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Legislation Committee Case-notes - July 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 "Alert24 – 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 decision on appeal against conditions of consent to a rural subdivision near Portland, Whangarei which resulted in deletion of covenants and consent notice conditions requiring stock management and weed control;
- A successful appeal against refusal of consent to modify an archaeological site in Taranaki to establish an oil & gas extraction facility in the Waitara area;
- A prosecution of a land-owner for doing extensive earthworks to its property near Dunedin without the necessary resource consents;
- An appeal against grant of consent to a non-complying “over-density” residential development at Mt Albert, Auckland. The decision clarified the status of the consent order;
- A decision on costs arising from a dispute involving restrictive covenants affecting neighbouring properties near Hoon Hay, Christchurch;
- An interim decision of the Environment Court which had require security for costs on a further appeal involving a saga of unsuccessful applications for subdivision consent of land at Waitakere, Auckland.

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CASE NOTES:

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Puwera Māori Ancestral Land Unincorporated Group v Whangarei District Council _ [2016] NZEnvC 94

Keywords: subdivision; conditions; jurisdiction; Maori values; ancestral land

This decision concerned an appeal concerning conditions of consent regarding a subdivision of a block of land at McGill Road, Portland. Puwera Maori Ancestral Land Unincorporated Group and Dr J Panoho (“P”) (together “the appellant”) appealed conditions relating to a no-stock covenant and weed management conditions requiring the preparation and implementation of weed control. Whangarei District Council (“the council”) agreed that some of the weed management conditions could be deleted, but wished to retain those relating to the construction of a road. The council sought to extend the no-stock covenant to a bush protection covenant with specified exemptions.

The appellant argued that the imposition of a covenant regime was inappropriate in the circumstances. The Court stated that the council and the Court were empowered to impose conditions that would require consent notices to be registered against the title to protect continuing obligations. The Court considered the merits, referring to matters including: the effect

of an agreement between the council and P; the process for consent; the evaluation of conditions; an access road; and ecological and Maori values.

The Court stated that it must reach a reasonable and proportionate response to the issues in the case. It concluded that the placement of the road and its impact on the ecological areas were the consequence of the council and that any obligation to manage weeds in Lot 3 was on the council in terms of its obligation to maintain the road. As to the no-stock covenant the Court stated that this condition and any appropriate covenant would be less effective in achieving the desired ecological outcome than allowing the land to be managed by the owner unencumbered by those controls. A bush covenant was beyond jurisdiction and would involve unnecessary and unreasonable constraints on use of ancestral land by the owners in maintaining their relationship with the land.

The Court stated that under the RMA there was no justification on the facts of the case for the imposition of conditions controlling stock and requiring weed management. It further stated there was no merit in the retention of those conditions, or requirement for consent notices and that all the relevant conditions could be deleted without affecting the proper operation of the consent. Subdivision consent was confirmed subject to the deletion of specified conditions. Any application for costs was to be filed within 20 working days.

Decision date 15 June 2016 Your Environment 16 June 2016

(Note – this decision does not limit use of “Augier” conditions but conditions requiring registration of covenants under Section 108 RMA may not be included in subdivision consents – RHL.)

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Greymouth Petroleum Ltd v Heritage New Zealand Pouhere Taonga [2016] NZEnvC 11

Keywords: heritage protection authority; archaeological site; interpretation; Maori values; natural justice

Greymouth Petroleum Ltd (“GPL”) appealed against the decision of Heritage New Zealand Pouhere Taonga (“HNZ”) to decline GPL’s application for an authority to modify or destroy an archaeological site (“the authority”). The application was made under s 44(a) of the Heritage New Zealand Pourere Taonga Act 2014 (“the HNZPTA”) and related to earthworks to be undertaken by GPL in a site in the Waitara Valley in Taranaki. GPL wished to establish an oil/gas well site, accessway and pipeline in an area specified as Kowhai D. The grounds for declining the application were that the area had significant Maori values that warranted protection and it was not possible to offset adequately the adverse effects of the proposal. HNZ had been informed by Otaraua Hapu (“Otaraua”) that a significant ancestor of Te Atiawa, Wiremu Kingi Te Ranitake (“the ancestor”), was buried in the Waitara Valley.

