~~~~~~

Legislation Committee Case-notes - June 2016

Feedback Please! Any Feedback? Drop us a note!

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”.

The Case-book Editor Roger Low can be contacted through the National Office, or by e-mail, Roger Low<rlow@lowcom.co.nz>

~~~~~~

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

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

- A successful appeal against refusal of consent to an industrial activity on a site in a partly industrial area on the western fringe of Hastings;
- An unsuccessful appeal by the Royal Forest and Bird Protection Society against provisions in the New Plymouth district plan for protection of “significant natural areas”;
- A decision on an appeal by a community group against the effects of proposed intensification of activities on public reserve at Ellerslie, Auckland;
- A successful application for judicial review of a non-notified decision by Auckland Council to approve the demolition and replacement of a bungalow built in 1926 in a location where pre-1944 houses are “protected”;
- A decision of the Environment Court on the lawfulness of proposed “framework plans” in the proposed Auckland Unitary Plan.

~~~~~~

Log-in and download the case summaries and other news items at:
http://www.surveyors.org.nz/Category?Action=View&Category_id=655

CASE NOTES:

~~~~~~

JARA Family Trust v Hastings District Council _- [2015] NZEnvC

Keywords: resource consent; district plan; district plan proposed; objectives and policies; zoning; activity non-complying

JARA Family Trust (“JARA”) appealed against decisions by Hastings District Council to decline resource consents to construct an industrial workshop on land at 1139 Maraekakaho Rd, Hastings (“the site”). The site was situated in the Plains zone under the operative Hastings District Plan (“the OP”) and in the Plains Production zone under the Proposed District Plan (“the PP”). Under both plans the activity was non-complying, which engaged the provisions of s 104D of the RMA. JARA owned the land and, through a related company, operated a business of prefabricated construction of houses, and previously carried on business from land across the road from the site and wished to expand its business on the site. JARA submitted that the zoning in the OP and PP was unrealistic as the soil on the site was of poor quality and site already contained, authorised by resource consents, a dwelling and sheds for a mixed use industrial/commercial activity, although for a lesser scale than that proposed. Hastings District Council (“the council”) accepted that the proposal would produce not more than minor adverse environmental effects, but submitted that the activities were contrary to the objectives and policies of the OP and PP, and the proposal threatened the integrity of both documents.

The Court considered the existing environment, noting planning evidence that the site and its surroundings was an “orphaned historical industrial hub”, known as Irongate, which was intended to be zoned industrial in the future, and that there were already existing industrial uses in the Plains zone land. As the proposal passed the threshold of s 104D(1)(a), the Court

considered the provisions of s 104 and pt 2 of the RMA and stated that the regional planning documents relating to the effects of urban development encroaching on versatile land were of limited relevance because the land in question was not “versatile”. Assessed against the provisions of the district planning documents, the proposal required consent under several rules. The Court accepted that the relevant spirit and intent of the OP was to maintain the life-supporting capacity of the district’s rural resources and its soil resource, and that the policy direction of the PP was to provide areas for urban activity to keep the Plains focused on production. However, the Court stated that the reality was that the decision-makers of the past seemed not to have accepted the thrust of the plans and decisions were made which led to the present existing environment. Further, it was difficult to be critical of such decisions, given the poor quality of the soils in question. Considering the issue of plan integrity under s 104(1)(c) of the RMA, the council’s argument as to the adverse outcome of the loss of productive capacity of the soils by erecting buildings on them fell away. The plans did permit the erection of industrial buildings, if they were for processing or other horticultural or agricultural uses. The question then was whether the construction of buildings for a purpose unrelated to rural production in the present case would be to set a precedent which would significantly harm the integrity of the plan. As a matter of fact, the area surrounding the site had long since ceased to be dominated by truly rural characteristics. The Court employed the “reasonable person” test to state that such a person would call the area an industrial/commercial area: it been allowed to become a de facto industrial/commercial node, and there was no point in pretending otherwise. The Court stated that the “horse had bolted”, the site had ceased to be Plains land in a true sense, and to recognise this would not harm the integrity of the plans. The best that could be done was to stop such de facto development spreading outwards.

