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Legislation Committee Case-notes - April 2016

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

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

- An unsuccessful application to correct an error in a supermarket company’s submission on a proposed plan change in Hastings district;
- Another case relating to the scope of a territorial authority’s jurisdiction to extend the scope of a proposed plan change at Queenstown;
- The decision on costs of an appeal against the Bay of Plenty Regional Council’s decision to locate a waste-water treatment plant and disposal area on Maori land near Matatā;
- A decision of the Court of Appeal following the High Court decision on judicial review of a decision not to notify a tenant of an application for redevelopment a business site at Manukau to redevelop part of a commercial property.
- An unsuccessful appeal by owners against the High Court decision to refuse to legitimise some illegally converted residential units in suburban Auckland;
- Two decisions relating to the “neighbours at war” situation involving a view-blocking wall and structure adjoining the boundary between two residential properties in Wellington’s hill suburbs that had been approved by the Wellington City Council on an incorrect assumption about the ground level from which the relevant height measurements should be made.

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CASE NOTES:

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Progressive Enterprises Ltd v Hastings District Council - [2015] NZEnvC 187

Keywords**: **declaration; district plan; jurisdiction; zoning; supermarket; submission

Progressive Enterprises Ltd (“Progressive”) sought a declaration that certain amendments to the Plains Production Zone, including provisions which liberalised rules relating to the development of supermarkets, were within the scope of Progressive’s submissions made on the Proposed Hastings District Plan (“the PP”). In November 2013, Hastings District Council (“the council”) notified the PP, and on 20 January 2014 Progressive lodged a submission in response. By mistake, the submission misidentified the zone in question as Rural, when it should have been Plains Production. This error was not picked up by the council’s officers and it was not until 2 May 2014 that Progressive’s planner acknowledged the mistake. The council declined to allow Progressive to retrieve the situation by amending the relief initially sought.

The Court stated that the issue was whether a submission should be taken at face value as meaning what it says, or whether the receiving council, and others reading the summary of submissions, should be expected to conduct inquiries whether it contained errors. The Court now adopted the test to be imposed on a submission as expressed by Hansen J in *Healthlink*

South Ltd v Christchurch International Airport Ltd [2000] NZRMA 375, which was that it was not for the reasonable reader to have to uncover the extent of a submission's error or the true intention of the submitter. Further, the Court in *Environmental Defence Soc Inc v Otorohanga District Council* [2014] NZEnvC 70 emphasised that the submission and appeal process in relation to a proposed plan was confined in scope and that the summary of submissions process depended on the accuracy of a submission in identifying what the submitter actually wanted. The Court now stated that it was for the submitter to define accurately what was sought by way of amendment of what was in the notified proposed plan, because it was expected that the summary of submissions process had integrity and provided an accurate basis for the rest of the process in sch 1 of the RMA. Further, the Court did not find it reasonable to expect that the council officers would identify and correct every material error in a submission.

Accordingly, the declaration was declined. The Court's clear view was that the rules relating to the development of supermarkets in the plains Production zone were not within the scope of the submission made by Progressive. Costs were reserved.

Decision date 2 December 2015; Your Environment 3 December 2015

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Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council - [2015] NZEnvC 214

Keywords: procedural; jurisdiction; district plan change; zoning; objectives and policies; alternatives

This procedural decision concerned four appeals against Plan Change 50 ("PC50") to the Queenstown Lakes Operative District Plan ("the plan"). The issue was whether certain parts of the appeals were "on", or within the scope of, PC50. PC50 created a new Queenstown Town Centre Zone ("QTCZ") and the purpose of the plan change was to provide for an extension to the existing QTCZ by rezoning specified sites and areas. The four appellants owned parcels of land outside but next or close to the PC50 area, and each appellant had made submissions on the plan change, in part seeking extensions to the PC50 area and the QTCZ. At the hearing before council commissioners, the council argued there was no scope to accept parts of the submissions because they were not submissions "on" PC50 and requested that the issue of scope be determined as a preliminary issue.

The Court considered the provisions of cl 6, sch 1 of the RMA to determine whether the relief sought in the appellant's submissions was within scope. The Court stated that the real issue was whether fair and reasonable notice had been given to other persons who might be affected so that they had an opportunity to participate. The council submitted that neighbours of the appellants would have been unable to know that they needed to make submissions on PC50 if they had concerns about land adjacent to them being rezoned as part of the new QTCZ. The Court stated it was only by looking at one of the many appendices to the s 32 evaluation that neighbouring landowners would appreciate the appellants' land might be rezoned. The Court concluded that the total notice, in the s 32 evaluation and the notice given by the notified summary of submissions, was inadequate to fairly alert potential parties in relation to the further extensions appeals. The Court held that the affected parts of all four challenged appeals were not within jurisdiction and made orders accordingly.

