**IN THE ENVIRONMENT COURT**
**AT CHRISTCHURCH**

**I TE KŌTI TAIAO O AOTEAROA**
**KI ŌTAUTAHI**

**Decision No. [2024] NZEnvC 180**

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| IN THE MATTER | of the Resource Management Act 1991 |
| AND | an application for enforcement orders under s316 of the Act |
| BETWEEN | TASMAN DISTRICT COUNCIL |
| | (ENV-2023-CHC-32) |
| | Applicant |
| AND | MATHIAS SCHAEFFNER AND CHRISTIN SCHAEFFNER |
| | Respondents |

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|---|---|
| Court: | Environment Judge K G Reid<br>Sitting alone under s309 of the Act |
| Hearing: | at Nelson on 11 June 2024 |
| Appearances: | S F Quinn and A C Besier for the applicant<br>A S Olney for the respondents |
| Last case event: | 24 June 2024 |
| Date of Decision: | 31 July 2024 |
| Date of Issue: | 31 July 2024 |

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## DECISION OF THE ENVIRONMENT COURT

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A: Under s314(1)(a)(i)and (b)(i) of the Resource Management Act 1991 the court makes the enforcement orders set out in Appendix 1.

B: Costs are reserved. Any application for costs must be filed and served within three weeks and any reply shall be filed and served two weeks thereafter.

**REASONS**

**Background**

[1] In mid-2021 Mr and Mrs Schaeffner moved a tiny home onto their property at 6 Neudorf Road, Upper Moutere (the property). The tiny home has remained there since. The Tasman District Council (the Council) maintains that the tiny home requires a resource consent because it is a dwelling. Mr and Mrs Schaeffner disagree.

[2] The Schaeffners maintain that the tiny home is a mobile home. They say it is neither a dwelling nor a building under the relevant definitions in the Tasman Resource Management Plan (TRMP) and Resource Management Act 1991 (RMA). However, they accept that the tiny home has been used as a place of long-term accommodation.

[3] The Tasman District Council has applied for an enforcement order under s316 of the RMA. Orders are sought by the Council requiring that the tiny home is either removed from the property or decommissioned, such that it can no longer be used as a dwelling.

[4] The principal issue before the court is whether the tiny home requires a resource consent as a dwelling. This issue turns on the application of various definitions in the TRMP and RMA to the facts. In short, under the relevant definitions for the tiny home to be a "dwelling" it must be a "building", for it to be a building it must be a "structure", and for it to be structure it must be "fixed to the land". The dispute is about whether it is fixed to the land.

This is an incorrect statement of the dispute. The dispute is whether the mobile home is a building (realty) or chattel. Fixed to land is the determinant.

It is correct that all dwellings are buildings, all buildings are structures, but there is a gap in the logic – all structures are realty and all realty is either land or that which is fixed to the land. This connection is fundamental to framing this appeal which seeks a declaration that aligns the RMA with long-standing property law.

**Plan provisions**

[5] I now turn to the relevant provisions of the TRMP and RMA.

[6] The property is zoned "Rural 1" under the TRMP. Chapter 17.5 of the TRMP sets out land use rules that apply in the Rural 1 zone. Rule 17.5.3.1 provides that the construction, alteration or use of a building in the Rural 1 zone is a permitted activity provided that, amongst other requirements, the building is not a dwelling.

[7] The Rural 1 zone rules (including rule 17.5.3.1) are more restrictive of dwellings than the rules for the other rural zones in the TRMP. The reason for this is explained in the *principal reasons* section of the rural zone rules as follows:

> The construction of buildings, especially dwellings, has been recognised as a contributing factor to fragmentation of land which limits the productive values, including versatility of land. The rules relating to land use, including those for buildings and location are to control the adverse effects of land fragmentation on the productive values of the land, as well as on rural character and amenity values. The more highly valued versatile land in the Rural 1 zone is at greater risk of fragmentation and the rules seek to limit those adverse effects through more stringent controls than in Rural 2.
>
> Small subsidiary units that are dependent on the main dwelling are permitted, whereas consent is required for additional dwellings because of their propensity to contribute to land fragmentation. Cooking facilities are not allowed in these subsidiary units as these can encourage separation and independence from the main dwelling.[1]

While it may be generically correct that "*The construction of buildings… is a contributing factor to fragmentation of land which limits the productive values*" this appeal of TDC v Schaeffner 2024 is not a case about construction of a building on the land. It is about towing a mobile home (chattel housing) onto the land that increased the land's versatility, and does not fragment the land because it does not commit the land in contrast to construction of buildings which fragments the land.

The problem at law is TDC distorting the meaning of *building* to support their abatement order, and the acceptance of that distortion by the Environment Court.

[8] Nothing turns on the issue of activity classification. However, for completeness, if the tiny home is a dwelling, it would require a resource consent as either a restricted discretionary, or more likely a discretionary activity. One of the criteria for a dwelling in the Rural 1 zone to be a controlled activity is that it is

[1] TRMP Chapter 17 p 126.

the only dwelling on the property (rule 17.5.3.2 in Chapter 17.5 of the TRMP). Given the Schaeffners' main residence is also situated on the property, the tiny home would be the second dwelling and would not meet this requirement (and therefore would not be a controlled activity).

Rather than describe this as the assertion of TDC, the above statement appears to indicate bias; that the Court already accepted TDC's position.

[9] The TRMP defines a "dwelling" as:

> a building or part of a building for a single self-contained housekeeping unit, whether of one or more persons (where "single self-contained housekeeping unit" means a single integrated set of sleeping, ablution, and cooking facilities under a continuous roof and fully enclosed walls).

[10] The only element of this definition that is in dispute is whether the tiny house is a "building".

**Which is it? *Fixed to Land* or *Is a tiny house a building*?**

In [4], the court states "the dispute is about whether it is fixed to the land" but in [10] it writes "The only element of this definition that is in dispute is whether the tiny house is a "building". Which is it?

While these are related questions, the decision creates two targets that adds confusion to the ruling. Which is it? *Building* or *fixed to land?*

[10] is the correct statement of dispute (*Is the mobile home a building or not*?)

Think of [10] in grammar as the noun or the thing itself.

In contrast, [4] is the test to determine if it is a building or not. Think of it as the verb, the action. The question, *is it a building or chattel?*, is the element in dispute. The meaning of *fixed to land* is the means to answer the question.

**Rephrase the question: *Is the mobile home realty or chattel***

However, it also may be useful to rephrase the question**: *Is the mobile home realty or chattel?*** because all buildings are realty. To say *a building is chattel* would be to conflate the most fundamental difference in Property Law, something that would be done by Parliament, not civil servants writing rules.

Every lawyer, judge and lawmaker as well as property conveyancer, mortgage banker, home insurer and council rates assessor should be well-schooled in the fundamental difference between realty and chattel.

Realty is land and everything fixed to land, where all such fixtures have lost their independent identity and become part of the land. Chattel is everything else. Under the principle of *imperium* the Crown absolutely owns all realty in NZ and issues a bundle of rights called real property, real estate or realty. In contrast chattel can be absolutely owned by anyone. Realty generally requires transfer by a formal deed, which is a document executed in a formal fashion. In contrast, chattel property is

usually transferred by delivery with payment.

In simple terms, realty is a tree rooted to the land while chattel is the cattle grazing on the land. The tree moves (sways) but it is not mobile. The livestock moves over the land, and is bought and sold independent of the underlying land. Grazing rights and mobile home parking rights are similar, both are land use rights, but not land (realty) itself.

The TRMP defines a "building" as: any structure (as defined in the Act) or part of a structure whether temporary or permanent, movable or immovable, including accessory buildings but does not include:

coastal protection structures:

(a) any scaffolding or falsework erected temporarily for maintenance or construction purposes;

(b) fences, walls or retaining walls of up to 1.8 metres in height, not used for advertising or for any purpose other than as a fence or wall;

(c) structures that are both less than 5 square metres in area and less than 1.2 metres in height, except where such structures are for the purposes of damming, diverting, taking, or using water;

(d) free-standing masts, towers, pylons, poles, radio and television aerials (excluding dish antennae for receiving satellite television), less than 10 metres above mean ground level;

(e) fan blades of any tower-mounted frost protection device;

(f) any vehicle, trailer, tent, caravan or boat whether fixed or movable, unless it is used as a place of long-term accommodation (for two calendar months or more in any year), business or storage;

(g) overhead lines;

(h) in relation to any building setback requirement, any eaves, spouting, or bay windows projecting 1 metre or less from any exterior wall.

[11] Under this definition, if the tiny home is a "structure or part of a structure" it is a "building" regardless of whether it is temporary or permanent, movable or immoveable, unless one of the exceptions in (a) to (i) applies. None of the exceptions are relevant except for (g). It was common ground that the exception in (g) does not apply because even if the tiny home is a "vehicle", a "trailer", or a "caravan" it has been used as a place of long-term accommodation for more than two calendar months in any given year. In fact, it is quite clear that the tiny home has been used in this way for considerably longer.

NOTE: It is presumed [10] contains a typographical or transcription error, as (g) refers to overhead lines, not vehicles. The actual TRMP numbering starts with (a) being coastal protection structures it shall presume [11] refers to *any vehicle…*

## Is the TRMP ultra vires or is the TDC interpretation ultra vires?

The question at law is asks if the TDC interpretation of the TRMP is ultra vires. Has the RMA granted TRMP authority to extend the meaning of structure to include what appears to be chattel or has the TDC exceeded the powers granted to it by the RMA by how it interprets the meaning of the TRMP, or if the interpretation is found to be correct, that *building* as defined in the TRMP extends to chattel is the definition ultra vires?

A careful reading of the meaning of *building* in the TRMP, where *movable* is understood in the context of stare decisis suggests the error at law is in the interpretation; that the error is an outcome of regulatory creep

A vehicle can become realty, but not simply by being used as long-term accommodation. It can become realty by being fixed to land. Indeed, using the tests established by Elitestone, Savoye and other stare decisis cases, it can become realty while remaining movable.

However, when moveable is interpreted to include mobility thus making including chattel in the meaning of realty (structure), TDC has exceeded its powers under the Act because the meaning of structure is limited to realty.

## The US Manufactured Home Construction and Safety Standards Act 1974

Consider the United States mobile home law which is far more advanced than New Zealand law. In 1974, the United States adopted the Manufactured Home Construction and Safety Standard Act that replaced mobile home with manufactured home that set specific standards for health, safety and durability among other things. All manufactured homes are a mobile home, but not all mobile homes are a manufactured home. They are built to HUD code inside of climate-controlled facilities and then moved to their usually permanent location.

When transferring property that contains a mobile or manufactured home, title agents must determine if the home is chattel or real estate. Chattel refers to any privately owned property that is not real estate, such as campers, cars, or boats. The majority of mobile and manufactured homes in the U.S. – as many as 75% – are classified as personal property, not real estate.

The home becomes “real estate” when it is permanently affixed to the land and application is made to the state to permanently retire the mobile or manufactured home title. Unlike New Zealand that registers ownership but does not issue titles for vehicles, most states in the USA issue a title of ownership of chattel.

If the mobile home is permanently affixed, then the real estate transactions are the same as for a permanent structure, where the entire property is transferred by deed. But if it is not, then there would be two separate transactions, the land transfer conducted as a real estate transaction and the manufactured home as a personal property sale. The transfer of the manufactured or mobile home as personal property would include the transfer of title similar to the manner in which one transfers title to a boat or a car.

The reason American purchasers have the choice is the **Purpose of Annexation**. When the purpose is realty, the purchaser can finance the purchase through a mortgage on the land. They can insure it with home owner insurance which

generally costs less. The fixture tends to increase the market value of the land, and it appreciates with inflation, whereas chattel mobile homes depreciate.

[12] The TRMP adopts the definition of "structure" from the RMA as:

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

[13] The element of circularity in the definition with the inclusion of the word "building" has been previously noted by the court.[2] However in this case the tiny house is clearly a "building… or other facility made by people".

This underlined statement is in in error at law.

