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Legislation Committee Case-notes - March 2016

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We would appreciate comments and suggestions from members on content, format or information about cases that might be of interest to members but may have not been reported in "Your Environment" or “Alert 24 Land”.

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Summaries of cases from Thomson Reuter’s "Your Environment" and “Alert24 – Land”.

This month we report on six court decisions covering diverse situations associated with subdivision, development and land use activities from around the country:

- A further decision relating to a conundrum involving a (possibly) lapsed consent for “concept subdivision” consent of a beach-front property at Umupuia, Kawakawa Bay, east of Auckland;
- An unsuccessful direct referral to the environment Court for establishment of a marina at Matiatia, Waiheke Island including deep and meaningful discussions of the effects as required by S104D of the RMA. (A direct referral to the Court largely by-passes involvement of city or district councils.)
- A decision recording the mediated settlement of an appeal against refusal of consent for a residential development and subdivision at Henderson;
- The final decision on an unsuccessful appeal against notices of requirement for the proposed underground railway line between Britomart and Mount Eden rail stations in Auckland;
- Another decision resulting from a direct referral to the Environment Court. This decision followed refusal of consent for a 34-lot subdivision of a bush filled valley adjoining a golf course at Albany;
- An appeal involving determination of affected parties to an application by Hamilton City Council to undertake remedial works to a pa site following a land-slip on the banks of the Waikato river.

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CASE NOTES:

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184 Maraetai Road Ltd v Auckland Council _ [2015] NZEnvC 213

Keywords: consent lapse; subdivision; rural

This was decision of the Court on an application for declarations. The matter was remitted to the Court after an appeal. The High Court held that the Environment Court erred by applying the wrong legal test and taking into account irrelevant matters when making declarations that the concept development consent (“CDC”) granted by Auckland Council for a 15-lot development was “given effect to” within the meaning of s 125(1A)(a) of the RMA.

The Court now stated that the question to be decided was whether the CDC was given effect to by September 2010. After considering the factual matrix, the Court concluded that the CDC was given effect to on the granting of the subdivision consent in 2010 and the subsequent realisation of that consent with the issuing of titles in 2011. In particular, the Court concluded that the arrangement entered into was intended to provide for the members of the Duder family in recognition of their long association with the area but that, subsequent to the agreement

being reached, the council, in particular Auckland Regional Council officers, presented impediments to the subdivision of the land. Further, the subdivision costs escalated to the extent that members of the family were disabled from undertaking their desired subdivision. The Court saw no clear evidence that there had ever been an intent to abandon voluntarily the balance of the Duder family's claims for subdivision.

The Court concluded that the intent of the CDC was to recognise the special position of the Duder family in relation to the land occupied by them for 150 years, most of which was being provided as a regional park. The Court was satisfied that the reason that the CDC was not fully implemented by 2010 was not due to unwillingness, but was because of complications arising regarding infrastructural requirements and associated costs. Accordingly, the Court declared that the land use consent for a concept subdivision for 15 rural allotments granted on 1 March 2002, as attached as A to the present decision, had been given effect to. Costs were reserved.

Decision date 22 January 2016 Your Environment 27 January 2016.

(Note – the "concept development consent" referred to in this decision is a land use, pre-development consent in the Manukau City "legacy" district plan to provide for comprehensive planning of future subdivision of the several properties. The required follow-up subdivision consent had only been given effect for one of the several properties subject to the CDC but not the other properties. The previous court decisions relating to the subject site were reported in the December 2015 and February 2016 issues of Newslink. I understand that the Auckland Council is seeking to appeal this decision - RHL)

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Re Waiheke Marinas Ltd _ [2015] NZEnvC

Keywords: resource consent; marina; landscape protection; amenity values; coastal; Maori values; district plan; regional plan; activity

In this decision the Environment Court considered, by direct referral under s 87G of the RMA, an application by Waiheke Marinas Ltd ("WML") for resource consents to establish and operate a marina at Matiatia Bay on the west of Waiheke Island. Towards the end of the three-week hearing, WML withdrew that part of the application relating to reclamation for a carpark. WML then advised the Court that it wished to proceed with an amended application, with a reduction in the number of berths proposed and with new draft conditions of consent. The parties in opposition to the proposal, collectively known as Direction Matiatia Inc, successfully argued that the amendments to the carparking arrangements were beyond scope. WML then proposed new provisions relating to carparking on the foreshore and on a deck structure over the Coastal Marine Area.