Decision date 4 February 2016 Your Environment 5 February 2016

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Sustainable Matata Inc v Bay of Plenty Regional Council - [2015] NZEnvC

Keywords: costs; consultation; Maori values

Sustainable Matata Inc ("the appellant") and Ngati Rangitihi Raupatu Trust Inc ("NRRTI"), a party under s 274 of the RMA, applied for costs against Bay of Plenty Regional Council ("the regional council") and Whakatane District Council ("the district council"). The applications followed the substantive decision of the Court of 14 May 2015 ("the previous decision") by which the Court disallowed consents for the establishment of sewerage works, but deferred its decision regarding a land application site in order to allow the council time to consider whether it wished to proceed. Costs had been resolved with Matata Lot 6A Papakainga Komiti. The appellant now claimed $94,827, comprising $72,000 for legal costs and $22,827 relating to expert witness costs. The appellant sought one third of the total from the regional council and two thirds from the district council. NRRTI sought a total claim of $133,923, consisting of

consultants' costs and witness expenses. NRRTI claimed 75 per cent of the total from the district council and 25 per cent from the regional council.

The Court considered the principles relevant to the award of costs under s 285 of the RMA, noting that it was rare for the Court to make a costs award against a consent authority in the absence of a neglect of duty or blameworthy conduct. In the present case, the Court concluded that the applications fell well short of an argument that the regional council neglected a duty or acted inappropriately, and the Court declined any costs order against the regional council as consent authority. However, the Court found that the district council failed to consider the obligations for consultation and appropriate investigation of cultural issues. While no criticism could be made of the district council for seeking to establish a wastewater system for Matata, the Court found that the failure was in the selection of the site for the sewage treatment plant, ie Lot 6A, when more careful consideration of the information would have revealed the particular sensitivity of the site. The Court concluded that there were aspects of the district council's actions, as applicant/consent authority, which were blameworthy and/or failed to recognise and discharge the duty required under pt 2 of the RMA and the relevant plans. However, the Court emphasised that there was no evidence that this had been a deliberate action by the district council officers. The Court concluded that costs should be awarded against the district council.

Considering quantum, the Court stated that the issue was what percentage of the costs claimed could be reliably established. The Court described the claims for the lay parties in the present case as "truly eye-watering" and said that they seemed to be based on a suggestion that a party could recover money as a consultant. The Court found that the law did not permit the reimbursement of the time of a lay party and that this was precluded by both the operation of s 285 of the RMA and the District Courts Rules. The Court concluded that it was not appropriate for either applicant to recover its costs directly relating to the matter beyond a modest reimbursement of disbursements. The Court ordered that a payment of $3,500 should be made by the district council to the appellants and also $3,500 to NRRTI, to recognise the assistance (although limited) of their expert witnesses and to recognise their disbursements and certain legal fees.

Decision date 11 December 2015; Your Environment 17 December 2015

(For the previous report see Newslink August 2015 – RHL.)

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Wendco (NZ) Ltd v Auckland Council - [2015] NZCA 617

Keywords**: **Court of Appeal; High Court; judicial review; public notification; district plan rules; interpretation; access; parking; declaration; resource consent

Wendco (NZ) Ltd ("Wendco") appealed against the High Court decision of 24 June 2014 dismissing Wendco's application for judicial review. Wendco challenged the decision by Auckland Council ("the council") not to notify an application by Wiri Licensing Trust ("WLT") for resource consent to redevelop its site at 639 Great South Rd ("the site"). The site was WLT's largest and most valuable asset. Wendco was a tenant on the site and had operated a restaurant, with a drive-through facility, since 1999. Wendco sought an order quashing WLT's consent and argued that the access and parking effects of the proposal on Wendco's use of the site should have led the council to consider notifying Wendco of WLT's application. WLT's proposed redevelopment of the site involved modification of two vehicle access points onto the primary road network (Great South Rd) with the provision of new parking spaces, which meant that a restricted discretionary activity consent was required under r 8.10.3(b) ("the rule") of the Manukau Operative District Plan ("the plan").

