Newslink Case-notes for July 2017 prepared 20 June 2017.

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Legislation Case-notes – July 2017

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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".

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Summaries of cases from Thomson Reuter's "Your Environment".

This month we report on five court decisions covering diverse situations associated with subdivision, development and land use activities from around the country; most result from decisions made in district and unitary plans:

- One of many decisions of the High Court dealing with alleged errors resulting from decisions of the Auckland Council resulting from some of its decisions to accept recommendations by the independent Review Panel on the Auckland Unitary plan;
- The settlement of an appeal to the High Court by consent in relation to rules in the Christchurch Replacement District Plan restricting earthworks potentially affecting *waahi tapu* at Kaitorete Spit at Lake Ellesmere;
- An unsuccessful application for a declaration to the effect that the appellants were not bound by the position of a dwelling shown on a site plan which was attached to a consent order for a property near Mosgiel;
- An appeal to the High Court by the Independent Maori Statutory Board in Auckland against decisions of Auckland Council about sites of value for mana whenua in regional and district provisions of the proposed Auckland Unitary Plan;
- A decision on costs following a successful appeal appeals regarding the designation of a road through a property on Auckland's North Shore.

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CASE NOTES JULY 2017:

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Ancona Properties Ltd v Auckland Council - [2017] NZHC 594

Keywords: High Court; district plan proposed; error; consent order

The High Court considered requests for consent orders by seven appellants. The appeals were against the recommendations of the Independent Hearings Panel ("IHP") regarding the Auckland Unitary Plan ("AUP").

After considering each of the appeals (the details of which are set out below) the Court stated it was satisfied that the consent orders should be granted for the following reasons: the orders reflected the proper resolution of the issues of law raised; the proposed amendments and the resolution of the appeals were consistent with the purpose and principles of the RMA; approval of the orders would also be consistent with the purpose and intent of the Local Government (Auckland Transitional Provisions) Act 2010, ("the LGATPA") namely pt 4, which provided a streamlined process to enable the AUP to become operative within a short time; the orders might be granted under r 20.19 of the High Court Rules 2016, ss 300-307 of the RMA and s 158 of the LGATPA; and the consent orders were within scope of the appeals.

The Court noted what it referred to as a curious feature of the AUP process, under which Auckland Council ("the council") might accept or reject an IHP recommendation. A decision to accept an IHP recommendation might be appealed to the High Court on a question of law,

while a decision to reject an IHP recommendation triggered a right to appeal to the Environment Court. Where the High Court made a decision to substantively amend the AUP, this would usually trigger the statutory right to appeal to the Environment Court, because the effect of such amendment was to reject the IHP recommendation. The Court stated that this statutory right of appeal should be activated, subject to futility. By "futility", the Court meant situations where: there were no other submitters on the relevant part(s) of the proposed AUP; any submitters consented to the changes; or the changes were of a technical nature only. On the facts of each of the present appeals, the Court considered that a referral to the Environment Court would be futile and unnecessary.

The Court described the details and errors of law alleged in each of the appeals. First, Anaconda Properties Ltd alleged that the council erred in accepting IHP recommendations relating to inconsistent setback provisions. The council now accepted there was internal inconsistency between the relevant text and the diagrams and that a drafting error had been made. The Court was satisfied that the consent order sought should be made and stated that, as the council and the only party expressing interest in the appeal had consented, the order should be final. The second appellant, Bayswater Marina Ltd, alleged there had been errors of law made regarding the form and content of pre-conditions for the application of discretionary status for certain activities in the Bayswater Marina Precinct. The council accepted that a drafting error had been made. The Court stated that the error must be corrected and, as the council and the only other interested party agreed to the relief, the consent order was final. The third appellant, P and R Reidy and others, raised issues relating to a mapping error made by the IHP to certain land and sought a rezoning, alleging that the council erred in accepting two contradictory recommendations. The council accepted that an error of law had been made. The Court was satisfied that the amendments sought were necessary and that the consent order should be final.