The Court considered the proposal, noting that the most substantial structure would be the drilling rig. In 2014, GPL obtained a thorough archaeological assessment of Kowhai D and the works which revealed no archaeological sites or material in the proposed development area. Notwithstanding this, GPL applied for the authority as a precautionary measure. The Court noted that although the Maori values or cultural values referred to in the HNZ decision related to the contended place of burial of the ancestor, HNZ had sought to bring into play wider Maori or cultural issues relating to the vicinity. The Waitara Valley was historically an area of intensive Maori activity and occupation. GPL’s case was now that, in determining an application under s 44(a) of the HNZPTA, HNZ’s only considerations should be those relating to effects of the proposal on the archaeological site which the applicant sought to modify or destroy. GPL argued that HNZ’s considerations did not extend to consideration of wider, off-site, effects which in this case were non-physical effects on the contended burial place of the ancestor. In reply, HNZ submitted that the proposal would impact too greatly on the integrity of Maori cultural values “associated with the wider cultural landscape”.

The Court stated that the issue was a matter of statutory interpretation and addressed relevant provisions of the HNZPTA including ss 3-6, 39-41, 42-44, 46, 59 and pt 4. In this regard, the Court found it significant that the HNZPTA made a distinction between individual historic places (including archaeological sites) and wider historic areas. HNZ submitted that when regard was had to the purpose of the HNZPTA, its principles and its responsibility regarding the Treaty of Waitangi, it was appropriate to take a wider perspective of an application than just to consider its impact on the archaeological site itself, and that the location of such a site within a landscape of significant importance to Maori might justify declining an application. However, the Court
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found that it was abundantly clear from the provisions considered that the relevant sections of the HNZPTA addressed the protection of archaeological sites themselves and not the wider areas beyond them. The provisions of s 59(a)(i) of the HNZPTA addressed the cultural matters of particular concern in the present case, and it was clear that it was the cultural heritage value of the archaeological site itself and the factors which justified its protection which were the issues to be considered. The Court agreed with GPL's observation that if HNZ's interpretation was correct, and application for an authority would open Pandora's box, finding that HNZ's interpretation, of including the "broader cultural landscape", was clearly inconsistent with the provisions of pt 3 of the HNZPTA which were directly aimed at the protection of specific archaeological sites. The Court held that the purpose of subpt 2 of pt 3 of the HNZPTA was to protect the physical integrity of archaeological sites which persons sought to modify or destroy, and not to protect the wider cultural landscape. Accordingly, the Court held that HNZ was wrong in declining GPL's application on those grounds.

In the event that this finding was wrong, the Court then considered the merits of GPL's application, and in particular considered the evidence as to the location of the ancestor's burial place. While accepting the genuineness of the witness's belief as to the whereabouts of the grave, the Court was unable to find conclusively that the site indicated was the final resting place of the ancestor, even on the balance of probabilities, and stated that this finding meant that the appeal must succeed. However, on the basis that HNZ was entitled to take the wider approach, the Court considered the merits of the application. The Court stated that it was apparent that it was the mere presence of a drilling operation at Kowhai D that was at issue, which was an unquestionable concern relating to the relationship of Maori and their culture arising under s 59 of the HNZPTA. However, the Court found that the witnesses in reality sought a right of veto over activities in the vicinity of, but not within, their cultural sites and there were clearly arbitrary aspects to this view. The Court now found that in deciding whether or not to grant an authority to GPL in the present case, it was reasonable to balance the identified cultural considerations with the facts that: GPL's proposal did not involve any unacceptable disturbance or destruction of Kowhai D itself; Kowhai D was located between 300-500 m away from the cultural sites in question; the proposal would have no discernible effect on the cultural sites in question; and the proposal was to undertake a lawful use of land which was authorised pursuant to the exploration and mining permits held by GPL. When such matters were taken into account, the Court found there was no appropriate basis to decline the authority sought and the appeal was allowed accordingly. The decision was issued as an interim one to allow discussion to take place as to the appropriate conditions to apply to the authority when granted.

