms of activity status, from in situ built housing. If in situ built housing is a permitted activity, then so should

be relocatable housing. We considered whether the logical consequence of this was to remove all reference to relocated housing from the plan. There are however somewhat different issues when it comes to considering appropriate standards, and the appellant did not press for the relief of complete removal originally sought. We have considered the draft standards proffered by Mr Constantine for the appellant, and have made some modifications to them. They are attached as an appendix. We have in mind the result that we should direct the Council to modify its plan to accord with what we have said, but we think it is appropriate to offer the parties the opportunity to comment on those draft standards which are of course intended to be additional to other standards applicable to housing in either zone. To that extent, this decision is an interim one.

[24] Will counsel please respond to the draft standards by 30 April 2004.

DATED at WELLINGTON this 15th day of April 2004



C J Thompson
Environment Judge

Proposed Rules: Residential Resource Area

Permitted Activity Status

1. Add a new Standard to Rule 7.3.6, as follows:

(xi) Relocatable Dwellings

(a) Any relocated building intended for use as a dwelling (excluding previously used garages and accessory buildings) must have previously been designed, built and used as a dwelling.

(b) A building inspection report shall accompany the application for a building consent. That report is to identify all reinstatement work required to the exterior of the building.

(c) All work required to reinstate the exterior of any relocated dwelling, including painting if required, shall be completed within six months of the building being delivered to the site. Reinstatement work is to include connections to all infrastructure services and closing in and ventilation of the foundations.

(d) The proposed owner of the relocated building must certify that the reinstatement work will be completed within the six month period.

Reason

Non-residential buildings in a residential area can have an adverse effect on amenity values.

Incompletely reinstated relocated buildings can have an adverse effect on the amenity values of residential areas.

Breach: discretionary (restricted) activity see Rule 7.3.3 (vii)

2. Amend Rule 7.3.3 (iii) to read as follows:

(iii) Relocatable Buildings

The relocation of a previously used building intended for use as a dwelling (excluding previously used accessory buildings or garages) that does not comply with the standards set out in Rule 7.3.6(xi) is a discretionary (restricted) activity.

Council shall restrict the exercise of its discretion to the following:

- The proposed timetable for completion of the work required to reinstate the exterior of the building and connections to services
- The design and appearance of the building following reinstatement.

Any application made under this rule will generally not be notified or served where the written approval of affected persons has been obtained.

Reason

In the past Council has experienced difficulties with the completion of reinstatement works in respect of dwellings relocated to new sites. These buildings sometimes require exterior upgrading and repair and may be left on the site in an unfinished state. Consequently they can have significant adverse effect on local amenity values. Discretionary (restricted) activity status enables Council to consider whether a delay in completing the exterior reinstatement of a particular building is appropriate and impose conditions that will ensure amenity standards are maintained. Previously used accessory buildings and garages are not subject to this rule.

3. Add a new Rule 7.3.3 (vii) to read as follows:

(vii) Relocatable Buildings

The relocation of previously used buildings for any purpose, other than for use as a dwelling (excluding previously used accessory buildings or garages), is a discretionary (restricted) activity.

... (continue as per current rule 7.3.3(iii))

Proposed Rules: Rural Settlements Resource Area

Permitted Activity Status

1. Redraft Rule 10.3.6(i) as follows:

   (i) Residential amenity

   All activities shall comply with the standards applied also in the Residential Resource Area set out in Rule 7.3.6(iii), (iv), (v) (vii) and (xi) of this Plan.

2. Amend Rule 10.3.3(ii) to read as follows:

   (ii) Breach of Standards

   Any activity that fails to comply with any of the standards contained in Rule 10.3.6 (except for standard 7.3.6(xi), incorporated by Rule 10.3.6(i)) is a discretionary (restricted) activity.

   ...continue as per current Rule 10.3.3 (ii)

3. Amend Rule 10.3.3(iii) to read as follows:

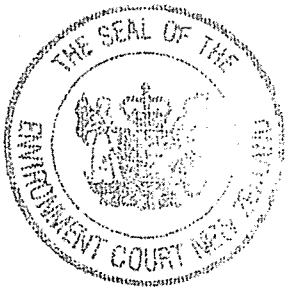
   (iii) Relocatable Buildings

   The relocation of a previously used building intended for use as a dwelling (excluding previously used accessory buildings or garages) that does not comply with standard 7.3.6(xi) (incorporated by Rule 10.3.6(i)) is a discretionary (restricted) activity.

   Council shall restrict the exercise of its discretion to the following:

   - The proposed timetable for completion of the work required to reinstate the exterior of the building and connections to services
   - The design and appearance of the building following reinstatement.

   Any application made under this rule will generally not be notified or served where the written approval of affected persons has been obtained.



Reason

In the past Council has experienced difficulties with the completion of reinstatement works in respect of dwellings relocated to new sites. These buildings sometimes require exterior upgrading and repair and may be left

on the site in an unfinished state. Consequently they can have significant adverse effect on local amenity values. Discretionary (restricted) activity status enables Council to consider whether a delay in completing the exterior reinstatement of a particular building is appropriate and impose conditions that will ensure amenity standards are maintained. Previously used accessory buildings and garages are not subject to this rule.

3. Add Rule 10.3.3 (v) to read as follows:

(v) Relocatable Buildings

The relocation of previously used buildings for any purpose, other than for use as a dwelling (excluding previously used accessory buildings or garages), is a discretionary (restricted) activity.

... (continue as per current rule 10.3.3(iii))