The Court turned to consider the proposal against the provisions of pt 2 of the RMA and concluded that overall, against the background of uses and activities which now existed in the immediate area, the proposal could be accommodated because it did not use finite resources which should be reserved for another use. For the reasons stated, the Court reached the opposite conclusion from that of the council. The appeal was allowed. Costs were reserved, but not encouraged.

Decision date 11 February 2016; Your Environment 12 February 2016

~~~~~~

Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council _ - [2015] NZEnvC 219

Keywords: declaration; enforcement order; district plan; natural character; forest indigenous; council procedures

Royal Forest and Bird Protection Soc of New Zealand Inc (“FB”) applied for declarations and enforcement orders under ss 311 and 316 of the RMA. The matter concerned the New Plymouth District Plan (“the plan”) which FB submitted failed to adequately recognise or provide for areas of significant indigenous vegetation and significant habitats of indigenous fauna, contrary to statutory obligations. Such areas were referred to as Significant Natural Areas (“SNAs”) and FB submitted that the council should change the plan to remedy such failure.

The Court considered the outstanding issues which were: what constituted a SNA; the extent of SNAs in the district; the extent of indigenous habitat loss in the district; methods provided by the council for protecting SNAs, and whether these provided the level of protection required by the RMA; the declarations sought by FB; and the enforcement orders sought by FB. After considering the plan criteria and the relevant provisions of the RMA, the Court concluded that SNAs were areas identified as such by applying the criteria in the relevant plan Appendices and the identified SNAs were significant areas of indigenous vegetation and/or significant habitats for the purposes of s 6(c) of the RMA. As to the extent of such areas in the district, the Court found from the evidence presented that there were probably between 326-361 SNAs which were not identified in the plan Appendices and accordingly not subject to the rules protecting SNAs from inappropriate development. The Court found that SNAs occupied an approximate area of 21,900 ha in the district. Turning to consider evidence relating to the extent of loss of indigenous habitat, the Court concluded that, although there had been only a small loss in the SNAs, the loss of indigenous vegetation had been in the areas most vulnerable to such loss, because further clearance would mean permanent loss of indigenous cover and the extinction of local species.
~~~~~~

The Court stated that the issue of the methods provided by the council for the protection of SNAs was at the heart of the proceedings. The council stated that it met its obligations under ss 6(c) and 31(1)(b)(iii) of the RMA through a "palette" of specified measures. The Court noted that the word "protection" was not defined in the Act, and adopted case authority that it meant to keep safe from harm, injury or damage, although the Court added a gloss on that meaning to imply that "adequate" such protection was required. It was clear that s 6(c) of the RMA imposed a duty on the council to protect SNAs. However, the Court found that a territorial authority was not necessarily obliged to achieve such protection by incorporating rules in its plan; the nature of the protection required was to be determined by the authority when preparing or reviewing its play under s 32 of the Act. In the light of that finding, the Court considered the methods, other than rules, provided in the plan for the protection of SNAs. The Court concluded that, viewed in their entirety, the range of methods, which included rules, now in the plan provided the protection of SNAs required by s 6(c) of the RMA. However, reliance primarily on QEII Covenants and associated methods to protect SNAs on private land did not provide the protection required by s 6(c) of the Act. Further, the Court found that reliance on community attitude to protect SNAs on such land was not adequate because it did not take account of differences in community attitudes and the high vulnerability identified of some SNAs.