In TDC v Schaeffner 2024 [26], Elitestone Ltd v Morris [1997] 1 WLR 687 (HL) (Elitestone) is cited as stare decisis. In Elitestone Lord Clyde wrote:

> *Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."* [underline added]

**Is the article not otherwise attached to the land than by its own weight?**

The mobile home in question is not attached to the land other than by its own weight. It is not fixed to a foundation. It sits on tyres with corners sitting on jacks and blocks. The evidence from Council Officers [19] does not claim the mobile home was attached to the land in any other way than its own weight

[19] (i) there are wind-down stabilisers and wooden blocks underneath the tiny house.

The evidence from the respondent's lawyer agrees

[31] (a) it [the mobile home]is constructed atop a trailer chassis and sits on the land entirely by its own weight;

The photograph attached to the Decision, Attachment 2 clearly shows the two axle wheels and tyres are the primary support for the mobile home, with conventional car jacks at the corners to make the unit feel stable when moving inside. This should clearly indicate the article is not otherwise attached to the land than by its own weight, thus it is not to be considered as part of the land unless the circumstances are such as to show that it was intended to be part of the land.

**Do the circumstances show the article was intended to be part of the land?**

The evidence clearly shows the mobile home is not intended to be part of the land. To the contrary, as chattel, the mobile home is owned by a 3rd party who may come and go with their chattel at will. Should for example, the Schaeffner family fail to pay

their mortgage and their land is placed in foreclosure and sold, the mobile home would not be part of the sale. Most likely, the bank would order the mobile home to vacate the premises, but it would have no interest or claim to the mobile home. If the mobile home was financed, to perfect its security interest, the financier would file its interest in the mobile home on the personal property securities register (PPSR) under the Personal Properties Securities Act 1999 (PPSA).

## Does attachment to utilities constitute annexure?

This second test is thoroughly examined in stare decisis, for example, that connection to utilities does not in itself constitute annexure, nor does tenure.

Elsewhere in Elitestone Lord Lloyd wrote:

> *A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity.*

Elitestone makes clear under these circumstances the onus is on the Council to show the mobile home has ceased to be chattel and become realty, but they have failed to so show such. They have stated is connected to utilities, but have not shown any legal basis how this connection changes the chattel to realty.

In [20] the environment judge noted:

> (d) the demonstration video shows the tiny house being disconnected from the services and towed by a tow truck a short distance to the gate. A jack is used to raise the tiny home so that blocks of wood underneath it can be removed. Mr Schaeffner is shown disconnecting an underground pipe or hose supplying water to the tiny home with a spanner. Mr Schaeffner said that the pipes connecting to the tiny home can easily be detached in "less than a minute";

"Detached in less than a minute" and lawfully by an unlicensed person is a temporary connection. Indeed, most mobile homes use caravan connections that are designed to be connected to and disconnected from utilities in "less than a minute" because they are designed to be temporary. Contrast this to a building, where licensed professionals are required to make connections of wires and pipes that are generally inaccessible once the building is completed. If they are removed, it generally is by cutting, not disconnecting, thus doing damage to the utility of the utilities.

In [13] above, the environment judge makes the assertion the tiny house is clearly a building, but the Applicant, TDC, has not cited any of the stare decisis law that would support the facts put forth. The fact this is stated as an absolute by the environment judge raises a concern the judge appears to have made up his mind "*the tiny house is clearly a "building"… or other facility made by people*."

Far from being clear, this is the central question that was put forth to the environment judge, and the presumption stated by the judge at the onset of the decision suggests a bias toward the Applicant's case, placing the onus of proof on the respondent, contrary to settled law.

[14] Both counsel characterise the sole issue for the court to determine as whether the tiny house is "fixed to the land".

This is not entirely a correct statement of the issue for the court to determine. The question of fixed to land is to determine if the mobile home is a building or chattel. If it is chattel, then enforcement as realty is ultra vires. And because fixed to land is not defined in the statute, it must be determined based on common law – stare decisis. However, the implications in law are far wider reaching. The Enforcement Order makes clear it considers the mobile home to be chattel.

**A(a)** orders the mobile home to be removed from the land. Removal means towing it away, something done when the property is chattel.

**A(a)(ii)** orders the mobile home to be relocated within 20m of the dwelling (the primary residence of the Schaeffer family). Under stare decisis *removal* is different than movable, and again demonstrates the environment judge's acceptance that the mobile home is more than movable, it is mobile.

In effect, in this enforcement order, the environment judge declares the object in question is realty, but the prescribed cure for the breach is for it to be removed as chattel. The court conflates chattel and realty and in doing so, upturns a thousand years of property law.

**Evidence**

[15] Two visits to the property were conducted by Council staff who have provided affidavit evidence with photographs of the tiny home and surrounds. Mr Schaeffner swore an affidavit in opposition to the application in June 2023. Mr and Mrs Schaeffner provided a joint affidavit in August 2023.

[16] The affidavits filed by the Schaeffners make a series of allegations about the way they say they have been dealt with by the Council and Council staff. These include allegations that Council officers exceeded or misused their powers, or otherwise acted unlawfully in investigating the tiny home. It is quite clear that the Schaeffners feel deeply aggrieved. The issues raised relate partly to the two occasions when Council staff visited the Schaeffners' property to inspect the tiny home in June and August 2022. The second of these occasions was pursuant to a search warrant.

[17] Mr Olney began representing the Schaeffners after the June 2023 affidavit had been filed. At the hearing he addressed some, but by no means all, of the allegations against the Council in submissions and directed questions in cross-examination to aspects of the Council officers' conduct. However, Mr Olney

[2] *Antoun v Hutt City Council* [2020] NZEnvC 6.

submitted that none of these issues were relevant to the substantive issues the court must decide. Consequently, the focus on these issues in the affidavits has been of little assistance to the court. Mr Olney states that the Council's conduct is relevant to costs. I address the allegations briefly at end of this decision in that context and when discussing relief.

[18] The Schaeffners' August 2023 joint affidavit addresses the principal issues. The affidavit appended a series of helpful videos. One of these videos showed the tiny home being moved onto the site in 2021. I will call this the "2021 video". A second video shows a demonstration of the tiny home being disconnected from services and towed a short distance by a tow truck, I will call this the "demonstration video". Mr Schaeffner also gave oral evidence.

[19] I now summarise the evidence from Council officers Mr Galbraith and Mr Waters:

(a) in June 2022 after receiving a complaint from the public, Mr Waters and another Council officer visited the property to carry out an inspection but were asked to leave. The officers returned to the property on 22 August 2022 with a search warrant. Also present were two police officers;

(b) the Council officers took photographs of what they saw. Attachment 1 is the view of the tiny house from outside the gate on the day in question. Attachment 2 is a closeup of the tiny home. From the photographs the tiny house sits on a trailer with two axles and four wheels. It has a tow bar, jockey wheel, road lights, and a registration plate;

(c) the interior of the tiny home is visible through the windows. A kitchen, bathroom, laundry, and living area downstairs can be seen. There is a mezzanine floor containing a sleeping area. There are pot plants, kitchen items, ornaments and items hung on the wall;

(d) there is an external door to the tiny home with steps made of pallets leading up to the entrance;

(e) several plastic pipes have been extended through holes made in the floorboards of the tiny house. These pipes lead to a sump or gully

trap near the front door. The pipes come from below the bathroom, kitchen, and laundry areas;

(f) the tiny home has a corrugated steel roof with guttering, there is a downpipe at the rear extending from the roof to a plastic water tank sitting on pallets. Rainwater collects in the tank;

(g) there is another building located adjacent to the tiny house (the yellow building) which appeared to the Council officers in August 2022 to be being used as a massage studio. Next to the yellow building is a shed containing household items, and a pump. There is a buried electric cable running from the tiny house to the pump;

(h) from his experience Mr Waters concluded that the tiny house has a composting toilet. Composting toilets separate liquids (urine) and solids within the toilet. The solids are contained within the main chamber of the toilet and the liquids flow out of the system in a pipe to containment elsewhere. In this case, the urine was being conducted via a pipe though the floor to an external plastic container;

(i) there are wind-down stabilisers and wooden blocks underneath the tiny house. There are various pipes, timber and other materials stored under the tiny house;

(j) gas supply is self-contained. There are external gas pipes leading to an enclosed box behind the tow bar labelled "flammable gas". This is where it would be expected a gas bottle would be stored, although a gas bottle is not visible in the photographs;

(k) the photographs show that the tiny house is serviced by a driveway and gate that is separate to the main house. There are gardens, various pot plants and other materials around the tiny house;

(l) Mr Galbraith is a compliance officer employed by the Council. He drives past the site on the way to work each day. The tiny home and any vehicle parked outside were clearly visible from the road. He first noticed the tiny home and a car parked outside in mid-2021. He saw lights on in the evenings and sometimes a person outside the tiny home. From what he saw he considered that the tiny home was being occupied as a dwelling from mid-2021 to early November 2023, when

he affirmed an affidavit in these proceedings.

[20] Mr Schaeffner appeared for questioning on Mr and Mrs Schaeffners' joint evidence. I summarise the relevant matters from their evidence as follows:

(a) Mr Schaeffner says that the tiny home was constructed off-site and towed by a transportation company (Lift N Shift Ltd) approximately 50 km along public roads to its present location. While accepting that a specialist moving company had been hired to tow the tiny home, Mr Schaeffner maintained that there was nothing special about the vehicle used (a Toyota Hilux) with a towing capacity of 3.5 tonnes. The 2021 video shows the tiny home being towed to the site. The tiny home has not since been moved, the only exception being when it was moved on 2 July 2023 as part of the demonstration video;

(b) the tiny house was built in accordance with the Land Transport Rule: Vehicle Dimensions and Mass Rule 2016. The tiny home measures 2.5 m in width, 4.10 m in height at its highest point and 8.90 m in length (including the towbar fixture) which, I was told, is the maximum size;

(c) Mr Schaeffner said that the tiny home has solar panels on the roof which generate electricity. The buried extension cable conveys power from the tiny home to the pump and water is pumped back to the tiny home via an underground pipe;

(d) the demonstration video shows the tiny house being disconnected from the services and towed by a tow truck a short distance to the gate. A jack is used to raise the tiny home so that blocks of wood underneath it can be removed. Mr Schaeffner is shown disconnecting an underground pipe or hose supplying water to the tiny home with a spanner. Mr Schaeffner said that the pipes connecting to the tiny home can easily be detached in "less than a minute";

(e) in the demonstration video four pipes leading from the kitchen, laundry and bathroom under the tiny home are disconnected from the gully trap by removing the end extenders on each pipe. This exercise is relatively straight forward because the extenders are not glued in place. However, the extensive piping under the tiny house

remains in place. Pipes hang down from the holes through the floor and extend to a point in front of the wheels adjacent to the gully trap. The tiny home is towed without these pipes being removed;

(f) Mr Quinn questioned Mr Schaeffner about the process required to move the tiny home. Mr Schaffner confirmed that in addition to the pipes the power cable needed to be disconnected, wooden blocks for levelling out needed to be removed using a "standard jack" and the downpipe from the gutter to the water tank needed to be disconnected and removed;

(g) before being moved items inside the tiny home needed to be packed away. Mr Schaeffner maintained that this was no different to a normal caravan and the packing needed was similar to what might occur at the end of a holiday at a campground;

(h) once the tiny home was moved items left behind where it had been included the rainwater tank, the gully trap, the power cord connecting to the pump, the water hose connection to the pump. Gravel is left where the tiny home had been and the driveway;

(i) Mr Schaeffner said that the yellow building, shed and water tank were present prior to the tiny house arriving. If the tiny home was removed, they would remain as they had previously. Mr Schaeffner did not accept that the yellow building was being or had been used for running a massage business;

(j) Mr Schaeffner's evidence was that the tiny home had been occupied continuously from the time it was moved onto the site, a period of approximately 2 and a half years;

(k) Mr Schaeffner accepted that the occupation of the mobile home was separate to the occupation of the main house. Services are not connected to the main house and the occupants are effectively self-sufficient.

[21] Little turns on the registration status of the tiny home. However, Mr Schaeffner made a point of it in his evidence. His evidence was that the tiny home is "registered at NZTA as a "caravan" with licence number 612S1".[3] He produced a registration search for 612S1.[4] According to the search, registration number

612S1 is for a "2023 Trailer Fisher Caravan", with no more details.

[22] The registration plate attached to the tiny home can be seen in the 2021 video when it was brought to the property, and again in the demonstration video in 2023. Both videos show the tiny home with a different registration number (62Y44). There is an expired 2021 registration sticker (for 62Y44) next to the plate in the 2023 video.