Southern Gateway (Manukau) Ltd was the fourth appellant considered by the Court and it appealed concerning two technical errors relating to activity status relating to certain activities in the Puhinui Precinct. The council conceded that an error of law had been made. The Court was satisfied that the errors, which were substantive, should not be referred back because there was no disagreement between experts as to the appropriate status, and the proposed amendment relating to the construction performance standard was only technical in nature. Further, the Court considered that the wider public interest, including the interest of the parties, dictated a swift resolution. Accordingly the Court made the consent orders and said they were final. The fifth appellant, Waste Management New Zealand Ltd, had sought the rezoning of a site in Albany. It appealed on the ground that the IHP erroneously assumed that the site's use was not industrial. The council acknowledged that this was an error of law. The Court was satisfied that the IHP misapplied the statutory criteria to the site and that the consent order should be made and was final.

The sixth appeal, by Waytemore Forests Ltd, related to the zoning to apply to the Hunua Forest. The council accepted that there was an error made which materially affected the correct form of the Unitary Plan GIS Viewer relating to the Forest. The Court was satisfied that the consent order sought should be made and be final. The last appeal, by M Woolmore and others, sought additional subdivision allocations for their properties. The appellants alleged that drafting errors were made regarding the correct subdivision allocations which should be made to their sites. The council accepted that such drafting errors had been made. The Court agreed that consent orders, correcting the errors, should be made with final effect. The appeals were allowed. Costs were directed to lie where they fell with regard to all the appeals, with the exception of the Ancona appeal, for which costs were reserved.

Decision date 12 May /2017 - Your Environment 15 May 2017

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Te Rūnanga O Ngāi Tahu v Christchurch City Council _ [2017] NZHC 541

Keywords: High Court; district plan; excavation; rules; Maori values; farming; ancestral land

By this decision the High Court resolved, by consent of the parties, the appeal by Te Runanga O Ngati Tahu ("Ngai Tahu") against one aspect of the decision by the Independent Hearings
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Panel (“the Panel”) on the proposed Christchurch Replacement District Plan (“the PRP”). Ngai Tahu’s appeal was limited to rule 8.5A.3.b.iii (“the rule”) of the PRP, the effect of which was that earthworks less than 0.6m deep, within wahi tapu/wahi taonga sites of Ngai Tahu cultural significance, and on Kaitorete Spit, were exempt from any requirement to obtain resource consent (“the exemption”). The Panel approved the exemption in the rule to accommodate normal farming activities of inserting rammed posts for fencing, holes for tree planting and the maintenance of existing farm tracks.

The Court reviewed the background, noting that within the area there were numerous sites of particular cultural interest to Ngai Tahu, marked and mapped in the notified version of the PRP, as requiring resource consent as a restricted discretionary activity, without the exemption. The Court noted that under the rule, containing the exemption, as approved by the Panel, Ngai Tahu would be unable to make any submission or comment on an excavation which involved an interference less than 0.6 m deep. Further, Christchurch City Council (“the council”) would have no opportunity either to decline consent or impose conditions to protect Ngai Tahu’s cultural values. The parties now agreed that the appeal should be allowed and asked the Court to delete the exemption.

The Court stated it was satisfied it had jurisdiction to amend the rule as sought by the parties by allowing the appeal on the ground that there had been errors of law. The Court was not satisfied that one such error of law was a breach of natural justice. However, the Court found that the Panel erred in deciding that principles of coherence and consistency required a rule which was parallel to a different rule dealing with a specific site in North Belfast. That site was not included in the Schedule of wahi tapu/wahi taonga sites in the PRP, and the relevant issues were quite different from those in the present case. Further, the Court accepted that the exemption was contrary to the statutory obligation imposed under ss 6-8 of the RMA and did not give effect to the higher order planning documents including the New Zealand Coastal Policy Statement and the Canterbury Regional Policy Statement. Those provisions related to recognition of the principles of the Treaty of Waitangi and the role of tangata whenua as kaitiaki, in addition to the relationship between Ngai Tahu, their culture and traditions and their ancestral lands, and wahi tapu and taonga sites. Furthermore, the Court accepted that the exemption would frustrate the ability of the council and Ngai Tahu to achieve or implement specified policies of the plan as determined by the Panel.