The judgment of the Court was given by Fogarty J. Addressing the requirements of the plan, the Court noted that the rule was part of the chapter dealing with transportation, which also set out the assessment criteria to which the council was to have regard when considering a restricted discretionary activity consent application. The council required consent for an activity which modified access to a primary road, as in the present case. Further, internal circulation was one of the matters over which the council reserved discretion and the Court interpreted the plan provisions to mean that the purpose of the criteria was to ensure that the internal circulation of traffic did not adversely affect traffic in the primary road network. When assessing the particular application the council could recognise that there might be occupiers and other users of a site who would be adversely affected by the proposal. The Court said that it was common ground that WLT did not have to publicly notify the application; the question was whether the council
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should have considered whether Wendco should have been notified under ss 95B(1) and (2) and 95E(1) and 2(b) of the RMA. The Court noted that, in reaching its decision, the council assessed only those traffic effects of the proposal which were external to the site, and focused on adverse effects on traffic and safety on the local road network adjoining the site. However, Wendco submitted that it was adversely affected in more than a minor way by the modification of the mid-site access onto Great South Rd. The High Court found that the council had sufficient information to assess adverse effects and to decide they were less than minor. Wendco now argued that its area within the site had changed from one of limited vehicular access, used principally by Wendco's customers, to a main thoroughfare for all vehicles entering or exiting the site, which seriously downgraded the convenience, safety and efficiency of its access and on-site circulation.

The Court analysed the standard "relate to" in s 95E of the RMA, stating that subs (2)(b) of that section functioned as a qualification of the mandatory consideration required by subs (1). It was a "must disregard" rule, requiring the council to disregard an adverse effect of the activity on Wendco that "does not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion". In other words, the Court said it was only adverse effects within the scope of matters that the plan allowed it to control or restrict that were relevant. The Court now found that the HC's assessment of this test was limited and did not address whether the council was required to consider Wendco's concerns, whether it did in fact consider those concerns and whether it was open to the council to conclude that those effects were minor or more than minor. The Court did not agree that the council was concerned with matters in the rule only as they impacted on the primary road. On the contrary, the Court found that if there were adverse effects on Wendco by reason of circulation of traffic over its land and internal circulation and parking, that might result in congestion on the adjoining roads, those effects would necessarily connect to, or "relate to" matters addressed by the plan rules. In that sense, the adverse effect "on the person of the activity" was "related" to matters over which the council reserved its discretion. While the new two-way accessway on the site would have beneficial effects on the traffic flow on Great South Rd, it imposed an adverse effect on Wendco, which was related to the matters over which the plan reserved control. The record showed that the council did not ask the relevant question, which was whether the site circulation and parking might cause Wendco any adverse effect on its business. This was an error of law, a failure to apply ss 95B and 95E, and led to a breach of s 95E(1) of the RMA.

The Court then considered whether to grant equitable relief, reviewing relevant authorities on its discretion to do so. The High Court had considered that, even if review had been made out, relief should be declined because WLT's consent contained a condition for the consent to be reviewed and because of Wendco's delay in commencing the proceeding. WLT also now submitted that the error was at the low end of the scale. However, the Court preferred to follow the dictum of the Court of Appeal in *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 that "a discretionary withholding of relief is not the normal outcome of a successful attack on a reviewable decision" and cited academic opinion that the "default position" in such circumstances was to grant relief. After reviewing the evidence, the Court found that on the facts there had been no culpable delay by Wendco in issuing proceedings once it discovered the extent and consequences of the traffic changes on the site. Further, the Court found that the review condition imposed by the council on the consent did not provide for notice of complainants or other adversely affected persons to be heard during the review, nor did it provide for a hearing. The review condition was not a sufficient substitute for the default position of holding the council to the statutory process required by Parliament to identify persons adversely affected, prior to conducting the hearing as to the merits of an application for consent.

The application for review was granted on proof of error of law. The relief granted was: a declaration that the council's determination that there were no persons adversely affected by the proposal was affected by errors of law in the application of ss 95B and 95E of the RMA; an order under s 4(2) of the Judicature Amendment Act 1972 ("JAA") setting aside that part of the resource consent issued to WLT for the site that defined the ingress, egress, circulation and parking on the site; a direction, under s 4(5C) of the JAA, that, pending giving effect to the present judgment, the current access arrangements on the site were to remain in operation, and the internal circulation and parking were to remain the same; the council was directed to reconsider the application of ss 95B(1) and (2) and s 95E(1) and (2) of the RMA, pursuant to s 4(5) of the JAA; the council was directed to release its decision, giving reasons, to the parties; if the council's decision was that Wendco suffered adverse effects that were more than minor,

then the Court directed that the council reconsider its decisions regarding resource consent relating to site layout and traffic; if the decision of the council was that Wendco and/others suffered no such adverse effects, the council might reconfirm the decision quashed. The Court found that regarding costs, the appeal was classified as a complex appeal. Wendco was entitled to costs from the council on a band A basis, with disbursements.;

Decision date 28 January 2016; Your Environment 29 December 2016

(For the previous report see Newslink October 2014 – RHL.)