[23] Mr Schaeffner did not alert the court's attention to, nor seek to explain, the

[3] Affidavit of M Schaeffner dated 29 August 2023 at [12].

[4] Affidavit of M Schaeffner dated 29 August 2023 Exhibit 10.

difference in registration numbers. When Mr Quinn questioned him about the lack of a current registration sticker in the demonstration video, Mr Schaeffner maintained that at the time the video was taken the tiny home had a current registration "just not attached to the outside of the mobile home" and that it had been produced as "part of [his] affidavit", in reference to the registration search for 612S1.[5]

[24] It is clear to me that the tiny home was registered as 62Y44 when it came to the property. It retained this registration number until at least 2023. The registration was not kept current past 2021 and was not current when these proceedings were brought in April 2023, nor on 2 July 2023 when the demonstration video was taken. Without an explanation as to the relevance of 612S1, I put Mr Schaeffner's evidence on the registration status of the tiny home to one side.

**Council's submissions**

[25] Mr Quinn referred to two recent Environment Court cases where the definition of "structure" has been considered in the context of a tiny home; *Antoun v Hutt City Council*[6] and *Beachen v Auckland Council*.[7] Both cases focus on the interpretation of the words "fixed to land" in the definition of "structure" in the relevant plan and RMA – the same issue I need to determine.

In Antoun, the facts indicated that what Jono Voss was in the process of making was much more likely to be realty (a structure) than chattel. In Antoun, the Appellant did not retain a lawyer until 10 days before the hearing. Antoun's lawyer won the case on a technicality, but made it clear to his client that just because Jono Voss said he was building a vehicle, the facts did not support this. In short it is a weak case and not binding.

In Beachen, D. Beachen acted pro se. The case is defective because Beachen was not a lawyer nor did he take legal advice. He did not present stare decisis because he was unaware that Elitestone and the cases referred to by Elitestone rebutted Auckland Council's evidence. The Beachen case is a travesty of justice and should have been appealed, but Beachen gave up and sold his unit that was towed away. The only benefit of Beachen was the Council's introduction of Elitestone, which they cherry picked to support their case, while omitting to put forth to the court all relevant and significant law contained in Elitestone.

The Lawyers and Conveyancers Act Rule 2008 s13.11 states

> *"13.1 A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court... 13.11 The duty to the court includes a duty to put all*

*relevant and significant law known to the lawyer before the court, whether this material supports the client's case or not."*

In Beachen, the council lawyers cited Elitestone, but failed to fulfil their duty under s13.11; they withheld material law from the court. Either they did not read the case, or they wilfully chose not to put it before the court.

[26] In *Antoun*, the court considered a number of cases relating to the distinction under property law between a fixture and a chattel. These included the *Auckland City Council v Ports of Auckland Ltd*[8] and *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd.*[9]

Both these cases referred to the test adopted by the House of Lords in *Elitestone Ltd v Morris,*[10] of whether the chattel could be said to have become "part and parcel of the land" in question. The main two indicators being the *degree of annexation* and the *object of annexation.* In *Beachen*, the court adopted the same approach as the court in *Antoun*.

5 Transcript p 96, lines 1-5.

6 *Antoun v Hutt City Council* [2020] NZEnvC 6.

7 *Beachen v Auckland Council* [2023] NZEnvC 159.

8 *Auckland City Council v Ports of Auckland Ltd* [2000] 3 NZLR 614 (CA).

9 *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA).

**Respondents' submissions**

[27] For the respondents, Mr Olney closely examined various property law cases, including those referred to above. He said the traditional distinction is between moveable and immovable property, which is also known as the distinction between chattels and land (realty). Land includes not just land itself, but also things sufficiently fixed to the land. The distinction depends on the circumstances of the case, but mainly on two factors, *the degree of annexation* to the land, and the *object of annexation.*[11]

[28] Mr Olney submitted that removability has always been an important touchstone when assessing both the degree and purpose of annexation. If an object can be removed, then it is likely to be a chattel. He submitted that removability does not depend on the object being moved within any particular time.[12]

[29] Mr Olney relied on *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* in submitting that where an object is attached to the ground, it is presumed to be fixed to the land; where it rests solely on its own weight, is presumed to be a separate chattel. These presumptions will not apply where the degree and object of the annexation lead to a different conclusion.

[30] The object of annexation refers to the purpose for which an item is affixed to the land. The court must assess whether the object is intended to become a

[10] *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL) at 692.

[11] *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL) citing *Holland v Hodgson* [1872] L.R.7 C.P. 328. *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA).

[12] *Elitestone v Morris* [1997] 1 WLR 687 (HL).

part of the land or whether it is intended to remain as separate property. Intent is assessed from the perspective of an objective bystander based on visual features of the property. Subjective intent of the landowner is irrelevant to the assessment other than to the extent that it is manifestly objective.

[31] Mr Olney submitted that the *degree of annexation* of the mobile home to the land in this case is negligible. He referred to the following factors:

(a) it is constructed atop a trailer chassis and sits on the land entirely by its own weight;

(b) pipes through which greywater and rainwater are carried from the mobile home to a sump and a plastic tank are not attached to the sump or the tank and are easily (a matter of seconds) detached from the tiny home;

(c) the connection to water is no different in type to those found on caravans, mobile homes, for boats (or a domestic hose) and is readily disconnected (a matter of seconds);

(d) the tiny home is not connected at all to the property's sewerage or power systems;

(e) urine can be removed from the toilet in the tiny home to a small tank through a detachable pipe. The tiny home is not attached to the tank, the tank is not fixed to the land, and the pipe can be detached (a matter of seconds);

(f) the makeshift steps up to the door of the tiny home are simple wooden pallets that sit on the ground; they are not fixed to the land nor attached to the tiny home; and

(g) the tiny home can be towed on public roads and can be, and has recently been, made ready to be moved within about 10 minutes and moved without damage to the land or the tiny home.

[32] Mr Olney submitted that objectively visible features of the tiny home point to the *object of the annexation* being to maintain it as a chattel separate from the land

and not affixed to it. He submitted that:

(a) the tiny home was constructed so as to make it easily movable, registrable as a trailer (and therefore a vehicle) and towed on public roads;

(b) it has been kept in a condition that enables it to be easily moved, registered as a trailer and towed on public roads;

(c) the external pipes are not connected to the land or to anything connected to land and can be detached easily and quickly from the tiny home;

(d) it contains its own gas supply and means of generating electricity (solar) and is not connected to the property's sewerage or power systems;

(e) it can easily be disconnected from the external water supply;

(f) no permanent or purpose-built steps to the entrance have been constructed and nor are the wooden pallets that serve as makeshift steps attached to the tiny home or to the land;

(g) the limited capacity of the tub into which urine is discharged requires that the tub periodically be moved elsewhere to be emptied. Such a system is consistent with the intention that it be a temporary arrangement and no less labour-intensive system consistent with longer term intentions have been built.

[33] Mr Olney noted that while the Schaeffners own the land they do not own the tiny home. He submitted that the tiny home's owner may choose to move the tiny home at any time, or that the Schaeffners may require the owner to do so. He submitted that the separate ownership of the tiny home is inconsistent with any intention that it be part of the land.

[34] Mr Olney distinguished the tiny homes in *Antoun* and *Beachen* on the basis that the degree of annexation and object of annexation in both cases was greater than the present.

In Antoun, Mr. Olney was correct. Jono Voss constructed a large building on skids. Just because he called it a vehicle did not make it so. It was landlocked, oversized and unless the school behind the property permitted removal after breaking down its fence, would have involved taking the unit apart to remove it from the land. It should be noted Antoun did not retain a lawyer until ten days before the hearing. It was a bad case that should never have made it to court. As a footnote, Antoun's

lately-retained lawyer nevertheless won the case on a technicality.

As noted above, the Beachen case was a travesty because David Beachen elected not to retain a lawyer but act pro se. Accordingly, Beachen failed to present any law, but only facts. The lawyers for the Council failed to advise the Judge of the stare decisis in Elitestone and other cases that would have supported Beachen's claim that his mobile home was chattel.

**Discussion**

[35] I do not think there is any significant difference of approach between the parties on the applicable law. Both counsel referred to and sought to apply the two previous Environment Court cases dealing with tiny homes. Both these cases approach the issue of whether the tiny home in question is "fixed to the land" so as to be a structure by considering the *degree of annexation* and the *object, or intent, of annexation.*

## Meaning of Fixed to the Land

*Fixed to land* has been extensively examined in stare decisis. The environment judge confuses the word *movable* with *mobile* and in doing so conflates realty with chattel.

It is best to begin with the writing of New Zealand's most eminent jurist (https://nzhistory.govt.nz/people/john-salmond), Sir John W. Salmond, former NZ Solicitor General, NZ Supreme Court Judge, and author of Jurisprudence, (1902, currently in 12th edition), set out the fundamental basis of NZ land law. In Jurisprudence §155. **Movable and Immovable Property**, Salmond wrote:

> *Among material things the most important distinction is that between movables and immovables, or to use terms more familiar in English law, between chattels and land. In all legal systems these two classes of objects are to some extent governed by different rules, though in no system is the difference so great as in our own*

Salmond equates *movable* as *chattel* and *immovable* as *land.* He goes on to explain what land means in NZ law, writing in the next paragraph:

> *5…all objects placed by human agency on or under the surface with the intention of permanent annexation. These become part of the land, and lose their identity as separate movables or chattels; for example buildings, walls and fences. Omne quod inaedificatur solo cedit* [Everything which is erected on the soil goes with it] *said the Roman Law. Provided that the requisite intent of permanent annexation is present, no physical attachment to the surface is required. A wall built of stones without mortar or foundation is part of the land on which it stands. Conversely, physical attachment, without the intent of permanent annexation, is not in itself enough. Carpets, tapestries, or ornaments nailed to the floors or walls of a house are not thereby made part of the house. Money buried in the ground is as much a chattel as money in its owner's pocket.*
>
> *Footnote 2: Unlike a chattel, a piece of land has no natural boundaries. Its separation from the adjoining land is purely arbitrary and artificial, and it is capable of subdivision and separate ownership to any extent that may be desired.*

The Applicant alleges and the environment judge accepted that a mobile home, that

has clear natural boundaries and was not attached to the land save by gravity, and was show to be relocatable, has become part of the land. All parties accepted the mobile home was towed to the land, thus it was chattel when arrived on the land. Chattel can become realty, can lose its independent identity by annexure, but this does not happen by magic. It requires requisite intent of permanent annexation, and as Elitestone made clear, if the object is solely held by gravity, the onus of proof is on the Applicant to prove.

**Understanding Movable in terms of Latitude and Longitude but not Altitude or Time**:

In Elitestone, Lord Lloyd wrote

> *It will be noticed that in framing the issue for decision I have avoided the use of the word "fixture." There are two reasons for this. The first is that "fixture", though a hallowed term in this branch of the law, does not always bear the same meaning in law as it does in everyday life. In ordinary language one thinks of a fixture as being something fixed to a building. One would not ordinarily think of the building itself as a fixture*

The same is occurring in New Zealand, where territorial authorities and even lower court judges are confusing the legal meaning of movable as established in stare decisis with the several meanings movable has in ordinary life. More precise language is needed, thus it is proposed to use the language of titles, land surveys and geography, which from the Greek literally means Earth-Write, and that language uses three primary dimensions: latitude, longitude and altitude.

*Realty*, the law of real property, is two-dimensional. Because land has no natural boundaries, it is defined by latitude and longitude, often called XY coordinates. The coordinates form the artificial boundary, often marked with pickets, plaques or pegs, or earlier with stones, fences or even waterways. These coordinates are registered on a formal title that established a bundle of rights called real estate.

Property law does not concern itself with the 3rd dimension – *altitude* nor with the 4th dimension, *time*. Realty is solely defined by latitude and longitude. Realty begins with land that is artificially divided by XY coordinates and includes anything that is fixed to that demarcated land. But does not include things not fixed to the land, which are instead called chattel or personal property.