The Court decided as a preliminary issue that the applications for consent should be bundled, with the activity status being non-complying. This engaged the provisions of s 104D of the RMA. The relevant statutory planning instruments were considered, including: the New Zealand Coastal Policy Statement 2010 ("the NZCPS"); the Hauraki Gulf Marine Park Act 2000; Auckland Regional Policy Statement; Auckland Regional Council Plan; Coastal (Coastal Plan) 2004; Auckland Council Regional Plan: Air, Land and Water 2013; Auckland Council District Plan: Hauraki Gulf Islands Section 2013; and the Proposed Auckland Unitary Plan. The Court considered evidence regarding coastal engineering and marina design and effects on navigational safety before addressing issues relating to landscape, visual effects, natural character and amenity issues arising from the proposal. The effects on tourism and recreation were discussed by the Court which found that the evidence strongly pointed to potential adverse effects on the tourism values of Matiatia. However, this was to be balanced against the comparatively small tourism benefits which might flow from the provision of a new marina. Other potential effects considered included archaeological issues, traffic and transport and effects on coastal ecology. When it addressed the evidence relating to Maori cultural matters, the Court accepted expert evidence that Matiatia Bay was an important area which engaged ss 6(e) and (f), 7(a), 104D(1)(a) and 104 of the RMA. In addition, the Court found that the historical and cultural connection between the sea and the land was obvious. However, WML had not given evidence as to how the relationship with Maori and their ancestral land and water was to be addressed. The Court concluded that the proposal would not give appropriate attention to such matters and would be contrary to ss 5, 6(e) and 7(a) of the RMA.
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WML accepted that the proposal did not pass the gateway in s 104D(1)(a) of the RMA, as the potential adverse effects were more than minor. The Court then considered whether the proposal would pass the second gateway in s 104D of the Act, following case authority that if the proposal was to be stopped at that stage it must be contrary to the relevant planning objectives and policies as a whole. The Court found that this was a high test, and by a narrow margin, the proposal passed this threshold. Turning to consider the application under s 104 of the RMA, the Court repeated its findings that there were comparatively limited positive effects on recreation and tourism, and that effects on traffic and transport were no more than minor. However, adverse impacts in the areas of landscape and visual, natural character and amenity, ranged from minor to high and there were some significant adverse effects on recreation and tourism, in addition to the Court's findings of significant adverse effects on Maori cultural matters. Regarding the relevant statutory provisions, the Court found that the proposal did not comply with Objective 3 and Policy 3 of the NZCPS relating to the principles of the Treaty of Waitangi. The Court stated that WML's lack of adequate consultation and failures to inform itself and take steps to change the proposal concerning such matters meant that the proposal was significantly contrary to the policy thrust of the NZCPS provisions.

Considering the proposal under pt 2 of the Act, the Court concluded from the findings as to significant adverse effects that the proposal would be an inappropriate development from which the natural character of Matiatia Bay would not be protected (s 6(1)(a) of the RMA). Further, refusal of consent was required under s 6(e), as the proposal would not enable recognition of the relationship of Maori and their culture with the area or the principles of the Treaty. Overall, the Court held that the purpose of the RMA would not be served by granting consent to the proposal, which was declined. Costs were reserved.

Decision date 29 January 2016, Your Environment 1. February 2016

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Singh v Auckland Council _ [2015] NZEnvC 223

Keywords: land use consent; subdivision; conditions; consent order

G Singh ("S") appealed against the decision by Auckland Council ("the council") to refuse resource consent to subdivide land at 299 Don Buck Rd, Henderson into two lots. S wished to construct a three-level, four-bedroom dwelling on the new vacant lot and to undertake alterations to the existing dwelling on the other lot. The council declined the proposal because it would result in effects on the environment, in particular to visual amenity, which were more than minor.

After Court-assisted mediation the parties reached agreement on an amended proposal, by which the dominance of the dwelling was reduced. The Court considered the notice of appeal, the memorandum of the parties and the accompanying draft consent order. On the understanding the council was now satisfied with the issues of building coverage and density, the Court confirmed that consent was granted, subject to the conditions attached to the order as Annexure A.

Decision date 1 February 2016 Your Environment 2 February 2016

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Tram Lease Ltd v Auckland Transport _ [2015] NZEnvC 191

Keywords: designation; notice of requirement; railway; conditions; consent order

This was the final decision of the Court concerning six appeals against notices of requirement for designation issued by Auckland Transport relating to an underground passenger railway line in Auckland called the City Rail Link.

In its decision of 21 August 2015 on the appeal by Tram Lease Ltd, the Court confirmed the designation subject to the finalising of conditions. The Court now considered the amended conditions, which were agreed by the parties, subject to one dispute concerning the wording of condition 61.5. After considering the submissions of the parties, the Court found that the wording as proposed by Auckland Transport and Auckland Council was preferable. Condition 61.5 was amended accordingly.