The parties were agreed that the appropriate relief was for the Court to exercise its discretion and delete the 0.6 m earthworks exemption from the rule and resolve the appeal as sought. The Court stated it was appropriate to do so as all parties agreed that any person who might have an interest in the appeal had had an opportunity to participate in the hearing process and through the service of the notice of appeal. The proposed amendment was consistent with the purpose and principles of the RMA, especially pt 2, and it was not necessary to remit the matter back to the Panel, given the narrow scope of the issue. The Court concluded that the settlement and amendment amounted to a just, speedy and inexpensive way to determine the proceeding. Accordingly, the appeal was allowed and the Court ordered the council to amend the PRP as set out in Appendix 1 to the decision. There was no order as to costs.

Decision date 21 April 2017 - Your Environment 26 April 2017

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Hood v Dunedin City Council _ [2017] NZEnvC

Keywords: resource consent; interpretation; dwelling; declaration

K and S Hood (“H”), who represented themselves, applied for a declaration to the effect that they were not bound by the position of a dwelling shown on a site plan which was attached to a consent order (“the order”). The Court issued the order in June 2015, following the resolution of H’s appeal against the grant by Dunedin City Council (“the council”) of resource consent (“the consent”) to establish two residential units on a rural residential site. The units were to be established within one building at 482 Riccarton Rd West, Mosgiel and approvals by the owners of neighbouring properties, at 480 and 484 Riccarton Rd West, were attached to the original consent application, along with the site plan showing the location of the dwelling. H now wished to shift the location of the dwelling 50 metres to the north of the position shown on the site plan and sought a declaration that this was permitted. The council opposed such a declaration,
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submitting that H were restricted to what was applied for and by the conditions and site plan which formed part of the consent. The council said that because the application and subsequent consent order specified the location of the dwelling, any change that was not “generally in accordance with” the site plan must be approved by a separate process.

The Court considered case authority relating to scope, including the High Court decision in New Zealand Wind Farms Ltd v Palmerston North City Council [2013] NZHC 1504, upheld by the Court of Appeal. The Court said that a resource consent was limited by the terms of the relevant application and that the council, and the Court, had no jurisdiction to grant a consent which extended beyond the original application’s ambit. In the present case, condition 1 of the consent contained the words “generally in accordance with”, a phrase frequently used in conditions. Case authority had established that the use of the word “generally” in a condition did not affect its validity; it was intended to permit minor variation to the activity described, but not a material change. The Court agreed with the council that the use of the phrase gave the applicant “a little wriggle room” but not so much as would disadvantage any person who had chosen not to become involved, based on plans they were shown depicting the location. In the present case the applicants wished to move the location some 50 metres, which would alter the assessment of effects and could change how the neighbours viewed the proposal. It would be unfair to allow the change sought without giving the neighbours the opportunity to express their views. The Court concluded that the movement in location of 50 metres was material and could not be said to be “generally in accordance with” the site plan.

The Court concluded it should exercise its discretion under s 313 of the RMA and made a declaration that condition 1 of the consent did not allow for the construction of a dwelling 50 metres north of the approved site. Costs were reserved.

Decision date 28 April 2017 - Your Environment 1 May 2017

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Independent Māori Statutory Board v Auckland Council _ [2017] NZHC 356

Keywords: High Court; district plan; regional policy statement; tangata whenua; Maori culture; rule

This was an appeal relating to aspects of a decision made by Auckland Council (“the council”) on the proposed Auckland Unitary Plan (“the PAUP”). Under the provisions of the Local Government (Auckland Transitional Provisions) Act 2010 (“the LGATP Act”), the council accepted a number of recommendations made by the Auckland Unitary Plan Independent Hearings Panel (“the IHP”). The Independent Maori Statutory Board (“the IMSB”), constituted under the Local Government (Auckland Council) Act 2009, challenged: provisions relating to sites of value for mana whenua (“SVMWs”) proposed to be incorporated in the regional policy statement of the plan (“RPS”); a SVMW overlay proposed to be included in the district plan; an accompanying schedule of SVMWs; associated rules and provisions; and various provisions for cultural landscapes proposed to be included in the RPS.