Fixed to the land is an artificial agreement that harks back to Roman Law, as Salmond reminds us: *Omne quod inaedificatur solo cedit [Everything which is erected on the soil goes with it].* This fundamental of law was firmly established in New Zealand law in 1066 when King William I claimed absolute ownership all land and fixtures thereon, from which he then distributed a bundle of rights called *real estate* or *realty.* From that day to this, the same principle of property ownership applies. Anything fixed to land is part of the land, and is realty with absolute ownership (imperium) owned by the Crown. Anything not fixed to land is chattel that can be absolutely owned by anyone.

As Salmond points out, it is not about the physical contact with the ground; money buried in the ground remains chattel, but is about those things that are intentionally erected on or in the ground with the intention of remaining there. And with all such law, it is not a dichotomy. Case law is always about the continuum, finding where the dividing line is.

This appeal asserts in this case the Tasman District Council and the Environment Court crossed the line and the decision is in error at law.

## Stare Decisis

The TDC v Schaeffner decision referenced Elitestone, but lawyers for the Council failed to advise the environment judge of the very clear language in Elitestone that refuted their case.

In Elitestone, J Blackburn in delivering the judgement of the Court backhandedly but explicitly named mobile homes held by gravity that can be moved elsewhere are considered chattel, not realty:

> *It follows that, normally, things which are not fixed to the building except by the force of gravity are not fixtures. However, there can be exceptions e.g. where a wooden bungalow was constructed on concrete pillars attached to the ground – the bungalow was not like a mobile home or caravan which could be moved elsewhere; it could only be removed by demolishing it and it was, therefore, not a chattel but and must have been intended to form part of the realty: Elitestone Ltd v Morris [1997] 1 WLR 687.* [underline added]

Similarly, Lord Lloyd wrote in Elitestone:

> *For the photographs show very clearly what the bungalow is, and especially what it is not. It is not like a Portakabin, or mobile home. The nature of the structure is such that it could not be taken down and re-erected elsewhere. It could only be removed by a process of demolition. This, as will appear later, is a factor of great importance in the present case. If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel.* [underline added]

One would expect these clear examples, citing a mobile home that could be moved elsewhere, would be enough for the Court to throw out the Councils' case, but one must presume the Council lawyers failed to bring this to the attention of the Court, or the judge failed to read it, or wilfully overlooked it.

But one need not stop there. In Elitestone Lord Lloyd wrote:

> *In Deen v. Andrews the question was whether a greenhouse was a building so as to pass to the purchaser under a contract for the sale of land "together with the farmhouses and other buildings." Hirst J. held that it was not. He followed an earlier decision in H.E. Dibble Ltd. v. Moore [1970] 2 Q.B. 181 in which the Court of Appeal, reversing the trial judge, held that a greenhouse was not an "erection" within section 62(1) of the Law of Property Act 1925. I note that in the latter case Megaw L.J., at p. 187G, drew attention to some evidence "that it was customary to move such greenhouses every few years to a fresh site." It is obvious that a greenhouse which can be moved from site to site is a long way removed from a two bedroom bungalow which cannot be moved at all without being demolished.*

A mobile home is made to be moved from site to site, indeed it happens often, especially for investment units that may be redeployed annually. Mobile homes are easier to move than greenhouses because they are already on their wheels.

Consider also Skerrits of Nottingham v Secretary of State [2000] EWCA Civ 5569, (Skerrits) where the precedent of Elitestone is explained. Lord Justice Schiemann cites Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited[1949] 1 KB 385:

*12. The words which were used in the context of rating in that case upon which the judge and Mr Katkowski, who appears for the respondent, rely, are to be found in the judgments of Denning LJ and Jenkins J. Denning LJ said this:*

> *"A structure is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation; but it is still a structure even though some of its parts may be movable, as, for instance, about a pivot. Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a structure but it may be, 'in the nature of a structure' if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site. Thus a floating pontoon, which is permanently in position as a landing stage beside a pier is 'in the nature of a structure', even though it moves up and down with the tide and is occasionally removed for repairs or cleaning."* [Underline in original]

As discussed above, this is best understood in terms of XY coordinates (latitude, longitude). The windmill and the pontoon remain permanently in the XY coordinate, which is the sole identifier in property law. The windmill is a part of the land, even if it pivots (circular motion) around its XY centre, or if its sails move (vertical circular motion). Therefore, it is considered "in the nature of a structure" even though there is motion.

The pontoon generally maintains fixed XY coordinates while the Z coordinate (altitude) changes with the tide. However, "in the nature of a structure" provides that the XY coordinate can be changed when the pontoon is occasionally removed for repairs or cleaning. This is because the purpose of annexation, the benefit of the pontoon, is only operative when it is functioning at its intended fixed location. While there are periods of time (the 4th dimension) when the pontoon is not at its XY location, its purpose is only served while it is fixed to the pier.

As the question of movable is discussed, the shorthand of XY versus Z and the 4th dimension of time is a useful way to understand the fundamental difference between chattel and realty – between a mobile home and a building or dwelling.

## Physical Attachment

Next let the Court benefit from Elitestone on the question of physical attachment. In Elitestone, Lord Clyde examines physical attachment:

> *The reasoning in such a case where there is no physical attachment was identified by Blackburn J. in Holland v. Hodgson (1872) L.R. 7 C.P. 328, 335: "But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land." He continued with the following instructive observations:*
>
> *"Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land.*
>
> *The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that shipowner was also the owner of the fee of the*

*spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land.*

**Capstan and wheels:** Elitestone makes two points: Intention and weight. In weight, the anchor may be heavy, indeed the anchor of the Titanic was 16 tons, but that did not make it, or the ship realty. In contrast the anchor of a suspension bridge is realty.

In addition to the intent, the reason the 16-ton ship anchor is not realty is because of mechanics. The ship's anchor can be lifted because it has a mechanical capstan that is connected to a mechanical power source that enables a person, at the press of a lever or switch to lift it. The same holds true with the mobile home. It sits on the mechanical trailer chassis with an axle that enables a mechanical power source (usually a 3500 kg-rated towing ute) to easily move it with the press of the accelerator pedal.

In Elitestone, the bungalow was not designed to be moved. It was constructed on site, in situ and there would have been no question that it was a building except for the fact it was resting on a foundation but not bolted, nailed or screwed to it.

The same with the anchor holding a suspension bridge, both manner of fixing and intent are to hold the bridge in place. In contrast, a ships anchor is designed to be lifted by a capstan so the ship may relocate. Similarly, a mobile home's wheels are designed to enable it to relocate to another site.

Elitestone became stare decisis because the learned judges examined the full meaning of chattel versus realty to clarify where the line is drawn between these two types of property.

## Degree and Object of annexation

The next part of [35] to address is *annexation*, which the Court has accepted. Annexation means the mobile home has lost its independent identity and has become part of the land. This should be noted when reading [36] below which reads:

> …However, it should be borne in mind that the issue in this case is the application of the statutory definition of "structure" in the RMA to the facts, and not whether the tiny home is in fact a chattel or a fixture in a property law sense.

In addressing this approach, Elitestone referenced Hellawell v Eastwood (1851) 155 ER 554 where in answer to the question Hellawell established two tests:

> *Firstly to consider the degree in which the item is annexed to the land and whether it can be removed without damage to it or the land.*
>
> *Secondly, the purpose of the annexation must be addressed. If it is placed to be enjoyed better as an object it is likely to be a chattel. If it is placed for the benefit of the land, it is likely to be a fixture.* [underline added]

This was expanded in Savoye And Savoye Ltd v Spicers Ltd [2014] (Savoye) who quoted Halsbury's Laws of England (2012), by reference to various authorities, writes at Para. 174:

> *"Whether an object that has been brought onto the land has become affixed to the premises and so has become a fixture (or a permanent part of the land) is a question of fact which principally depends first on the mode and extent of the annexation, and especially on whether the object can easily be removed without injury to itself or to the premises; and secondly on the purpose of the annexation, that is to say, whether it was for the permanent and substantial improvement of the premises or merely a temporary purpose for the more complete enjoyment and use of the object as a chattel. The mode of annexation is, therefore, only one of the circumstances to be considered, and it may not be the most important consideration.* [underline added]

## Degree of Annexation

Elitestone, Lord Clyde addressed degree of annexation:

> *The first of these factors may serve both to identify an item as being real property in its own right and to indicate a case of accession. But account has also to be taken of the degree of physical attachment and the possibility or impossibility of restoring the article from its constituent parts after dissolution. In one early Scottish case large leaden vessels which were not fastened to the building in any way but simply rested by their own weight were held to be heritable since they had had to be taken to pieces in order to be removed and had then been sold as old lead: Niven v. Pitcairn (1823) 2 S. 270. In Hellawell v. Eastwood (1851) 6 Exch. 295, 312, Parke B., in considering the mode and extent of annexation of the articles in that case, referred to the consideration whether the object in question "can easily be removed, integré, salvé, et commodé, or not, without injury to itself or the fabric of the building." It is agreed in the present case that as matter of fact that "the bungalow is not removable in one piece; nor is it demountable for re-erection elsewhere". That agreed finding is in my view one powerful indication that it is not of the nature of a chattel.*

Can the object in question (a mobile home) be easily removed from the land, integré, salvé, et commodé, (*complete, safe, and convenient*) or not, without injury to itself or the fabric of the building? The answer is *Yes*. But, in [50] below, the Environment Court Judge disagreed, writing

> I find that the various modifications to the tiny home, particularly the connected wastewater infrastructure which hangs underneath the tiny home, mean that it can only be moved with difficulty.

The Judge is making law on the fly rather than applying established law. The standard of difficulty alleged by the judge is not supported by the facts nor supported by stare decisis. Mobile homes are relocated every day in New Zealand, some as large as 9 x by 3.1 metres, with wastewater pipes hanging below. They tend to require towing operators who are experienced towing large trailers with the aerodynamics of a brick, but instead of soliciting an expert opinion, the Judge made a finding based on his own experience or that of a counsel officer, both unlikely to include experience in towing mobile homes.

Returning to Elitestone, unlike the bungalow that was the object in Elitestone, which was not removable in one piece, nor demountable for re-erection elsewhere, the mobile home is designed to be removable in once piece – indeed this was shown in the video – and relocated elsewhere. Indeed, there is a thriving business in New Zealand leasing mobile homes on annual leases which are collected at the end of the

lease, valet cleaned and moved to their next location.

In Savoye, Akenhead J wrote:

> *The evidence before the court was that much of the equipment such as gondolas and book and food display units, albeit in some respects screwed or bolted to walls or floor, did not form part of the land as the central and important characteristic was that it was movable equipment which could be moved "as goods come and go and the seasons change". The Judge, HHJ Seymour QC, was referred to several authorities on fixtures, for instance Horwich v Symond [1915] 84 LJKB 1083, where Buckley LJ said at page 1087:*
>
> *"The question whether these articles were so fixed that they ought to be treated as annexed to the freehold, or were merely chattels, is, as I have said, a dual question of fact. The mere fact of some annexation to the freehold is not enough to convert a chattel into realty. That is shown by the case of carpets, which are certainly not fixtures; and the same principle seems to apply to a shop counter which stands on the floor not as a fixture, but as a chattel with a certain amount of fixing to keep it steady.*

Mobile homes are designed to be relocatable, to come and go, and in some cases are moved as the seasons change. Some are moved to ski resorts in the winter, and then relocated to beach resorts for the summer. Mobile homes are designed to be moved for emergencies, when an earthquake flattens a town or low-lying homes are flooded and red-stickered and the owner has no place to go while rebuilding.

Mobile homes are especially valuable for transitioning families. This includes a family with an elderly parent needing a modicum of supervision but wants their own kitchen, bathroom and lounge. If the family erects a granny flat (soon to be a permitted activity nationwide), and the elder then either died or had to move to a nursing home, the family is stuck with an expensive building they may not want. They would have to maintain it, pay rates and insurance on it, or demolish it, and face losing all their capital investment plus demolition costs. In contrast, they would list the mobile home for sale, recoup most of their investment and it would be decommissioned and towed away in a matter of hours, leaving only bare soil.

The same holds true for parents of an adult child or solo mum who can't afford to get on the property ladder and whose alternative is hidden homelessness (living in a car, tent, garage, or overcrowded conditions). Such people can qualify for a lease-to-buy mobile home, where their rent is applied like financing, thus after 5-6 years, they have sufficient equity for a down payment on a home. Other examples include resort areas where mobile homes provide adequate housing for service workers.