Regarding the other five appeals, the Court stated that it had considered the draft consent orders filed by the parties resolving the appeals. The Court was satisfied that all parties had agreed to the amendments sought and the appeals were resolved by consent. The six appeals were determined subject to the amended conditions attached as Annexure A.

Decision date 7 December 2015 Your Environment 8 December 2015.

(Note: The previous decision relating to the subject site was reported in the October 2015 issue of Newslink)

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3rd Fairway Developments Ltd v Auckland Council _ [2015] NZEnvC 193

Keywords: resource consent; conditions

This was a decision of the Court under direct referral under s 87 of the RMA. The applicant 3rd Fairway Developments Ltd ("3rdFDL") sought and obtained consents, on appeal to the Environment Court, for the development of land owned by it at Albany. The consents were for comprehensive land use consent and regional consents. However, before the hearing of the matter, the Auckland Proposed Unitary Plan ("PUP") was notified. The PUP deemed certain aspects of the regional consents to be operative immediately and, in order to make effective the district plan consents, 3rdFDL applied for the direct referral.

The Court stated that by the time the direct referral was set down for hearing there was no opposing party, and the Court received affidavit evidence from the council and, for 3rdFDL, from an ecologist, a landscape architect, and planner and an engineer. The Court stated it had read all such evidence and was satisfied that it addressed all the matters required by the RMA, noting that the suggested conditions were largely the same as those for the regional part of the earlier consent. Overall, the Court was of the view that the inclusion of the conditions would lead to an improvement in the ecological quality of the area, improve the riparian and planted areas and ensure reasonable controls over future stormwater. The Court described the development subdivision as an eco-type development which had the objective of maintaining a balance between the built environment and the ecological values of the area. At the Court's suggestion, the parties agreed that the consent would contain a statement that it was to be read in conjunction with the existing consent. Accordingly, the consent was granted on the conditions amended and attached as "A" to the decision.

Decision date 9 December 2015 Your Environment 10 December 2015

(Note: The previous Environment Court Case relating to the proposed application was reported in the November 2015 issue of Newslink.)

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Nga Mana Toopu O Kirikiriroa Charitable Trust v Heritage New Zealand Pouhere Taonga _ [2015] NZEnvC 194

Keywords: esplanade reserve; consultation; Maori culture; kaitiakitanga; heritage value; jurisdiction

This decision concerned an appeal against the determination by Heritage New Zealand Pouhere Taonga ("HNZ") to authorise Hamilton City Council ("the council") to carry out remediation works on an esplanade reserve ("the authority"). The authority was to enable the council to undertake remediation works following a slip which occurred on the edge of the Waikato River at Te Hikuwai Reserve in Flagstaff, Hamilton ("the site"). The reserve included a pa site which of significance to Ngati Wairere, a hapu of the Waikato-Tainui. The appeal was by Nga Mana Toopu O Kirikiriroa Charitable Trust ("the NMT Trust") which argued it should have been consulted by the council when it applied for the authority. The council contended that the NMT Trust no longer had a mandate to speak for Ngati Wairere, which had withdrawn its mandate from the NMT Trust in 2012. The council submitted that this loss of mandate frustrated the contracts relating to consultation services, and brought such obligations to an end. Subsequently, Te Ha O Te Whenua Kirikiriroa Trust ("the THTW Trust") was created, and five hapu, including Ngati Wairere, confirmed its mandate with the council. When applying for the authority from HNZ, the council had consulted the THTW Trust. All parties now agreed that: Ngati Wairere had mana whenua in relation to the site; the NMT Trust represented some members of Ngati Wairere; and the THTW Trust represented some members of Ngati Wairere.

The council, which had abandoned the authority, now asked the Court to resolve the matter by using its power under s 269 of the RMA to reverse the decision of HNZ. The council would then apply for a new authority and in the process of doing so would consult with both the NMT Trust and the THTW Trust. However, the NMT Trust argued that this new process would not cure the defects associated with the first application for the authority.

The Court stated that it could only determine the issue in the context of the first authority, and had no jurisdiction to determine the NMT Trust's asserted right to be consulted on future matters. Further, the Court observed that it was the Maori Land Court which had jurisdiction to decide who represented a class or group of Maori. The council now agreed that, given HNZ's view that it would support the NMT Trust as being within "any other person likely to be affected" under s 46 (1)(h) of the Heritage New Zealand Pouhere Taonga Act 2014, the appeal might be allowed on such basis. The NMT Trust had reluctantly agreed to resolve the appeal on this limited basis in order to enable the remediation of the site to progress. Accordingly, the appeal was allowed on the limited basis agreed by the parties as recorded in the present decision.