The Court addressed the declarations sought by FB, together with s 310 of the RMA and found that the issue of the appropriate degree of protection required for areas of significant indigenous vegetation and significant habitats of indigenous fauna was an issue which it was empowered to consider under s 310(h) of the RMA. The Court found further that the council's duty to protect SNAs required application of the full range of methods provided in the plan, including identification of SNAs in the plan Appendices and the consequent application of rules to them, because the other methods relied on (covenanting under the QEII process and voluntary protection) did not provide an adequate level of protection. Accordingly, the Court made declarations that: council had a duty to recognise and provide for the protection of SNAs identified in the district; the plan methods, including application of rules, if implemented in their entirety, gave effect to the provisions of the New Zealand Coastal Policy Statement ("NZCPS") and Taranaki Regional Policy Statement ("TRPS") which sought to protect indigenous biodiversity; and the omission by the council to include in the plan Appendices the identified SNAs contravened the council's duty under ss 6(c) and 310(a), (c) and (h) and also failed to give effect to relevant provisions of the NZCPS and TRPS. The Court declined to make the enforcement orders sought by FB. Costs were reserved.

Decision date 12 February 2016; Your Environment 15 February 2016.

~~~~~~

Friends of Michaels Avenue Reserve Inc v Auckland Council - [2016] NZEnvC 5

Keywords: resource consent; conditions; reserve; land use; residential amenity; noise

This decision concerned an application by Auckland Council (Parks, Sports and Recreation) ("the council as applicant") to Auckland Council as consent authority ("the council") for a discretionary activity resource consent to authorise noise levels generated by organised winter sports activities on the upper and lower playing fields of Michaels Avenue Reserve in Ellerslie ("the reserve"), to install and operate floodlights in the lower fields, and to construct four sound barriers at various points at the upper field. Friends of Michaels Avenue Reserve Inc ("the Friends") and Mr Shen ("S"), the owner of a property close to the upper field, appealed on issues relating to noise and effects on residential amenity, and sought conditions controlling hours of play, especially in the evening.

The Court stated that all parties sought to progress the appeal in a realistic and pragmatic way: the Friends acknowledged the need for intensified use of the reserve; and the council as applicant sought site intensification while trying to retain residential amenity. The Court considered that there should be a Management Plan for this and for other reserves in the region which would manage cumulative effects for activities taking place, hours of operation, lighting and noise, and that such a Management Plan should be consultative. The Court stated that the mechanism of using Community Liaison Groups and Management Plans had been highly effective in other contentious areas, such as ports and airports, and the Court considered that such an approach would be of significant benefit in the case of reserve intensification generally. The Court acknowledged the "measured and reasonable" evidence given by the planning witnesses in the present case and the concessions made by either side.
~~~~~~

After describing the reserve layout and usage, the Court noted that floodlights had been in operation for years in the upper field, and the exceedance of the district plan noise limits had become evident. Under the plan, the site was zoned Open Space 3 and 4. Open Space 3 provided for noise levels of up to 55dBA L_{10} as permitted between specified hours. Playing soccer and cricket was permitted provided the relevant plan noise control was met. The Court considered expert noise evidence and evidence regarding lighting effects and hours of operation, and the odour effects of the use of the rubber crumb artificial turf on the upper field. The Court concluded that the key mechanism for intensification of sporting use of the reserve and for achieving residential amenity at an appropriate level, was the use of a Management Plan approach, with a Community Liaison Committee being used to contribute and comment on the plan, identifying areas of concern before it proceeded to council level. In the present case, the council accepted that such an approach would be appropriate.

The Court found that consent for the modified range of hours and subject to the general conditions now proposed by the council was appropriate. The conditions of consent were attached, as a guideline, as Annexure E. The Court concluded that a discretionary consent should be granted, subject to finalising the conditions. Such consent would provide for greater future physical activities while achieving a standard of residential amenity appropriate to the area, thus meeting the purpose of the RMA. The council was directed to prepare and circulate to all parties a new set of conditions and its proposal regarding the Community Liaison Committee, and the parties were directed to respond, within the specified timetable. Costs were reserved.