The Court made some comment on the process employed by HNZ in deciding the application for the authority. Of concern to the Court was the delay by HNZ in declining the application in order to give the Maori witness an opportunity to influence the position of Otaraua on the proposal, and further the council's decision to decline consent on the basis of the uncritical acceptance of the Maori witnesses as to off-site effects. Further, the Court found it entirely unsatisfactory that GPL was not given an opportunity to respond to these matters. The Court stated that in determining applications under s 44 of the HNZPTA, HNZ and the council were acting in a judicial or semi-judicial capacity and were obliged to act fairly and in accordance with the rules of natural justice. There were fundamental failings in fair process in the present case. Costs were reserved.

Decision date 24 February 2016 Your Environment 25 February 2016

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Dunedin City Council v South Sea Trust - [2016] NZDC 1024

Keywords: prosecution; earthworks; district plan

South Sea Trust ("the Trust") was sentenced after pleading guilty to three charges brought by Dunedin City Council ("the council"). The charges related to breaches of the district plan by the Trust when it undertook earthworks at its property at 158 Creamery Rd, Ocean View ("the site") over a period of two years without the required resource consent. The earthworks did not comply with minimum setback requirements, exceeded the permitted maximum change in ground level and exceeded the permitted volume of excavation and fill.

The Court considered the sentencing principles as established by the Sentencing Act 2002 and case authority. The environment affected was the rural neighbourhood but, although the development involved a very large volume of earthworks over an extended period, there were no discharges or other adverse effects outside the site. The Trust's fault was in not making
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inquiry before starting the works as to whether resource consent was required. The Court noted that consent had now been applied for and granted. The global starting point for the three offences was set at $25,000, from which 10 per cent was discounted for the Trust's lack of previous conviction, cooperation with the council and remediation. A further 25 per cent reduction was made for early guilty plea.

The Trust was fined $5,625 for each offence and ordered to pay solicitor costs of $113 and Court costs of $130 on each charge. Ninety per cent of the fine was to be paid to the council.

Decision date 7 March2016 - Your Environment 08 March 2016

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Munoz v Auckland Council - [2016] NZEnvC 87

Keywords**: **resource consent; consent order

This was an appeal against a decision of Auckland Council to grant consent to construct two additional residential units at 129 Taylors Rd, Mt Albert. Following mediation the parties had reached an agreement to resolve the appeal. The parties filed amendments to conditions and development plans in the form of a draft consent order. The Court reviewed the draft consent order and queried the appropriateness of the resource consent as the development was located within the Residential 6a Zone of the Operative Auckland District Plan – Isthmus Section and was a non-complying activity as it failed to comply with the density control of one residential unit per 375 m^2.

The Court stated that while the filing of a draft consent order does not render the Court *functus officio*, it recognised that the parties had reached an agreement involving mitigating factors and that these were sufficient that all parties considered the appeal was resolved in full. The Court stated that this determination was confined to the circumstances of the case and was not to be considered as a precedent for granting consents to reduced lot sizes in future. The Court, by consent, approved the consent and development plans, and these were attached to the decision. The appeal was otherwise dismissed. There was no order for costs.

Decision date 8 June 2016 Your Environment 9 June 2016

(*Functus officio* - means without further authority or legal competence. In this case the existence of an agreed consent order does not constrain the Court authority to determine the case. It will not agree to an inappropriate consent order – RHL.)