The Court reviewed the background, including the history of the PAUP process, and noted that the notified proposed Unitary Plan proposed: a schedule of sites of significance; and an overlay showing sites of value to man whenua, with an accompanying schedule detailing 3,600 such sites. However, at the IHP hearings of the issues, the council advised it would withdraw a number of the scheduled sites from the SVMW overlay. The IHP’s key findings in relation to the protection of sites and places of significance to mana whenua and the SVMW overlay included that; the SVMW overlay was flawed and contained sites not properly evaluated against appropriate criteria; the council’s s 32 evaluation did not provide an adequate basis for the SVMW overlay; the IHP favoured a two-tier protection for sites and places, those of significance to mana whenua and those of value to mana whenua; sites and places of significance to mana whenua should be protected though an overlay and schedule; policies for sites of value to mana whenua should be retained in the RPS. The council accepted all the IHP’s recommendations as to such sites and places.

The Court considered the questions of law raised in the present appeal, noting that it was the council’s decision to adopt the IHP’s recommendations that was at issue and that, under s 148 of the LGATP Act, the council was not required to give reasons for accepting recommendations of the IHP. The Court made the following findings: that the deletion of the SVMW overlay, and
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associated provisions, had not either compromised, nor had the potential to compromise, the council's compliance with its RMA obligations; the IHP's conclusion that the overlay and the schedule of sites and places was not of value was a conclusion which was open to it on the evidence, and there was no apparent error in this regard; having regard to the evidence before the IHP, along with inferences it was entitled to draw from its own perusal of relevant documents, the IHP did not err in law by concluding that the council's s 32 evaluation, prepared prior to notification of the PAUP, did not provide an adequate basis for the introduction of the SVMW overall, and that conclusion was open to it; there was no evidence that the council erred by relying on a mistaken understanding of the withdrawal resolution; and that proposed Unitary Plan framework implemented the relevant statutory directives and tests. Overall, the Court concluded that the rules and policy framework recommended by the IHP, and accepted by the council, complied with the relevant statutory requirements and there was no error law in the approach taken. The appeal was dismissed. The Court made directions as to costs.

Decision date 7 April 2017 - Your Environment 10 April 2017

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North Eastern Investments Ltd v Auckland Transport _ [2017] NZEnvC 47

Keywords: costs; public works

North Eastern Investments Ltd ("NEIL") sought an order for indemnity costs against Auckland Transport ("AT"), following appeals regarding the designation of a road through NEIL's property on Auckland's North Shore. NEIL now sought a total of $605,000, comprising legal costs of $235,000, plus extra counsel costs of $55,000, and expert costs of $315,000. AT opposed costs but, if there was to be an award, it opposed indemnity costs.

The Court considered the legal principles and case authority relevant to the exercise of its discretion to award costs under s 285 of the RMA. The Court noted that awards tended to fall into three bands: standard costs, within 25-33 per cent of costs actually incurred; higher than standard costs, where the factors in *Bielby* were present; and indemnity costs, which were awarded rarely in exceptional circumstances. The present case involved provision of public roading to allow infrastructure for residential land beyond the subject site. NEIL's grounds for claiming indemnity costs included: alleged insidious aspects of AT's conduct; a submission that the Public Works Act 1981 ("PWA") principles should apply; and the steps NEIL took to settle. The Court accepted AT's submission that the PWA principles did not apply in costs applications under s 285 of the RMA. However, the Court accepted NEIL's underlying submission that there were shortcomings in AT's considerations of alternatives, including inadequate written background information provisions. Further, the Court found there was a failure by AT to address the designation footprint issue, which was a factor to be considered in the assessment of costs. The Court concluded that AT was blameworthy and a costs award to NEIL was justified.

Regarding quantum, the Court accepted AT's argument that all of NEIL's costs relating to Court-assisted mediation and costs of attendances prior to the pre-hearing conference should be excluded. Further, the Court accepted that NEIL was not entitled to claim for the costs of extra counsel. The Court stated it could only compensate for a proportion of costs sought because NEIL failed to focus on the core issue of the removal of the designation which meant that, before and during the hearing, counsel and the Court and the experts dealt with other issues. Taking into account all the circumstances, the Court considered that a sum of $155,000 adequately and reasonably recognised the need for an award while allowing for the need for a road and allowing for the need for the role of AT in addressing that need.