Decision date 17 February 2016; Your Environment 18 February 2016.

~~~~~~

Marche Ltd v Auckland Council - [2016] NZHC 145

Keywords: High Court; judicial review; resource consent; public notification; dwelling; district plan rules; council procedures

The High Court considered an application for judicial review of decisions by independent commissioners of Auckland Council ("the council") that a resource consent application not be notified and be granted. G Deeney owned a bungalow, built in 1926, ("the dwelling") at 48 Seaview Rd, Remuera ("the site") and sought to remove the dwelling and build in its place a new two-storey house. Neighbours of the site challenged the council's decision not to notify the application ("the notification decision") and to grant consent and asked for both council decisions to be set aside.

The Court considered the notification decision together with certain email exchanges between a council commissioner and council officers. The Court noted that these exchanges showed elements of confusion or misunderstanding on the part of the commissioner. First, one email referred to cl 4.3.2.6 of the district plan as "trumping" the special circumstances in s 95A(4) of the RMA; the Court found this was an inappropriate reference as the provisions sat side by side with neither "trumping' the other. Second, the commissioner erred in an emailed reference to proceeding on a non-notified basis as long as the application was "amended as per r 4.3.2.6" of the plan; in fact, that rule did not deal with amendment of applications. Further, the notification decision referred to the general discretion to notify under s 95A(1) of the RMA; however, the Court stated that the relevant subsection for the commissioners to consider was not s 95A(1) but was s 95A(4). The Court stated that, looking closely at the terms of the notification decision, it was unable to discern the reasons of the decision. The decision stated that there were "no relevant reasons" for notification, which raised several questions: what factors were considered by the commissioners; what weight was given to the factors considered; and how was the decision on relevance reached? Having reviewed case authority relating to the rationale for requiring reasons for a decision, the Court did not consider that the reasons provided by the commissioners in the present case for the notification decision were adequate. Taking this together with the elements of confusion and misunderstanding previously referred to, and given the brevity of the reasons provided, the Court considered that the notification decision was made on the basis of an error of law.

The Court stated that the notification decision was obviously derived from a template and that, although this might be beneficial to good decision-making, care must be taken to ensure that such a template was appropriate to the case at issue. In the present case, the template made reference to irrelevant matters such as marine title groups.
~~~~~~

The Court referred to the High Court decision in *Urban Auckland v Auckland Council* [2015] NZHC 1382, where the Court raised issues about discussions between certain council officers. The Court stated that in the present case, there appeared to have been similar discussions: three hours before releasing his decision that the application be non-notified, the duty council commissioner recorded his view to a council planner that the application should be notified. This reinforced the Court's concerns about the lack of reasons provided and the commissioner's potential misunderstanding of the relevant law.

The Court quashed the notification decision and therefore found that the substantive decision to grant consent could not stand. The application for resource consent was referred back to the council for reconsideration. The plaintiffs were entitled to costs.

Decision date 18 March 2016; Your Environment 21 March 2016

~~~~~~

Re Auckland Council - [2016] NZEnvC 56

Keywords: declaration; district plan proposed; jurisdiction; activity; resource consent; interpretation

Auckland Council ("the council") applied for four declarations under pt 12 of the RMA concerning the lawfulness of the inclusion of Framework Plan ("FP") provisions in the proposed Auckland Unitary Plan ("PAUP"). The provisions provided that consent was required for the FP itself, and that the activity status of land use activities would differ depending on whether that has first been done. The council sought the declarations because, during the course of the hearings of the Independent Hearings Panel considering submissions on the PAUP, questions were raised about the lawfulness of the FP provisions, and as to whether they were ultra vires the RMA. The Court noted that numbers of councils had been including similar provisions in plans, under various names, and due to widespread national interest in the issue a full Court of three Environment Judges heard the case, with the assistance of Amicus Curiae Dr R Somerville QC ("the Amicus").

The Court emphasised that its enquiry was strictly one of legal interpretation and that the merits of the FP technique were the province of the Independent Hearings Panel. The Court considered the provisions of the PAUP at issue: the definitions of "Framework Plan" and "approved Framework Plan" and rules in the PAUP relating to activities. The Court considered the cases of parties in support of the application, the cases of parties in opposition to the application and the submissions of the Amicus. The council summarised the FP's features as being a voluntary resource consent, applying within specific precincts, enabling landowners to achieve integrated development or subdivision, authorising infrastructure, generally applied for as a restricted discretionary activity, and operating as an assessment criterion for subsequent development /subdivision consent applications. Submissions against the application included that, while FPs might be useful tools, they were not a necessary feature of integrated management and there was no reference to them in the RMA or elsewhere. Further, it was submitted that the FP process would enable an outcome to be achieved which should properly be achieved by a plan change, including notification and public participation. It was argued that a consent which would still require the exercise of discretionary power would be invalid, as was recorded by the Court in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93.

The Amicus submitted that, following the reasoning in the *Queenstown Airport* decision, in which the instruments concerned were called Outline Development Plans ("ODPs"), the Court held that the term ODP did not constitute an "activity", and a resource consent must be for an activity. The Amicus now argued that classifying an activity's status on the basis of the absence of a consent granted for FP activities would arguably be ultra vires because a plan was not an activity for which consent could be sought.

In response to concerns raised by parties in opposition, and by the Amicus and the Court, the council submitted revised provisions, and posed four questions for determination. These were: what was a "framework plan application"; what were the statutory foundations for the revised Chapters G and K of the PAUP; did the revised provisions require resource consent "approval" for something which was not an "activity"; and was it unlawful for the categorisation of an activity to change on the approval of a framework plan application? The Court stated that the council now intended that FP applications were for resource consents for certain land use activities. However, the Court concluded that the revised definition of "framework plan
~~~~~~