In all of these examples, the quality of the home is its negligible degree of annexation. The mobile home does not commit the land owner and does not commit the land. It also tends to have a much lighter environmental footprint than a building because of its very compact design and for those made in factories, designs that minimise waste in materials.

## Object of Annexation

Next the Court accepted the second consideration is the object, or intent of annexation. But it does not seem to have considered Elitestone or other stare decisis cases that examined this in detail.

In Elitestone, Lord Clyde wrote:

*It is important to observe that intention in this context is to be assessed objectively and not subjectively. Indeed, it may be that the use of the word intention is misleading. It is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there. The question is whether the object is designed for the use or enjoyment of the land or for the more complete or convenient use or enjoyment of the thing itself. As the foregoing passage from the judgment of Blackburn J. makes clear, the intention has to be shown from the circumstances. That point was taken up by A.L. Smith L.J. in Hobson v. Goringe [1897] 1 Ch. 182, 193, a decision approved by this House in Reynolds v. Ashby & Son [1904] A.C. 466, where he observes that Blackburn J.,*

> *"was contemplating and referring to circumstances which shewed the degree of annexation and the object of such annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between the owner of a chattel and a hirer thereof."* [underline added]

In [33] the Court documents the respondent's note that

> "while the Schaeffners own the land they do not own the tiny home. He submitted that the tiny home's owner may choose to move the tiny home at any time, or that the Schaeffners may require the owner to do so. He submitted that the separate ownership of the tiny home is inconsistent with any intention that it be part of the land."

The agreement between the Schaeffners and their mobile home owner whose unit is parked on their land is not sufficient to show intent because it is subjective. However, the objective test shows that the mobile home, owned by a third party, and designed to be removed at any time, *integré, salvé, et commodé*, clearly is for the convenient use of the thing by itself, in this case the use by a third-party owner. The third party enjoys the mobile home on the Schaeffner's land until they move on and take their mobile home with them.

This is in contrast to the Schaeffner's home, a building is clearly designed for the use or enjoyment of the land and which adds increasing value to the land as it appreciates.

## Statute and Property Law (including stare decisis)

[36] I see the property law approach as a helpful way to analyse the facts. However, it should be borne in mind that the issue in this case is the application of the statutory definition of "structure" in the RMA to the facts, and not whether the tiny home is in fact a chattel or a fixture in a property law sense.

The statutory definition of *structure* incorporates property law that must be consistent with stare decisis. *Fixed to land* is not defined in the RMA because it is long-decided property law. The property law division of chattel and fixture (or realty) is fundamental to New Zealand, and there is nothing in the definition of structure in the RMA that changes that.

If the tiny home is a chattel, then it cannot be fixed to land. If it is a fixture (realty) in the property law sense, then this must be proven. Because the statute does not

provide a meaning, the role of the Court is to look to stare decisis, which it referenced in Elitestone. But the environment judge ignored the stare decisis so explicitly set out in Elitestone and other stare decisis cases.

By every measure in common law, the mobile home is chattel until it ceases to be mobile (such as intentionally being fixed to a foundation so it can be financed with a home-loan and insured on a home-owner policy).

One of those measures are the tests applied to the meaning of *fixed to land* which is in the statute but not itself defined. For this reason, while the application of the statutory definition of structure would override stare decisis where it differed, the test, *fixed to land* lies solidly in common law as stare decisis.

As noted above, in [35] the Court accepts that the question turns both on degree of annexation and intent of annexation. Neither quality of annexation is written in the statute, but the Court relies on that stare decisis. The statute does not exist in a vacuum.

[37] Although nothing turns on it, I observe that some aspects of Mr Olney's summary of the property cases are not translatable into the current statutory context. The asserted common law presumption that where an object rests solely on the ground by its own weight it is a chattel, is one such aspect.[13] Approaching the issue on the basis that there is a presumption, one way or the other, is neither relevant nor helpful. I do not think a presumption has any proper statutory basis in the definition of "structure" with which I am dealing. [underline added]

The underlined text does not accurately reflect common law presumption.

Stare decisis has examined if resting solidly on the ground makes it a chattel, and has found this on its own to be incorrect. Indeed, in Elitestone, the bungalow was not connected to the earth except by gravity, but was found to be a structure/building/realty because it would have to be taken apart to be removed.

As such this assertion is not helpful but likewise does nothing to support the Council's assertion the mobile home is a structure.

As discussed above in [13], if the object rests solely on the ground by its own weight, the onus is on the Council to show it was intended to be part of the land. In Elitestone Lord Clyde wrote:

> *Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."* [underline added]

The Court errs in waiving this away, because the statute does not define *fixed to land*, hence it should be looking to common law for guidance.

[38] The analogy with the property law cases should also not result in a reading down of the statutory definition of "structure". The word "structure" as it appears in the RMA and district and regional plans occurs in a range of contexts. The current context is in the definition of "building" in the TRMP. A building is a structure "whether moveable or immovable, temporary or permanent".[14] A building (which must be a structure) is able to be both *temporary* and *moveable*.

While the word "structure" may appear in a range of contexts, in TDC v Schaeffner, it appears in Section 2 meaning of the word, and in the TRMP directly referring to that meaning. Accordingly, the sole statutory locus is the RMA s2 meaning. The TRMP is subsidiary to the statute and must have the same meaning as the empowering legislation. The **Legislation Act 2019** s20 states:

> *Words used in secondary legislation or other instruments have same meaning as in empowering legislation*

A district plan is secondary legislation under the authority of the empowering legislation, the Resource Management Act.

The New Zealand Cabinet Manual is an authoritative guide to central government decision making for Ministers, their offices, and those working within the public service. In referencing secondary legislation, it states:

> *7.87 The scope of the power to make secondary legislation will depend on the wording of the enabling Act. Therefore, care must always be taken to ensure that secondary legislation falls within the scope of the power to make it. The High Court can review secondary legislation and declare it to be ultra vires and therefore invalid if it is outside the scope of the power to make it.*

The word *structure* as defined in the RMA is clearly and absolutely embedded in property law. The TRMP in making reference to movable and immovable, temporary or permanent, remains within the same meaning of the Act, until TDC interpretation conflates realty with chattel as it has done in this case. At that point the TDC has interpreted the secondary legislation outside the scope of the Act and it falls to the High Court to declare the interpretation ultra vires.

In this case, unless the High Court finds the RMP definition of *building* is ultra vires, the High Court is not asked to declare the definition as ultra vires, but only the interpretation that gave rise to the abatement order. It asks the meaning of movable and immovable be clarified in line with stare decisis, that *movable* is limited to fixed XY coordinates, that "in the nature of a structure", such as a windmill or pontoon; while the realty may move on the Z coordinate (altitude as in the pontoon) or in a circular motion around an immovable XY coordinate (as in the windmill), this is not the same in law as the word "mobile", which refers to chattel designed to move from one XY coordinate to another – "over land" as opposed to "on" or "in" land..

This is not to say the TRMP is barred from regulating mobile homes – far from it. The law delegates authority to TDC to regulate effects, and this could have easily been done by adding a definition for chattel housing and storage to control mobile homes or shipping containers converted to storage, homes and even coffee shops. But it did not do so. Instead, it conflated realty and chattel.

Why? When the RMA was adopted, indeed even when the TRMP was notified, Tasman District and many other popular districts in New Zealand were not facing an

affordable housing crisis. While it would be technically easy (a public plan change) to add a definition for chattel housing and write regulations for them, today, politically, it would be an entirely different matter because such a plan change, if it did not address the affordable housing crisis would fail to achieve the RMA s5 purpose.

Mobile homes are an answer to the affordable housing crisis, at least on a 15–20-year interim measure. But this is a legislative and executive matter.

The sole role of the High Court in this question is to force the issue, by not allowing councils to distort fundamental meaning of property law in their district plan, or to engage in regulatory creep by distorting interpretation of statutory law because they failed to write proper secondary legislation in the first place.

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[13] *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA).

[14] Although definitions of 'building' may vary in plans throughout the country, they include this formulation as a matter of course.

[39] I do not see any difficulty with the concept of an object being fixed to land and also being temporary and moveable. One example might be a building secured to the ground for a specific event to be removed afterward: such buildings are commonly controlled as structures by rules in district plans such as the TRMP.[15]

This statement by the environment judge is an ambiguity fallacy.

It is correct that an object fixed to land can be temporary and movable. However, this is correct because realty is solely defined by its XY coordinates, not the 4th dimension of time (i.e temporary) nor the 3rd dimensions of altitude (i.e. movable) which is pivotal, pardon the pun, in stare decisis on movable structures.

In the windmill case, the building pivots around a fixed XY coordinate in a circular fashion but does not wander off to another XY coordinate. In the pontoon example, the pontoon retains its XY locus while rising and falling in altitude according to the tides, and from time to time (i.e. the 4th dimension) is removed for cleaning or repair, but has no utility until it is replaced on its fixed XY coordinates, fixed by the pier that defines its *in the nature of a structure.*

It is an ambiguity fallacy; however, because the environment judge puts it forward to support the finding the mobile home is a building. The fact that realty can be temporary and movable does not mean that mobile homes, that are by design temporary and movable even if they remain in one place, unmoved for decade, are realty.

The environment judge's example fails to say how the building arrived on the land and how it was removed. If it arrived on the land in situ and was removed in situ and was intended for the convenient use of the object by itself, then even though he called it a building, under law, it was always chattel not realty.

If the building was constructed on the land, used for a temporary period and then taken apart, that is a different story. A frequent example of this happens in war when Quonset huts are erected by the military in a war zone. When the structures outlive their usefulness, they are taken apart and removed in pieces.

Omitted from environment judge's observation was the question of size. This was

addressed in Savoye:

> *Jenkins J as he then was said in the same case:*
>
> *"It would be undesirable to attempt, and indeed, I think impossible to achieve, any exhaustive definition of what is meant by the word "is or is in the nature of a building or structure". They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, in relation to the hereditament, answer the description of buildings or structures, or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size: I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought onto the hereditament ready-made. It further suggests some degree of permanence in relation to hereditament, i.e., things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces.*

Mobile homes are designed to fit within the legal parameters of New Zealand roads and highways. They are limited in width, height and length because they are designed to be mobile over the roads.

Consider a different example – a building that is sold to a house removal company, uplifted and then stored in their yard on pallets for sale, then sold, delivered and fixed to a purpose-built foundation. While on the original site, it is a building. Generally, a resource consent is not required to remove it. But as soon as the building is uplifted from its underpinnings and placed on a trailer to be moved, it is no longer realty. In law it becomes chattel. While in the resale yard, it remains chattel. It only transforms into a building when it is permanently installed on the destination property, for which a resource consent may be required, and a building consent for the new building work, such as the foundation and the fixing of the frame to the foundation.

[40] However, a temporary building erected for a specific event would likely be a chattel rather than a fixture in a property law sense on the various cases Mr Olney referred to.

The Court errs by not stating how the temporary building arrived on site, how it was held down and how it was removed. If it is a Quonset-type emergency hospital erected during a pandemic and then taken apart when the crisis passed, it would not be chattel. But if it was a mobile medical field hospital temporary bought in during a pandemic, delivered intact and removed intact for its next deployment, then it would be chattel. Indeed during COVID, Coastal Cabins Ltd, a manufacturer of mobile homes was permitted to stay open during Level 4 lockdown because it shifted its manufacturing assembly line to making emergency COVID field cabins that were placed in hospital carparks to enable testing isolated from hospital buildings.

[41] The limitations of the analogy with the property law cases is illustrated with reference to the Environment Court cases where a vessel moored in the coastal marine area has been held (on the facts in question) to be "fixed to land" and a "structure".[16] Those cases do not on the face of it align well with the English cases Mr Olney referred to concerning houseboats such as *Chelsea Yacht and Boat Company Ltd v Pope*.[17] Mr Olney

quoted the following passage:

> Turning firstly to the degree of annexation it is important to bear in mind that what is required is sufficient attachment to the land so that the chattel becomes part of the land. ……
>
> Here the houseboat rested on the riverbed below it and was secured by ropes and perhaps to an extent the services to other structures. It is difficult to see how attachments in this way to the pontoons, the anchor in the riverbed and the rings in the embankment wall could possibly make the houseboat part of the land. One is bound to ask "which land?" There is in my judgment no satisfactory answer to this question. More importantly, however, all these attachments could simply be undone. The houseboat could be moved quite easily without injury to itself or the land

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[15] Rule 17.5.2.1 of the Rural 1 zone rules is an example. This rule sets out the conditions under which an event which is advertised for public admission is a permitted activity. One of the conditions is that "any temporary building or structure … is removed at the end of the event".