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Jayashree Ltd v Auckland Council - [2016] NZCA 5

Keywords: Court of Appeal; High Court; leave to appeal; costs

Jayashree Ltd and others ("the applicants") applied for leave to appeal to the Court of Appeal against the High Court ("the HC") decision of Edwards J of 31 August 2015 ("the HC decision"). The matter concerned the correct interpretation of provisions in the Auckland Operative District Plan 1999 (Isthmus Section) ("the plan") relating to the definition of "residential unit". The applicants sought leave to appeal three questions regarding the correct legal approach to assessing whether certain properties owned by Mr Karmarker and his associated companies in Mt Roskill and Mt Albert contained one residential unit or two for the purposes of the plan. The properties were in residential zone 6a which prescribed a density limit of one residential unit per 375 m^2 site. A residential unit was defined in the plan as "a building, room or group of rooms used, or designed to be used, exclusively by one or more persons as a separate household unit". The HC decision upheld the Environment Court ("the EC") finding that the design in the present case enabled each flat to be used as one or two residential units, which could be achieved by locking an internal door.

The three questions of law now proposed by the applicants were: did the HC apply the wrong legal test in relation to the meaning of "residential unit"; did the HC have regard to an irrelevant consideration or apply the wrong legal test in considering future potential "minor changes" to the residential unit, contrary to the rule in *Barry v Auckland Council* [1975] 2 NZLR 646 (CA); and did the HC err in applying the test in *Landeman v Cavanagh* [1998] NZRMA 137 (CA)? Auckland Council ("the council") opposed the granting of leave, but consented to the application being determined on the papers.

The Court considered each of the proposed questions. The first concerned the word "exclusively" in the plan definition of residential unit and the Court noted that there were different views in the EC decision in *B & C Shaw Ltd v Auckland City Council* EnvC Auckland C56/03, 9 May 2003 as to the meaning of the word "exclusively". Edwards J in the HC decision decided that the definition required the residential unit to be "designed for use" exclusively as a single household unit. It did not require consideration of whether the building could be used in other ways. The Court now stated that such approach was orthodox and consistent with the Court of Appeal's decisions in *Barry* and *Landeman*. It also was consistent with *Holm v Auckland City Council* [1998] NZRMA 193 and the Court considered that these decisions reflected a consistent approach to the definition, and it was unnecessary to revisit the issue. No question of law of general or public importance deserving a second appeal arose relating to the first question.

The second question related to *Barry*. The Court was of the view that this longstanding decision of the Court did not require reconsideration and that its application in the present case by the EC and HC was entirely orthodox. The Courts applied an objective test to the design, asking whether the development was designed to be used exclusively as a separate household unit. If that test were met, *Barry* meant that that potential future changes were to be put to one side. The Court stated that in the present case the inherent features of the design were assessed, including the lockable internal doors. Locking a door was not a "design change". While the Court acknowledged that it was always a question of degree whether potential changes were of a "design" nature or an inherent feature of the existing design, the Court found that the facts in the present case were not "close to the line". Accordingly, no question of law of general or public importance deserving a second appeal arose.

Finally, the Court considered the third question, which concerned the *Landeman* decision which had considered the question of whether a sleep-out, constructed on a residential property, was an "accessory building", as defined. The Court of Appeal found that determining the designed use of the building at the time resource consent was sought and granted involved an objective
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assessment of the plan of the building and its relationship to the other buildings on the property. The applicants now submitted that the *Landeman* objective approach should not be applied to the definition of residential unit in the plan because the word "designed" required a partly subjective consideration of aesthetic and cultural matters, including cultural aspirations to allow extended family occupation of single dwellings. However, the Court rejected this argument and found this was not an appropriate case in which to revisit *Landeman* and that whether a property contained one or two "residential units" required an objective, factual assessment. The applicants' interpretation of *Landeman* was unprincipled and would likely make the clear-cut application of the plan unmanageable. The Court stated that if the applicants sought a departure from that clear-cut application, the preferable mechanism was to apply for resource consent. Again, there was no question of law of general or public importance deserving a second appeal arising from the third question. The application for leave to appeal was declined. The Court directed that the applicants were jointly and severally liable to pay the council's costs.

Decision date 19 February 2016; Your Environment 22 February 2016.

(For the previous report see Newslink July 2015 – RHL.)