Decision date 10 December 2015 - Your Environment 11 December 2015.

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This month's cases were selected by Roger Low, rlow@lowcom.co.nz, and Hazim Ali, hazim.ali@aucklandcouncil.govt.nz.

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Other News Items for March 2016

Flooding: Lack Of Maintenance Blamed - Retired surveyor Bruce Hendry reminds Dunedin City Council about the cause of last year's floods.

A man who helped build South Dunedin's drainage network says a lack of maintenance exacerbated problems caused by last year's record-breaking flood. Bruce Hendry (81) wrote a report on last June's flooding after becoming fed up with the lack of answers from the Dunedin City Council. ''Eight months after what has probably been the biggest and most expensive disaster in Dunedin since the 1929 floods, answers relating to the future and safety of those most affected, particularly residents of South Dunedin, have not been given," he said in the report."

Read the full story here

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Concern over private control of paper roads

Radio New Zealand reports that an advocacy group claims that public access to much of New Zealand's 56,000 km of paper roads is being controlled by local landowners, which amounts to land privatisation by stealth.

Read the full story here.

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BoP orchards placed on hazardous activity register

Radio New Zealand reports that the Bay of Plenty Regional Council will put all the orchards in the Bay area on a Hazardous Activity and Industries register because of pesticides employed
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on the farms. The council's Emma Joss said that several orchards were found to be contaminated and the register will help to identify other potentially contaminated land. The council took the step because of problems encountered with owners of orchards which historically used arsenic based sprays wishing subsequently to subdivide their land into residential blocks.

Read the full story here.

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LINZ: OIO releases Motukawaiti (Step) Island findings

The Overseas Investment Office (OIO) has announced that it is not able to take action over the purchase of Motukawaiti Island – also known as Step Island – by New Zealand company St Morris NZ Limited.

“While the investigation found evidence pointing to a possible breach of the Overseas Investment Act, there is not enough to prove this beyond reasonable doubt,” OIO Manager Annelies McClure says.

“This means we cannot meet the threshold in the Solicitor-General’s Prosecution Guidelines and, so, we cannot take action.”

The OIO began its investigation after learning that St Morris had used funds borrowed from an overseas person – Chinese businessman Jun Zhang – to buy the island.

The investigation was to determine whether St Morris was a front for Mr Zhang – to get around the need for consent – or whether Mr Zhang was just a lender.

Please click here for the full statement.

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Wellington view-blocking fence dismantled after Environment Court order

The Dominion Post reports that Peter and Sylvia Aitchison's ordeal regarding the fence built by their neighbour David Walmsley may not be over, despite the fact that the view-blocking structure has been demolished. This is because Wellington City Council has asked the Environment Court to allow the council to continue the appeal by Mr Walmsley, despite his decision to withdraw from the proceedings.

Read the full story here.

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Christchurch developers assisted to avoid red tape

The Press reports that a new Christchurch City Council initiative that helps developers avoid costly delays due to red tape is assisting projects worth more than $1.5 billion. The initiative works by pairing developers with case managers who help them to gain all the approvals necessary to complete their projects.

Read the full story here.

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Protected Norfolk pine felled after Environment Court declaration declined

The New Zealand Herald reports that contractors have removed a controversial 39 m tall Norfolk Pine from James Gilderdale's property. Prior to Christmas 2015, the Environment Court declined Mr's Gilderdale's urgent request for a declaration that he was entitled to cut down the tree. However, the court said that if Auckland Council prosecuted Mr Gilderdale for felling the protected tree, he would probably have an appropriate defence under the *Resource Management Act 1991*, because the tree was a threat to life and property.

Read the full story here.

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Maori express concerns about customary fishing rights under new marine parks

Radio New Zealand reports that Iwi from the Marlborough Sounds and the Hauraki Gulf have raised concerns that the new recreational marine parks, to be created under the recently-announced government policy, will adversely affect Maori customary fishing rights. Ngati Toa Iwi chair Matiu Rei said that large areas in the Marlborough Sounds recreational reserve are lands acknowledged in treaty settlements to have special ties with iwi.

Read the full story here.

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New Dunedin harbour hotel considered

The *Otago Daily Times* reports that a new waterfront multi-storey hotel and apartment development on the south side of the Steamer Basin is being considered, although the project is at an early stage.

Read the full story here.

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$300,000 makeover for Kuirau Park's thermal foot pools

The *Rotorua Daily Post* reports that Rotorua Lakes Council has approved a concept design for a new architecturally designed shelter over one of Kuirau Park's two thermal foot pools, part of a wider project to redevelop the pools and their surrounds. A $300,000 makeover of Kuirau Park's foot pools will begin in March.

Read the full story here.

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