[16] *Tasman District Council v Way* [2010] NZEnvC 349 where the vessel in question was mainly located in two locations but took brief sorties away from these anchor points to other nearby locations.

[17] *Chelsea Yacht and Boat Company Ltd v Pope* [2000] EWCA Civ 425

The Court missed important elements of Chelsea. A houseboat on the river and a mobile home on land have more in common than a building constructed on land.

LJ Truckey wrote:

> *In considering the degree of annexation, it is obviously of importance that the chattel can be removed without injury to itself or to the land. There must also be a degree of permanence. Purpose is also important as the illustration given by Blackburn J in Holland v Hodgson [1872] LR 7 CP 328 at 335 cited with approval in Elitestone shows. He said:*
>
> *"Blocks of stone placed one on top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee at the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land."…*

LJ Truckey continued:

> *The district judge decided the case on the basis that Elitestone was of no assistance. He does not appear to have addressed the question of whether the houseboat became part of the land at all. As I have already said, it is not clear whether the judge really did so either. If he did, he appears to have based his decision on the fact that the houseboat was: "Permanently immobile and let as*

*such." But it was not permanently immobile and it is common ground that the terms of the agreement could not of themselves have created the necessary annexure…*

Elitestone is binding upon that case and this. Stare decisis expects the principles laid down in that case are considered in this case. The mobile home is like the houseboat it is I place to serve a purpose, but when it is time to relocate, it is taken away intact.

In this part of Chelsea, the assessment of the district judge bears a striking similarity to the environment judge in this case; that the judge does not appear to have addressed the fundamental difference between chattel and realty, which is at the heart of all stare decisis, but rather writes:

[39] I do not see any difficulty with the concept of an object being fixed to land and also being temporary and moveable. One example might be a building secured to the ground for a specific event to be removed afterward: such buildings are commonly controlled as structures by rules in district plans such as the TRMP

The example given has no bearing on the case before the Environment Court, and as such like LJ Truckey observed of the district judge, the central principles at law were ignored.

Next turning to the degree and object of annexure, Chelsea supports the same principles of law.

*Turning firstly to the degree of annexure it is important to bear in mind that what is required is sufficient attachment to the land so that the chattel becomes part of the land itself…*

*The houseboat could be moved quite easily without injury to itself or the land. The Agreement contemplates that it will be moved, and, in practical terms, required Mr Pope to dry dock it if he was to fulfil his obligation to paint the hull. The fact that it cannot move under its own power is not the point. Whilst the houseboat was obviously intended to be moored where it was for the term of the Agreement at least, the fact that it could and would have to be moved greatly undermines the argument based on permanence…*

Likewise, a mobile home can be moved quite easily without injury to itself or the land. The fact it is allowed on the land solely for the terms of the land use agreement and could and would have to be moved when the agreement terminated undermines the argument based on permanence.

*Turning then to the object or purpose of annexure, Miss Easty* [lawyer for Mr. Pope] *strongly submits that the attachment of the houseboat was to provide a permanent home for its occupant. I do not agree. <u>It is not necessary to annex the houseboat to the land to enable it to be used as a home</u>. The attachments were, like the ship's anchor referred to by Blackburn J, to prevent the houseboat from being carried by the tide or the weather up or down stream and to provide the services to it.* [underline added]

The principle of Chelsea is the same in this case. It is not necessary to annex a mobile home to the land to enable it to be used as a home.

*For these reasons I conclude that the houseboat has not become part of the land. I support this conclusion on the grounds of common sense. It is common sense that a*

*house built on land is part of the land. (See Lord Lloyd in Elitestone at page 692 H). So too it is common sense that a boat on a river is not part of the land. A boat, albeit one used as a home, is not of the same genus as real property.*

Likewise, a mobile home, albeit one used as a home, is not of the same genus as real property.

Turning to the sequence of application of law, Lord Justice Morritt wrote:

*. It is equally plain that originally both the landing craft and the barge in which it now rests were chattels. It seems to me, therefore that there are two questions only (1) Has the combined barge/landing-craft become part of the land? (2) If it has is it a dwelling-house?*

*We heard argument on the first point only. Accordingly the views I express are directed to that point alone even if some of them might be capable of being addressed to both of them.*

*We are, of course, bound by the decision of the House of Lords in Elitestone v Morris [1997] 1 WLR 687. In that case the House of Lords pointed out that the question was whether the chattel had become part and parcel of the land, not whether it was a fixture. (See page 691G- H). The House of Lords also approved the test formulated by Blackburn J in Holland v Hodgson [1872] LR 7 CP 328 that the answer to the question depends on two factors, the degree and object of annexation. Lord Lloyd of Berwick pointed out that the intention of the parties was only relevant to the extent to which it could be derived from the degree and object of annexation. Illustrative of those principles in relation to a tapestry is the decision in Leigh v Taylor [1902] AC 157 to which we were referred.*

*… The proper test is that laid down in Holland v Hodgson as approved in Elitestone & Morris. The Court has to consider both the degree and object of annexation. The Dinty Moore is attached to the river wall and the river in the manner described by Tuckey LJ ultimately by ropes and service connections. Those ropes and services may be untied and disconnected without any undue effort to enable the Dinty Moor to be towed away by a barge. Thus the degree of annexation does not require recognition of the Dinty Moore a part of the land.*

*Counsel for Mr Pope emphasise that the purpose of the annexation was to provide a home. Certainly the object of the conversion of the landing craft and its attachment to the services was to provide a home. But there is nothing to prevent the removal of the Dinty Moore from this mooring to another. The provision of a home does not necessitate annexing the structure (be it a caravan or a boat) to the land so as to become a part of it; it is sufficient that it is fitted out for living in.*

*I agree with Tuckey LJ that the Dinty Moore cannot, in these and the other circumstances to which he refers, be regarded as a part of the land. In those circumstances the second question, whether the Dinty Moore is a dwelling house within the Housing Act 1988, does not arise.* [underline added]

This sequence of application of law has often been ignored in NZ environment and district court cases. The first question to be asked asks *Is the mobile home to be regarded as a part of the land?* If the answer is in the negative, then the second question asking if it is a dwelling house does not arise.

Because the RMA does not define *fixed to land*, the court must turn to stare decisis.

[42] I set out the above reservations for completeness. As I apprehend it, the differences in the submissions on the law between counsel were, on the facts of

this case, questions of emphasis rather than substance. The real difference of view between the parties was on how the facts should be interpreted.

This is incorrect. The real difference is on how the law should be interpreted. What is the meaning of fixed to land in the context of realty as opposed to chattel. Only after that is answered can the facts be examined. In this case, if the law is correctly applied, the facts would be clear for all to see, with an application for summary judgement being sufficient to nullify the abatement order and subsequent orders.

[43] I turn to my analysis of the facts and approach the issues by considering the *degree of annexation to the land* and the *object of annexation*.

[44] Firstly, the degree of annexation. In the 2021 video the tiny home can be seen being towed, somewhat awkwardly, by a ute to its current location. Since that time modifications to the tiny home have been made. It has been connected to infrastructure installed on the property, in particular water and electricity, and wastewater. These systems are all self-contained. They do not connect to the mains or other services on the property.

[45] The modifications are substantial. Holes have been made in the floorboards of the tiny home and extensive piping installed. Wastewater is conveyed through the pipes and into the ground via the gully trap.

[46] Mr Olney made much of the fact that the pipes are not glued to the gully trap, rather they simply connect through holes made in the gully trap. I find that this makes no material difference to the degree of annexation. The pipework and gully trap are part of a purpose-built wastewater disposal system that connects and attaches the tiny home to the ground.

## Utility Connections

Utility Connections do not necessarily make it realty: In Elitestone Lord Lloyd wrote:

> *These tests are less useful when one is considering the house itself. In the case of the house the answer is as much a matter of common sense as precise analysis. A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty."* [underline added]

This supports Mr Olney's submission.

[47] The infrastructure for the supply of water consists of an underground power cable leading from the tiny home to the pump and a water pipe returning underground, to the tiny home. The infrastructure can be disconnected with tools, but I find that these connections mean the tiny home is attached to the ground.

In Savoye [2014] citing Horwich [1915]. HHJ Seymour, QC wrote:

> *The dividing line between things which are fixed and not fixed might be the telephone on one's desk which is not fixed to the land and the socket in the wall which is.*

The telephone socket is part of the building. Removing it may result in exposed wires that could compromise the use of the telephone network in the building, thus, the socket is part of the land. However, the wire running into the socket can be disconnected with tools by a technician to enable phone and wire to be disconnected as chattel. In 1915, phones would be hard-wired into the socket with a threaded rod and nut requiring a technician to disconnect, but Horwich finds the telephone remains chattel. In later years telephones were coupled using phone jacks, similar to caravan electrical connections, making them even easier to disconnect by anyone. This contradicts the finding of the Court, as stare decisis finds:

1. The fact a utility is connected to the mobile home does not make it realty
2. The fact a utility requires, under law, a licensed professional to attach or detach does not in itself make the mobile home realty

The true test examines the effect of detachment. If detachment damages the realty, such as leaving exposed telephone wires, then the object (the socket) is realty. In the case of mobile homes, they are brought on intact, their utilities have an exterior connection, be it cable, pipe or hose. These are the same as the telephone wire that runs from the phone (chattel) to the socket (realty). Even if a licensed professional is required to disconnect, that fact does not cause the mobile home to become part of the land.

As a factual matter, in most factory-made mobile homes, connections are designed to not need a licensed professional. Just as a wall phone now uses a removable jack rather than being hardwired by a telephone technician, caravan connections do not require a licensed professional. Electrical generally uses a caravan plug that works similar to an EV charger. Water is generally connected using a potable water hose, similar to a garden hose (but uses non-toxic hose). Wastewater generally uses a macerator pump and hose connected with a caravan-type wastewater connection, although some mobile homes use composting toilets and on-site or off-site greywater disposal, depending on council regulations.

[48] The rainwater collection system including the down pipe and water tank, as well as the gardens, plantings, gravel pad, driveway, pallets and the proximity and integration with the yellow building, shed and water tank all show that the tiny home is integrated into the site. It has the appearance of a separate lived-in, residential unit.

Same as comment on [46].

[49] I agree with Mr Quinn that much of this infrastructure would be rendered purposeless if the tiny home were to be towed away.

[50] I find as a matter of fact that the tiny home cannot simply be driven away, contrary to Mr Schaeffner's assertions. The demonstration video showed the tiny home can be disconnected and towed a short distance (with the assistance of a tow truck). The video also showed the piping underneath the tiny home remained in place as it was towed, as did the water connecting hose/pipe and the pipe connecting to the urine container. I find that the various modifications to the tiny home, particularly the connected wastewater infrastructure which hangs underneath the tiny home, mean that it can only be moved with difficulty.

This is not the test established by stare decisis

Consider SKERRITS OF NOTTINGHAM LIMITED [2000] in the Supreme Court of Judicature in the Royal Courts of London where Lord Justice Schiemann then moves to same point as in Elitestone citing Hellawell:

> *13. Jenkins J said this:*
>
> *"It would be undesirable to attempt, and, indeed, I think impossible to achieve, any exhaustive definition of what is meant by the words, 'is or is in the nature of a building or structure'. They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, in relation to the hereditament, answer the description of buildings or structures, or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size: I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, ie, things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces."* [Underline in original]

Mobile homes are brought onto site ready made and when removed are not pulled down or taken to pieces.

The Court is ignoring the fundamental question of realty versus chattel. Realty is either land or that which is fixed to land. As Elitestone, Savoye and other stare decisis cases have made clear, moveable extends to something "in the nature of a

structure", but does not extend to something that moves over the land (or through the water for that matter). When something made by people is designed and intended to remain within its XY (latitude and longitude) coordinates that is the test of fixed to land.