application" was still uncertain. Further, the matters over which the council proposed to restrict its discretion would arguably be void for uncertainty. The Court noted that in *Queenstown Airport* it was held that a rule which did not specify the activities which were expressly allowed subject to a grant of consent would be ultra vires. In the present case, while the general subject matter of the activities for which land use consent was required as part of a FP application was identified in the PAUP, most of the detailed activities for which consent was required were not identified. The Court considered whether a future grant of resource consent was a matter over which the consent authority's discretion might be restricted. The efficacy of such a rule depended on the assumption that the land use consents for the FP were likely to be given effect to, and this was not always the case. The Court's view was that the issue of consistency with a consent for a FP was a matter best left to an assessment criterion in the plan.

The Court concluded that the council's intention was to include a provision in the PAUP enabling an integrated application for a bundle of land use consents, and the Court's tentative view was that such a rule was intra vires the RMA. However, the Court was not satisfied that that this had been achieved under either set of provisions offered by the council. There was a legal uncertainty arising in relation to the phrase "approved framework plan application" and, following *Queenstown Airport,* a rule which did not specify the activities which were expressly allowed subject to a grant of consent were arguably ultra vires s 77A(1). The land use activity rules were arguably ultra vires ss 77A and 77B as the activity for which land use consent was required was not identified. Alternatively, the rule might be void for uncertainty. Accordingly, the Court declined to make declaratory order A. As the context for the other orders was so removed, they were also declined. The decision was issued as an interim one, to enable the parties to submit material which might allow the Court to make two positive declarations, as described by the Court.

Decision date 19 April 2016; Your Environment 20 April 2016.

~~~~~~

The above brief summaries are extracted from "Alert 24 - Your Environment" and "Alert 24 – Land" published by Thomson Reuters and are reprinted with permission. They are intended to draw attention to decisions that may be of interest to members. Please consult the complete decisions for a full understanding of the subject matter. Should you wish to obtain a copy of the decision please phone Thomson Reuters Customer Care on 0800 10 60 60 or by email to judgments@thomsonreuters.co.nz.

~~~~~~

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

~~~~~~
~~~~~~

Other News Items for June 2016

Overseas residential property buyers may face land tax _ *The New Zealand Herald* reports that the Government is collecting evidence on the effect on New Zealand house prices of speculation by foreign-based house buyers. The Prime Minister says that if it is proved that this is pushing up house prices then a land tax may be introduced on non-resident house buyers. Read the full story here.

~~~~~~

$50 million Christchurch tower approved._ *The Press* reports that the $50 million rebuild of a central Christchurch apartment tower has been approved. The Verve, an 11-storey apartment complex will contain 62 apartments in two adjacent buildings on Peterborough St and is due to be finished in late 2017. Read the full story here.