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Re Nikolaou _ [2016] NZEnvC 58

Keyword: costs

Christchurch City Council ("the council"), P Dorrance ("D") and J and T Purdie ("P") applied for costs against S Nikolaou, K and T Powers and N Truckell ("the applicants"). The applicants had made an application for an order recalling consent orders ("the orders") made by the Environment Court in August 2010 ("the orders"), but withdrew the application following a hearing. D, P and the applicants were neighbours, owning properties on Worsleys Rd, Christchurch. The background was a restrictive covenant registered in 2005 ("the 2005 covenant") against the title to P's property ("Lot 2"). An appeal by D against the grant of consent for a residential dwelling on Lot 2 was resolved by the orders. A further covenant ("the 2010 covenant") was entered into restricting further development on Lot 2. The terms of the 2005 and the 2010 covenants conflicted, and by the time P discovered this, P had spent $200,000 preparing Lot 2 for building a dwelling. P filed an application with the High Court for an order modifying the 2005 covenant. It was in response to P's application that the applicants sought recall of the orders in the Environment Court. Following the discontinuance of the recall application, P now sought between two-thirds and three-quarters of their incurred legal costs of $14,300, the council sought 75 per cent of its incurred costs of $11,054 and D sought a higher than standard costs award relating to his incurred legal costs of $18,000, which sum included costs of preparing the present costs application.

The Court considered the legal principles and case authority relevant to its discretion to award costs under s 285 of the RMA. The Court stated it was satisfied that it was just in all the circumstances to exercise its discretion to award costs for all three applications. While the Court accepted that the purposes of the recall application was collateral to the High Court dispute, the Court stated that the failure by counsel to work constructively to find a solution contributed

significantly to the costs incurred. While such failures were mutual, the Court accepted the submission that the application to recall the orders lacked merit and stated it was just in all the circumstances to award costs. The Court considered it reasonable to make an award of around 50 per cent of the costs incurred in each case. Accordingly, the applicants were ordered to pay costs as follows: to the council, $8,367; to P, $7,000; and to D, $7,000 (D's claim for costs relating to the present application was declined).

Decision date 20 April 2016 - Your Environment 21 April 2016

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Mawhinney v Auckland Council _ [2016] NZEnvC 93

Keywords: procedural; security for costs

This decision concerned a further appeal against refusal to process an application for subdivision of a property in Waitakere, Auckland. P Mawhinney ("M") had been adjudicated bankrupt in February 2015 on an adjudication of Environment Court costs of $475,242. In March 2015 M, in his capacity as trustee, was ordered to pay a further $18,706 to Auckland Council ("the council") which remained outstanding. In *Waitakere Forest Land Trust v Auckland Council* [2015] NZEnvC 179 the Court had discussed the position of the Trust. The Court stated the question was whether the position had materially changed since that decision.

The council considered the financial position of the Waitakere Forest Land Trust ("the Trust") had not improved since October 2015 and noted that $7000 security for costs had not been paid. Rates on the property in question had not been paid and the Trust had been struck off the companies register. M asserted that the Trust was able to pay the costs awarded against it and there was no reason to believe the Trust was unable to pay costs if it was unsuccessful. He asserted that the $7000 security for costs ordered in respect of the other proceedings would be sufficient to cover both matters and that they could be consolidated.

The Court found that a hearing was not necessary and that the matter could be considered on the papers. The Court stated that given the significant amount of Environment Court costs standing unpaid (and the subject of the bankruptcy) it was not satisfied that there was any public interest in ensuring that this appeal be determined. It concluded there should be a reasonable payment to defray the expenses of the council in the event that the appeal was unsuccessful and it was successful in an application for costs.

The Court found that the two proceedings should be listed under the same topic for the time being and would be managed jointly in the event that security for costs were paid; security for costs in these proceedings was set at $5,000 (in the event of consolidation they would be $12,000). The proceedings were stayed until further order of the Court subject to payment. If the security was not provided by 9 October 2016, the Court would review the proceedings to consider strike out as an abuse of process under s 279(4) of the RMA. Costs on this application were reserved.

Decision date 14 June 2016 - Your Environment 15 June 2016

(Note – Cases involving Mr Mawhinney have been reported in these case-notes on numerous occasions over the past few years – RHL.)