[51] While in my assessment a matter of much less significance in terms of the degree of annexation, I find that at the time of the demonstration video the weight of the tiny home was resting on the wheels and also on the wooden blocks which are seen underneath it. The video shows a jack being used to lift the tiny home so that these can be removed.

[52] As to the object, or intent of annexation, I find that it is intended that the tiny home is fixed to the land. The modifications made to the tiny home make it clear that the intention is that the tiny home will remain on the site. As I indicated, the tiny home has been modified so that it can only be moved with difficulty.

The finding is an affirmative statement (*I find that it is intended that the tiny home is fixed to the land*), but the environment judge fails to apply stare decisis tests to support the finding. Instead the judge makes observations that are not supported by established law, and in many cases are the opposite.

Savoye quotes Halsbury's Laws of England (2012), by reference to various authorities, says at Para. 174:

> *"Whether an object that has been brought onto the land has become affixed to the premises and so has become a fixture (or a permanent part of the land) is a question of fact which principally depends first on the mode and extent of the annexation, and especially on whether the object can easily be removed without injury to itself or to the premises; and secondly on the purpose of the annexation, that is to say, whether it was for the permanent and substantial improvement of the premises or merely a temporary purpose for the more complete enjoyment and use of the object as a chattel. The mode of annexation is, therefore, only one of the circumstances to be considered, and it may not be the most important consideration. [underline added]*

Permanent and temporary need to be understood in the context of tenure. Buildings must have a 50-year life and many stand for centuries. When the land is sold, there is no question they go with the land. In contrast, when land hosts chattel housing, especially if belonged to a 3rd party as is the case here, the chattel does not go with the land, and unless the buyer wishes to have the chattel remain, it is expected to be removed prior to passing of title. If the buyer wishes to have the chattel remain, it is the subject of a second contract, not the purchase of real property rights.

Unlike buildings, mobile homes neither commit the land, nor commit the landowner. They tend to be temporal. In the Schaeffner's case, they are making their land available to alleviate a severe housing that can be directly attributed to bad government policy – supporting population growth but restricting commensurate growth in housing for that increase in population. But if they change their mind, or they sell their land, they can require the mobile home be towed away.

[53] As I have said, the tiny home has the appearance of a separate lived-in, residential unit. The level of integration demonstrates that the tiny home is intended to remain in its current location on a long-term basis or permanent basis.

As noted above, the test of realty is latitude and longitude (2 dimensions), not the 4th dimension of time. There is no magic line, over which a chattel home loses its independent identity and becomes part of the land as realty. In Elitestone, the

[54] The tiny home is also furnished and set up internally in a way that indicates that it is intended that it will continue to be used in its current location as a long- term or permanent residence. There are numerous loose personal effects, pot plants, pictures hung on the wall. Items are loosely stored in cupboards. There is no system to contain these items as would be needed if the tiny home was being transported on a road.

[55] The tiny home has in fact been occupied on a permanent basis for over two and a half years. Mr Schaeffner says that the tiny home can be taken away at any point by its owners. However, I find that the removal of the tiny home from the site is not what is intended. The modifications to the tiny home and the infrastructure surrounding it indicate that it is intended to be used as a separate self-contained residential unit in the long-term.

[56] As to Mr Olney's submission that the separate ownership of the tiny home is inconsistent with any intention that it be part of the land, the court was not told who owns the tiny home or what relationship the owners have (if any) with Mr and Mrs Schaeffner. But in any event, I do not agree that there is any inconsistency. Any separate ownership has not prevented the tiny home being integrated into the property in the way I have described.

[57] For these reasons I find that the tiny home is fixed to the land in such a way as to be a structure as defined under s2 of the RMA. On this basis it is common ground that the tiny home contravenes rule 17.5.3.1(b) of the TRMP. Accordingly, there are grounds for the court to make an enforcement order requiring the respondents to cease using the tiny home in a manner that breaches this rule.

**Whether the court should make orders**

[58] The court retains a discretion to refuse to make an order. However, an order will seldom be refused where grounds are made out. The focus is on environmental effects and the public interest in maintaining the integrity of district

and regional plans and the RMA rather than the detriment that might be suffered by private individuals.[18]

## The RMA has had devastating consequences for New Zealand's housing market

The court focus misstates the purpose of the RMA and this error goes to the core of the problem that has resulted in a view, including by the father of the RMA, Sir Geoffrey Palmer, that the RMA has failed in its purpose.

In 2019, NewsHub reported:

> *"Sir Geoffrey Palmer, creator of the Resource Management Act, has labelled it an "incoherent mess" and says he "disowned it" long ago… The Act has had devastating consequences for New Zealand's housing market.*
>
> https://www.newshub.co.nz/home/new-zealand/2019/07/resource-management-act-s-creator-sir-geoffrey-palmer-labels-it-an-incoherent-mess.html

The error by the Environment Court goes to the heart of the matter. It places the language of the TRMP as sacrosanct, and the words contained have validity, even if not supported by the purpose of the RMA and by stare decisis.

Sir Geoffrey is right, *the Act has had devastating consequences for New Zealand's housing market*. In the RMA lens, the TRMP has utterly failed in its purposes, especially enabling people and communities.

## An RMA Lens

The Parliament Council Office (PCO) explains the role of the Legislation Act 2019 in the context of law:

> *The Legislation Act 2019 promotes high-quality legislation for New Zealand that is easy to find, use, and understand.* ***Interpretation of legislation****: The Act provides principles and rules about the interpretation of legislation.*

Legislation Act s10 states:

> ***General principles of interpretation*** *– 10. How to ascertain meaning of legislation (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.*

In lawyer shorthand, this is often referred to understanding the law through the lens of the legislation, or *looking through the lens of the RMA*. When the environment judge writes:

> "The focus is on environmental effects and the public interest in maintaining the integrity of district and regional plans and the RMA rather than the detriment that might be suffered by private individuals."

the environment judge's focus on environmental effects and the public interest in maintaining the integrity of district and regional plans rather than the detriment that might be suffered by private individuals is based on s10 of the Legislation Act.

The Act states the meaning of legislation must be

a) Ascertained from its text, in this case the definition that a structure is limited to buildings that are fixed by land, and

b) When the text does not provide a meaning, which it does not provide for "fixed to land", one next is to look to the purposes of the Act and its content.

Because the meaning of "fixed to land" is not defined in the RMA, one next turns to the purposes of the RMA.

The purposes of the RMA are set out in s5 which states:

> *Sustainable management of natural and physical resources means managing the use, development and protection of those resourced in a way or at a rate that enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.* [underline added]

In [58] the environment judge makes a distinction between public interest and private individuals, implying that the Schaeffners are private individuals. In the context of the RMA, they are not private individuals, they are precisely the object to which the authority, in this case TDC are instructed by the Act to enable.

When the RMA refers to "communities" one must ask not what are these communities but who, because communities are made up of social human beings who have formed a common interest. The people in these communities do not need to know each other for the community to be real. The people in those communities do not need official appointment or election to office. In many cases, they are simply private individuals who are motivated to act in the public interest.

Often such people are vilified, finding themselves entangled in litigation, indeed even imprisoned by a system that has failed in its purpose.

By now, the Schaeffners would have spent over $90,000 in this litigation. They are not rich people, and from a pecuniary standpoint, they would have been much better off to evict the 3rd party living in the mobile home on their land. But they have persisted. Why?

Because, when the territorial authorities fail in their duty to enable the people and communities to provide for their wellbeing, the "community" does not stand by and tolerate the failure they are funding through rates, fees, fines and contributions.

The duty of the authority is to sustainably manage development. In clear English this means that for every new family adding to the population of Tasman District, the TDC's duty is to ensure real estate development provides one new home. Under the old Town and Country Act, this meant converting greenfield to housing zones. Under the RMA, it means the planners must balance environmental effects with population growth. As Sir Geoffrey observed, the planners have failed in this, instead producing an incoherent mess that has had devastating consequences for New Zealand's housing market.

Instead of providing for sustainably managed growth, the TDC and other planning departments in New Zealand wrote plans that result in fewer new homes than new families. In a capital market this results in shortages, and shortages result in bidding wars. Where once the median price of a home in Tasman was 3X median family annual income, (according to the Ministry of Housing and Urban Development (https://www.hud.govt.nz/assets/Uploads/Documents/Data-Table-Number-of-years-of-savings-on-the-median-household-income-to-purchase-a-median-priced-house.pdf) that multiplier is now 10.9X.

In a socialist environment, which is found in the MSD Housing Register, the outcome is rapid expansion of the state house waiting list, as well as growth of hidden homeless, people living in cars, tents, garages and overcrowded conditions. Local businesses find they cannot employ low-wage persons because those persons cannot find affordable housing. School leavers find they have to leave the community of their birth because they cannot afford to buy or rent their first home like their parents did. Old people, especially older women who suffered divorce or relationship breakup and did not own the nest egg of their own home, find themselves tipped into poverty.

That is the real situation in Tasman District in 2024. And when the authority has failed to enable the people and communities, the people and communities do not shut down, they take it upon themselves to provide for wellbeing, health and safety while protecting and preserving the natural and physical environment.

This is precisely what the Schaeffners have done. While the RMA refers to the "people and communities" TDC and the environment judge do not see the Schaeffners as those people and communities, but as private individuals who are trouble makers.

The environment court judge defends the integrity of the district and regional plans, presuming they have integrity and are delivering on the purposes of the RMA. They have not and are not. Instead, they have created a professional class of environmental planners who have been providing for their own economic well being at the expense of the people and communities.

The rules are so complicated that, de facto, they require employing the services of a private planning consultant. Reading the "about" page on many of these services finds prior to entering private consultancy, they worked for the council planning departments. Currently there is a national debate about corruption that has been highlighted by the Helen Clarke Foundation. An 18 August 2024 NZ Herald article begins with the question:

> *Should a Cabinet Minister be able to leave Parliament and immediately become a lobbyist, taking insider information with them while pressuring former colleagues?*
>
> https://www.nzherald.co.nz/nz/politics/political-corruption-donations-and-lobbying-in-new-zealand-new-report-from-the-helen-clark-foundation-on-rules-in-need-of-overhaul/NG3RVJJAXRCXXDCJL75TX4KJCQ/

The same question should apply to the council planning regime, except it is worse. Unlike the minster who leaves and uses his connections, the planner who left will have in some cases actually drafted the complex rules they then charge private applicants to navigate. It is not unreasonable to ask if that complexity exists not to further the purposes of the RMA, but to provide a career path for the council planner at a far more lucrative level than the salary of a civil servant.

Even with paying a private consultant the process is a labyrinth of paperwork, with continual delays and ongoing charges both by council and the consultant. When the planner assigned to the case changes, the demands often change, in breach of RMA s18a

> *Every person exercising powers and performing functions under this Act must take all practicable steps to—*
>
> *(a) use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised;*

The consenting process is not timely, efficient, consistent or cost-effective.

The TRMP and other district/regional plans have failed to enable people and communities to provide for their wellbeing, health and safety. To the contrary they have disabled people and communities while providing for the economic wellbeing of the council planners and the independent consultants

Rather than manage development in a way or at a rate that enables people and communities to provide for their wellbeing, the TDC planners and their lawyers block it.

Developers find more than half their business is not subdivision and infrastructure but obtaining consent. They must negotiate with entitled NIMBY neighbours and a council whose planning and building department budgets are funded by the fees, fines and contributions they collect. The obstacles are great, the time frames can stretch out for years, the cost and risk is carried by them.

The result is devastating consequences for New Zealand's housing market.

Contrary to the assertion by the environment judge that the orders in this case are in the public interest, the opposite is true. This appeal to the High Court is in the public interest. This case is about the integrity of the RMA, which has become, in the words of Sir Geoffrey Palmer, *an incoherent mess.*

The rules, interpretations by council planners and consultant expectations around consenting and construction of new buildings have resulted in the unaffordable housing crisis. Territorial authorities have shown little interest in engaging in meaningful change. They turn a blind eye to the hidden homeless living in cars, but when the people and community take advantage of omissions in the rules, they are harassed until they pay for the consents. Those who make a stand, like the Schaeffners are dragged through the court system.

[59] I find that it is fundamental that the integrity of the TRMP be maintained. Under the TRMP dwellings are discretionary (or restricted discretionary) in order to protect highly productive land in that zone from fragmentation, and to maintain rural character and amenity. In this case, the tiny home has been set up as a separate residential unit some distance from the main dwelling on the property in a way that appears quite inconsistent with plan provisions.