~~~~~~

$250 million plan for commercial precinct at Jack's Point welcomed. The *Otago Daily Times* reports that local residents at Jack's Point have welcomed news of a $250 million-plus commercial precinct at Jack's Point near Queenstown. Village hub plans include a 172-room waterfront hotel and 120 units, including retirement living and staff housing, bordering the Clubhouse and Restaurant and Lake Tewa. Read the full story here.

~~~~~~

Dunedin council mud-tank maintenance failure. The *Otago Daily Times* reports that 75 per cent of the mud tanks in South Dunedin have not been properly maintained, according to a report into the flooding event in June. The report criticised both the management of the city's mud tanks by contractor Fulton Hogan and also the failure by council staff to oversee the contract with the contractor. Longer-term concerns about South Dunedin's stormwater network, mostly installed in the 1950s and 1960s, were also covered by the report. Read the full story here.

~~~~~~

Proposed shared track between Avondale and New Lynn. *The New Zealand Herald* reports that Auckland Transport has revealed its plans for a new $17.7 million shared walking and cycling track between New Lynn and Avondale and is asking for public comment. Read the full story here.

~~~~~~

Halfway Bush subdivision declined. The *Otago Daily Times* reports that Dunedin City Council's hearings committee has declined a consent application for a 34-lot subdivision proposed for Dalziel Rd, Halfway Bush. Read the full story here.

~~~~~~

Auckland Rapid Transit Network plan open for consultation. *The New Zealand Herald* reports that Auckland Transport, Auckland Council and the New Zealand Transport Agency have prepared plans for Auckland Rapid Transit Network which are now open for public consultation. The network consists of rail, light rail and busways that will operate at a frequency of least every 10 minutes, targeted for areas with planned growth in housing and employment. Read the full story here.

~~~~~~

Regenerate Christchurch to consider red zone water course. *The Press* reports that Gerry Brownlee and Mayor Lianne Dalziel have asked the Regenerate Christchurch organisation to develop a water course in the red zone along the Avon River as a first priority. Read the full story here.

~~~~~~

Marlborough District Council's state of the environment report issued. The *Marlborough Express* reports that the state of the environment report launched by the Marlborough District Council reveals the district's land, air, freshwater and sea environmental health. The environment committee chairman Peter Jerram said the report revealed pressures faced by the region regarding soil conservation, climate change, natural hazards, overfishing, and water pollution, but that the council had made significant investment in community infrastructure to reduce discharges to waterways and to upgrade water treatment facilities. Read the full story here.

~~~~~~

$250 million Queenstown retirement village proposal. The *Otago Daily Times* reports that a $250 million retirement village proposal will be considered as a special housing area by the Queenstown Lakes District Council. Tauranga's Sanderson Group proposal would have 227 villas, 72 serviced apartments and a 72-bed care facility, with rest home, hospital and dementia care. Read the full story here.

~~~~~~

RMA reviews a "potential policy train wreck. *Radio New Zealand* reports that Sir Geoffrey Palmer, addressing the New Zealand Planning Institute conference in Dunedin, has said three separate policy reviews regarding the RMA are a recipe for confusion and a "potential policy train wreck". The reviews are the select committee inquiry into the Resource Legislation Amendment Bill, the Productivity Commission's inquiry into urban planning and Local Government New Zealand's review of the RMA system. Read the full story here.

~~~~~~

Redevelopment for Newmarket. *The New Zealand Herald* reports that the Warehouse Group is selling a 1.4 ha site in Broadway, Newmarket and is looking for a development partner in a proposal to create new retail space, a hotel, offices and apartments with car parking. Read the full story here.

~~~~~~

UK: Lawyers warn against privatisation of Land Registry. *The Law Society Gazette* reports that the City of London Law Society warns a proposal to privatise the Land Registry could damage the "fundamental foundation stone" of the UK's property market. Read the full story here.

~~~~~~
~~~~~~