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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 July 2016

Report on improving Unit Titles Act welcomed

A report on reform of the Unit Titles Act by a group of professionals involved with bodies corporate has been welcomed by Building and Housing Minister Dr Nick Smith.

“The Unit Titles Act was updated in 2010 but there are three major areas where improvements are recommended in this report:

- Better disclosure rules to ensure people know earlier in the purchase process all relevant information about a unit or apartment and the governing body corporate.
- Accessibility of the dispute resolution processes and whether the Tenancy Tribunal is best placed to resolve disputes.
- The role of body corporate managers and their legal obligations.

“I have asked officials to review these reform proposals and report back to me in August [2016] on potential options. I have also asked for a report on recent changes to unit title legislation in Australia to help inform any policy changes.”

Please click the link for the full statement. Media Release

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Council classes 2000 North Canterbury properties as "high risk" for flooding. *The Press* reports the Waimakariri District Council has mapped all 24,800 district properties according to how prone they are to flooding, liquefaction, earthquake fault lines and coastal erosion. More than 2000 properties have been classed as being at "high risk" of flooding. Read the full story here.

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South Africa's parliament approves land expropriation bill_

(Reuters) - South Africa's parliament on Thursday (26 May 2016) approved a bill allowing state expropriations of land to redress racial disparities in land ownership, an emotive issue two decades after the end of apartheid.

Most of South Africa's land remains in white hands and many commercial and small-scale farmers are currently facing tough times because of the worst drought in at least a century.

The bill, in the works since 2008, will enable the state to pay for land at a value determined by a government adjudicator and then expropriate it for the "public interest", ending the willing-buyer, willing-seller approach to land reform.

Experts say it will not signal the kind of often violent land grabs that took place in neighbouring Zimbabwe, where white-owned farms were seized by the government for redistribution to landless blacks.

The ruling African National Congress (ANC) said the bill, criticised by some opposition parties and farming groups, would tackle injustices imposed during white-minority rule.

"The passing of the bill by parliament is historic and heralds a new era of intensified land distribution programme to bring long-awaited justice to the dispossessed majority of South Africans," the ANC said in a statement.

Some economists and farming groups have said the reform could hit investment and production at a time when South Africa is emerging from drought - pointing to the serious economic damage arising from farm seizures in Zimbabwe. They have also complained about a lack of clarity on how it will all work.

The ANC says land will only be expropriated after "just and equitable" compensation has been paid.

Around 8 million hectares (20 million acres) of land have been transferred to black owners since apartheid, equal to 8 to 10 per cent of the land in white hands in 1994. The total is only a third of the 30 percent targeted by the ANC.

The national assembly initially passed the bill in February before it was sent for amendments and it remains only for President Jacob Zuma to sign it into law.

For the latest news visit Reuters.com

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Government suspends sale of Invercargill state houses.

Radio New Zealand reports that the Government has put on hold the sale of hundreds of Housing New Zealand homes in Invercargill after the only group to submit a proposal pulled out. Pact withdrew from buying 348 houses in Invercargill because it did not fit with its plans to provide for the community. Read the full story here.

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ADLSI Property Disputes Committee releases updated Rulings Manual.

The ADLSI Property Disputes Committee has released an updated version of it Rulings Manual.

The revised manual includes the most recent decisions of the Committee. At its most recent meeting, the Committee resolved a dispute that focused upon two issues:

- What qualifies as “within a reasonable time” to prepare the Landonline workspace prior to settlement?
- If the vendor’s lawyer has not specifically stated in correspondence to the purchaser’s lawyer that they have prevalidated the e-dealing, then does that mean that they are not ready, willing and able to settle?

The Committee found that setting up the e-dealing on the date of settlement was not “within a reasonable time” and was in breach of clause 3.6 of the ADLSI/REINZ sale and purchase agreement.

On the second question, the Committee decided that a failure to specifically state that they had pre-validated the e-dealing to the purchaser’s lawyer does not by default indicate that the vendor’s lawyer is not ready, willing and able to settle. That depends on the circumstances and other evidence of their position.