The environment judge errs at law. It is fundamental that the purposes of the RMA are maintained, not that the integrity of the TRMP be maintained. The TRMP is subsidiary to the RMA. If the TRMP fails in delivering the purposes of the RMA, the law does not give it precedence over the enabling Act.

This case challenges the presumption the mobile home is a dwelling. TDC and the environment judge's findings have not shown the mobile home is a dwelling. They have not shown that towing a mobile home on to highly productive land results in fragmentation because, unlike a dwelling, which commits the land, the productive nature of the land can be restored in a day by towing the mobile home away.

It is notable that the Parliament in its wisdom is currently questioning the integrity of every district plan in New Zealand, including TRMP. In June 2024, the government opened consultation on permitting 60 m² granny flats including kitchen and

bathroom and not limited to 20m from the main house, as a permitted activity not requiring resource consent or building consent. Such liberalisation will have a larger environmental impact than a 20 m² mobile home.

However, it does not address the need for temporal housing – the ability to come and go as Akenhead J wrote in Savoye. That need is addressed by mobile homes, which if found to be chattel, not realty, already do not require resource consent or building consent.

A determination by the High Court that mobile homes are already an excluded activity will call attention to government for the need to do what it is now doing with granny flats.

But for this to happen, the High Court must close the door on the ultra vires interpretations of the meaning of structure as written in the RMA s2.

[60] There are other possible adverse effects, although I note the evidence has not addressed these in detail. These include the discharge of greywater to the property and the collection of urine in a container when it is not clear how the contents are being disposed of.

[61] In summary there are no circumstances, exceptional or otherwise, that would justify the court refusing to grant an order.

**Section 332 power of entry**

[62] Before turning to the details of the proposed enforcement order I briefly address the Schaeffners' allegations against the Council. It would be fair to say that the focus of much of Mr and Mrs Schaeffners' evidence is dealing with these issues.

[63] Mr Olney submits that there is contested evidence before the court about the conduct of the Council that the Schaeffners consider is "heavy-handed, overbearing, disrespectful, misleading and/or unlawful". Mr Olney submits that these matters do not directly bear on whether the tiny home and its use contravene the TRMP and what, if any, enforcement orders should be made. He submits that the Council's alleged conduct is relevant to costs. As I indicated to the parties, I

[18] *Auckland Council v Blackwell* [2011] NZEnvC 352 at [43].

intend to reserve the issue of costs. If an application for costs is made, I will deal with the relevance or otherwise of the Schaeffners' allegations in that context.

[64] One issue that received some attention in evidence and submissions concerned the scope of the Council's powers under s332 of the RMA. Mr Olney made

submissions to the effect that the Council officers who went to the property on 14 June 2022 failed to correctly exercise these powers. The issue is academic, because the officers left the property when they were requested to do so without collecting any evidence and only came back later after obtaining a search warrant.

[65] However, the issue has some wider relevance (beyond the circumstances of 14 June 2022 and the issue of costs) because it is intended that Council officers will go back to the property to monitor compliance with the enforcement order and in doing so may again be exercising s332 powers. I therefore comment on the parties' submissions on the issue.

[66] Section 332 of the RMA provides:

> **332 Power of entry for inspection**
>
> (1) Any enforcement officer, specifically authorised in writing by any local authority, consent authority, or by the EPA to do so, may at all reasonable times go on, into, under, or over any place or structure, except a dwellinghouse, for the purpose of inspection to determine whether or not —
>
> (a) this Act, any regulations, a rule of a plan, a resource consent, section 10 (certain existing uses protected), or section 10A (certain existing activities allowed), or section 20A (certain lawful existing activities allowed) is being complied with; or
>
> (b) an enforcement order, interim enforcement order, abatement notice, or water shortage direction is being complied with; or
>
> (c) any person is contravening a rule in a proposed plan in a manner prohibited by any of sections 9, 12(3), 14(1), 15(2), and 15(2A).
>
> …
>
> (3) Every enforcement officer who exercises any power of entry under this section shall produce for inspection his or her warrant of appointment and written authorisation upon initial entry and in response to any later reasonable request.

[67] Mr Olney submitted in summary, that s332(1) requires that the local authority specifically and separately authorise in writing the exercise of the power in that section. Further, he submitted that s332(2) requires that where the power in that section is exercised an enforcement officer is required to produce both their warrant and a separate written authorisation, in response to a reasonable request.[19]

[68] Mr Olney submitted that there was no evidence that any specific authority existed authorising the exercise of s332 on 14 June 2022. If any authorisation

existed, it was not produced on initial entry as it should have been. He submitted that the Schaeffners were therefore within their rights to ask the officers to leave (as the officers in fact did).

[69] In response, Mr Quinn drew the court's attention to *Re Waikato Regional Council*[20] where the Environment Court made comments to the effect that the specific authorisation in s332(1) can and should be contained in the wording of the officers warrant. The court found this to be in accordance with s38(5) of the RMA which states that:

> The local authority or Minister shall supply every enforcement officer authorised under this section with a warrant, and that warrant shall clearly state the functions and powers that the person concerned has been authorised to exercise and carry out under this Act.

[70] I am satisfied that the Council officers who went to the property on 14 June 2022 did not incorrectly exercise their powers under s322. Mr Waters' evidence was that the specific written authorisation under s332 is written on his warrant.[21] That approach is in accordance with *Re Waikato Regional Council* and s38(5). The

[19] Respondents' submissions at [6.5] and [6.6].

[20] *Re Waikato Regional Council* (2002) 9 ELRNZ 90.

[21] Transcript p 64 at lines 4-6.

evidence is also that Mr Waters and the other Council officer who attended on 14 June 2022 produced their warrant cards during the visit.[22]

[71] There is nothing in the text of s332 indicating that there is a need for a separate specific authorisation over and above the specific authorisation set out on the warrant, and I find that there is no such requirement. The words "specifically authorised in writing" in s332(1) mean specifically authorised in writing to exercise the s332(1) power. The words of s332 do not imply any requirement for a separate authorisation for each occasion the power is exercised. That interpretation is not consistent with the plain meaning of the section.

[72] I am satisfied that the written authorisation under s332 that is set out in the wording of an enforcement officer's warrant card is sufficient for the purposes of s332, without the need for a further, separate or occasion-specific written authorisation.

**Terms of the enforcement order**

[73] Both counsel filed closing submissions addressing the terms of a potential enforcement order. The order proposed by the Council is as follows:

> An order under section 314(1)(a)(i) of the Act requiring the Respondents, within 4 weeks upon service of the Order of the Court, to:
>
> (a) cease using the building at 6 Neudorf Road, Upper Moutere, (Property) as a dwelling by:
>
> (i) removing the building from the Property;
>
> (ii) decommissioning or undertaking alterations to the building so it can no longer be used as a dwelling, undertaking work to the building to fully and permanently remove all kitchen and cooking related facilities and relocating the building on the Property to be situated within 20m of the dwelling (being the primary residence of

[22] Affidavit of Shawn Waters 10 November 2023 at [9].

the Respondents) and to ensure that the building remains within 20m of this dwelling; or

(iii) not using the building as a place of long-term accommodation, by ensuring that the use is for no more than two calendar months in any year); and

(b) not obstruct enforcement officers appointed by Tasman District Council from entering the Property for inspection for the purpose of monitoring compliance with this Order:

**Note:**

Tasman District Council's enforcement officers intend to undertake an inspection 4 weeks after the Respondents' have been served with this Order. If compliance with this Order has not been achieved, Tasman District Council's enforcement officers will undertake further inspections.

**Note:**

The Respondents are to provide evidence of compliance with order (iii) (if that option is elected) to enable the Council to effectively monitor compliance.

**Note:**

For Order (iii), if the building is to continue use of the sump for the discharge of grey water then it will need to obtain a certificate of compliance under the Building Act 2004 and ensure that the discharge remains below $2m^3$ to ensure that no resource consent is required.

[74] The terms of the enforcement order should be sufficient to address the underlying breach of the TRMP. There are a number of ways the property could be brought into compliance. Under the vehicle exclusion from the definition of building the tiny home would comply if it is no longer used as a place of long-term accommodation (two calendar months or more in a given year).

[75] Alternatively, the tiny home could be modified to remove the kitchen and cooking facilities so that it is no longer a single self-contained housekeeping unit and therefore not a dwelling under the TRMP. Even if the kitchen and cooking facilities were to be removed, the tiny home would be considered a sleepout which

would need to be within 20 m of the primary dwelling to be a permitted activity.[23]

It should be noted the irony that two of the options in the enforcement order presume the mobile home is chattel – that it is more than movable in law, it is mobile. One proposes the mobile home is relocated off the land, and while the environment judge is of the belief this is difficult because of the pipes that extend below the trailer chassis, it is a clear acknowledgement the mobile home is mobile.

The other option is to move the mobile home to be within 20 metres of the Schaeffners' home. This too presumes the mobile home is mobile. If the third party was living in a movable windmill, such relocation would be truly difficult, if not impossible. But with a mobile home it would be as easy as the environment court judge observed in the second video.

The same thing occurred after Beachen v Auckland Council. The environment court found Beachen's mobile home was realty, not chattel; that it was a minor dwelling, hence a building fixed to land. Beachen, who did not have funds to pay a lawyer, chose not to appeal, but to list his mobile home for sale. The buyer paid for the mobile home, not through a purchase of realty, but of chattel, and then arranged for the mobile home to be towed to the public road on its wheels and driven away to its next XY coordinate location reportedly hundreds of kilometres away. The proof the decision was wrong was in its execution.

The same will be the case here if the High Court does not rule for the respondent.

[76] Mr Olney objects to orders (a)(i) and (a)(ii). He notes that an enforcement order under s314(1)(b)(i) is limited to requiring a person to do something that in the opinion of the Environment Court is *necessary* to ensure compliance on behalf of that person with a rule in a plan. If I understand the point correctly, Mr Olney submits that an enforcement order cannot require a recipient to undertake one of a number of alternatives because no one of the alternatives are "necessary" in terms of s314(1)(b)(i). Mr Olney does not object to draft order (a)(iii) which is the alternative that the tiny home cease being used as a place of long-term accommodation.

[77] Mr Olney also raises the point that an enforcement order cannot require the third party owner to take any action, including to modify the tiny home, by removing the kitchen and cooking facilities.

[78] I see nothing in s314(1)(b)(i) which prevents an order from requiring that a recipient undertake one of a number of alternatives in order to achieve plan compliance. The three alternatives, one of which must occur, should be seen together as "necessary". Also, the words in subsection (b) "require a person to do something" are clearly wide enough to permit the framing of an order in the alternative.

[79] I agree with Mr Olney that the order cannot require someone other than the

Schaeffners to carry out work on the tiny home. Nor should the enforcement order require the Schaeffners to modify a tiny home they do not own. However, the intent of the draft order is that it should provide a self-contained set of alternatives specifying how the tiny home can be brought into compliance. None of the specified alternatives are obligatory, because one or other of the alternatives can be chosen. Beyond that I am satisfied that the issue Mr Olney raises can be

[23] TRMP definitions of "dwelling" and "sleepout" and rule 17.5.3.1 (e).

addressed in the drafting of the order.

[80] Mr Olney objects to the order numbered (b) as well as the explanatory notes set out in the draft. Order (b) is intended to make clear the Schaeffners' obligation not to obstruct Council officers when they attend the property for monitoring compliance with the order. Mr Olney's objection is that the wording is undesirably imprecise. I am satisfied that the proposed draft is clear, and I find that it is desirable to make this order so that there is clarity between the parties, given the history.

[81] The proposed "notes" set out when the Council intends to undertake inspections and how the Council intends to enforce the requirement that the building not be used for long-term accommodation, if that is the option chosen. I am satisfied again, given the history of the matter, that the notes should be included in the order for clarity between the parties.

**Outcome**

[82] Under s314(1)(a)(i) and (b)(i) I make the enforcement order set out in Appendix 1.

[83] Costs are reserved. Any application for costs must be filed and served within three weeks and any reply shall be filed and served two weeks thereafter.

**K G Reid**
**Environment ~~Judge~~**