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Aitchison v Walmsley _ [2016] NZEnvC 15

Keywords: enforcement order

This decision followed previous decisions relating to the structure built by the respondents which obscured the view from the home of P and S Aitchison. Having determined that enforcement orders should be made against the respondents, the Court now made orders that the respondents remove the structure.

Decision date 26 February 2016; Your Environment 29 February 2016

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Wellington City Council v Aitchison - [2016] NZHC 167

Keywords: High Court; council procedures; district plan rules; interpretation; jurisdiction; appeal procedure

This was a procedural decision of the High Court following litigation relating to the legality of a wooden structure, erected by Walmsley Enterprises Ltd ("WEL"), on the boundary between its property and that belonging to P and S Aitchison ("A") in Roseneath, Wellington. In its decision of 17 September 2015 ("the EC decision"), the Environment Court granted declarations sought by A concerning the proper interpretation of relevant provisions of the Wellington City District Plan ("the plan") ("the plan provisions") and held that the plan did not permit the structure. WEL appealed against the EC decision but, after enforcement orders were issued, began demolishing the structure and filed a notice discontinuing its appeal. Wellington City Council ("the council"), which was the respondent in the EC decision, had filed a notice of intention to appeal and be heard on the WEL appeal under s 305 of the RMA in order to defend its interpretation of the plan provisions.

The Court now stated that the council still wished to pursue its own appeal from the EC decision in order to obtain clarity as to the proper interpretation of the plan provisions. The issue was whether it might do so under the relevant provisions of the RMA and the High Court Rules. The Court considered the provisions of ss 299-307 of the RMA, noting that counsel were agreed that if the council were able to pursue the matter and ultimately succeeded, the position would be that: the enforcement orders would remain valid and in force; A could reactivate their application for a further enforcement order aimed at preventing WEL from building similar structures in future; but, in the absence of such an order, WEL might conceivably build another structure which complied with the council's interpretation and which was offensive to A.

While noting that that A did not wish to continue defending the appeal, the Court stated that the proper interpretation of the plan was of ongoing practical and legal concern for the council, and it should be able to continue with the appeal. If the council had merely filed a notice of intention to appear under s 301 of the RMA, its rights in relation to the appeal would cease upon abandonment by WEL of the appeal. However, the additional step taken by the council of filing a notice under s 305 of the Act signalled a change in status and an intention to take an independent and more substantive position. In this regard, the Court considered that filing a s 305 notice could be seen as akin to filing a cross-appeal under r 20.11 of the High Court

Rules. Counsel for A submitted that s 305(3) of the RMA did not incorporate s 300(5), which required a notice of appeal to identify, inter alia, the relief sought. Counsel for A further submitted that, in contrast, the omission of a requirement that a notice under s 305 should specify relief meant that such a notice was not intended to give rise to any independent substantive remedy. The Court stated that the relief sought was a requisite component not only of a notice of appeal under s 300 of the Act but also of the equivalent High Court rules dealing with appeals and cross-appeals. Further, the Court considered that it was arguable that such rules (rr 20.9(1) and 20.11(3)) were themselves at least indirectly applicable by virtue of the fact that s 305(3) of the RMA incorporated s 299. The Court concluded that the fact that the requirements of s 300(5) of the RMA were not incorporated into s 305 was not enough to tip the balance in A's favour. The Court considered that it followed that, if the filing of a notice under s 305 of the RMA was analogous to a cross-appeal, then the discontinuance by WEL of its appeal did not mean that the council could not pursue the matter alone; this appeared to be quite clear from r 20.11 of the High Court Rules. While A were disappointed by the council's apparent change in stance, this was not a case where they had relied to their detriment on the council's earlier advised position. Lastly, the Court said it would remain open for the council to apply to the Court for an extension of time under s 306 of the RMA for bringing an appeal under s 299. The Court found that the council had a legitimate interest in the issues raised by the WEL appeal and there was necessarily a wider public interest in the proper interpretation of the plan. The council took all the appropriate steps to enable its position to be advanced and dealt with in the context of the appeal. The change in circumstances caused by WEL's discontinuance was not of the council's making or within its control.

Accordingly, the Court found that: the council's appeal remained extant notwithstanding WEL's discontinuance; A would need to consider whether they wished to be heard in the council's appeal; and, if they did not, then in all likelihood counsel would be appointed as amicus curiae to assist the Court. The Court made directions accordingly. The Court considered that costs should lie where they fell.

Decision date 7 March 2016; Your Environment 8 March 2016 (For the previous report see Newslink December 2015 – RHL.)

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