Please click the link for the full statement and to download the manual. Media Release

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Firth not asked to pay lease for 30 years. *Stuff* reports that due to a mistake Firth Industries Ltd has been operating on New Plymouth District Council-owned land for 30 years without a valid lease, and without paying rent. Read the full story here.

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Argentine buyers may have to sell $6 million farm. The *Stratford Press* reports that Land Information Minister Louise Upston says that the Argentine investors granted permission by the Overseas Investment Office to buy Onetai Station in Taranaki might be forced to sell if it is established that they made false statements about their good character. The investors had previously been prosecuted for discharging toxic chemicals into a river in Buenos Aires. Read the full story here.

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Supreme Court declines leave to appeal in family water dispute. *Radio New Zealand* reports the Supreme Court has declined Simon Hampton's application for leave to appeal his unsuccessful challenge to Canterbury Regional Council's decision to grant his cousin Robert Hampton a water permit. The dispute between the cousins, who have neighbouring Canterbury farms, has gone on for eight years. Read the full story here.

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Insurance for title defects offered. Some lawyers recommend property purchasers take out conveyancing insurance to protect against problems with land title, writes Diana Clement for *The New Zealand Herald*. Read the full story here.

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Auckland housing accord below target. *The New Zealand Herald* reports that Housing Minister Nick Smith concedes it may be a challenge to achieve the Auckland Housing Accord's target of the creation of 39,000 new homes and sections by September this year. Read the full story here.
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Delays in Auckland building concrete supply. *Radio New Zealand* reports that Certified Builders Association chief executive Grant Florence says the high demand for concrete caused by Auckland's construction boom is resulting in delays to building projects throughout the city. Read the full story here.

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Tauranga CBD redevelopment opportunity. The *Bay of Plenty Times* reports that Tauranga Councillor Bill Grainger thinks that discovery of toxic mould and the vacating of badly leaking buildings in the centre of Tauranga had given the city council an opportunity to rebuild the downtown area in an inspired way. By its Civic Heart project, the council is seeking public feedback on redeveloping the area. Read the full story here.

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Wellington's Lombard Lane redevelopment begins. *The Dominion Post* reports that construction has started on a redevelopment of the area comprising Lombard Lane, Victoria St and Denton Park in Wellington as part of a collaboration between the public and private sectors. Wellington City Council and developer Luigi Muollo are working together to create retail and office spaces, a cafe and revamped park areas. Construction of the project is expected to be finished by May 2017. Read the full story here.

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Drilling started at Kawerau geothermal wells. *The Gisborne Herald* reports that drilling has begun on the $120 million Te Ahi O Maui power project near Kawerau. The drilling rig has been commissioned and the proposal is to build a 25-megawatt geothermal plant. Read the full story here.

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Waitara Lands Bill approved by council. *Radio New Zealand* reports that the New Plymouth District Council has unanimously adopted the Waitara Lands Bill, which if passed will pave the way for the freeholding of Waitara leasehold properties and return of reserve land. Read the full story here.

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First anchor tenant opens in Christchurch Innovation Precinct. Greater Christchurch Regeneration Minister Gerry Brownlee and Science and Innovation Minister Steven Joyce have welcomed the opening of Kathmandu's new worldwide head office in the Christchurch Innovation Precinct.

The Kathmandu head office will be located alongside several start-up firms and the precinct's other anchor tenants Vodafone and Wynyard Group. Other innovation agencies and collaborations, such as Callaghan Innovation, New Zealand Trade and Enterprise, and the ICT graduate school, are also looking at establishing a long-term presence in the precinct.

Please click the link for the full statement. Media Release

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$72,500 costs awarded to view-blocking fence victims. *The Dominion Post* reports that the Environment Court has awarded $72,500 to Peter and Sylvia Aitchison, whose views from their home in Roseneath, Wellington, were blocked by a fence built by their neighbour David Walmsely. The Court had held that the structure was offensive and objectionable to such an extent that it had an adverse effect on the environment. Read the full story here.

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