Decision date 5 May 2017 - Your Environment 8 May 2017

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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 2017

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Retirement complex cleared for construction by mediation. _ The *North Shore Times* reports that a residents group's appeal has been resolved by mediation clearing the way for Ryman Healthcare's 600-bed, six storey, retirement complex planned for Devonport on Auckland's North Shore. Read the full story here.

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Housing affordability index to be rejigged. _ *RNZ News* reports that the Ministry of Business, Innovation and Employment (MBIE) will be using the "new customer mortgage rate" rather the "effective mortgage rate" in its housing affordability index, pending development of a new measure by it and the Reserve Bank. RNZ obtained emails showing that MBIE released the index data despite the Reserve Bank disagreeing with the mortgage measure chosen but has now changed tack. Read the full story here.

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UK: Housing those displaced by Grenfell Tower fire, controversial proposals. _ *BBC News* reports on some controversial proposals for rehousing in the neighbourhood those people displaced by the tragic fire at Grenfell Tower - requisitioning of land (suggested by Labour leader Jeremy Corbyn) and compulsory purchase orders available to local government. In both cases emergency legislation would be required and would be controversial in the current context. Read the full story here.

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Government faults councils over Havelock North gastro outbreak. _ *Radio New Zealand* reports the Government has released its initial findings of an investigation into Havelock North's gastro outbreak in August 2016. The report criticises Hastings District Council and Hawke's Bay Regional Council for failing to safeguard the town's drinking water, and says that neither council had appropriate plans in place to deal with the campylobacter contamination. Read the full story here.

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Construction expert concerned that claddings in some NZ buildings may not be fire-resistant. *The New Zealand Herald* reports that property consultants Prendos are concerned that flammable cladding panels are visually indistinguishable from compliant fire-resistant panels and may have been used in construction here. Read the full story here.

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NZ imports coal to supply Huntly power stations as hydro-energy sources falter.

Radio New Zealand reports that the amount of electricity produced by coal and gas in New Zealand has increased temporarily from 12 to 23 per cent following the drying up of South Island hydro dams and Genesis Energy has had to import coal from Indonesia to supply its Huntly plant. Read the full story here.

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Luxury apartments for Tauranga CBD. The *Bay of Plenty Times* reports that a $29 million, six-storey luxury apartment complex is under construction in Park St within Tauranga's CBD. Read the full story here.

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Most submissions to Far North DC oppose lease of reserve to developer. _ *Radio New Zealand* reports that the proposal to lease beachfront Perehipe Reserve in the Far North,

owned by Te Whanau Moana Hapu, to Chinese developer Carrington Jade has sparked considerable opposition, as shown by submissions to the district council. Read the full story here.

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Trans Tasman Resources seafloor mining decision deferred. The *Otago Daily Times* reports that the Environmental Protection Authority has deferred by several weeks the date that it will deliver its decision on the application by Trans Tasman Resources to mine five million tonnes of iron-rich sands offshore in the Taranaki Bight. Read the full story here.

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Councils to check cladding used on New Zealand high-rise buildings. _ *Radio New Zealand* reports that the Government has asked councils to check whether cladding with combustible components was used on New Zealand high-rise buildings. The Government brought in regulations on 1 January prohibiting the use of the most combustible type of panel in high-rises. Read the full story here.

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Nelson co-housing community proposed. _ *The Nelson Mail* reports that the Nelson Cohousing Co-operative board is looking at buying land and building the city's first co-housing community. The co-housing neighbourhood is being proposed as a solution for Nelson's lack of affordable housing. Read the full story here.

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Dunedin City Council approves heritage building programme. The *Otago Daily Times* reports that Dunedin City Council has approved a heritage building programme with the purpose to monitor progress in preserving and enhancing the city's heritage. The programme will include a survey recording investment in, and use of heritage buildings, and highlighting any buildings and areas at risk that may need resources. Read the full story here.

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Opposition to council's land sale in Horowhenua. _*RNZ News* reports on opposition to the sale by the Horowhenua District Council of 115 units for the elderly and 1.1 hectares of land to the recently registered Compassion Horowhenua Ltd which is an equal shareholding between the Sisters of Compassion and developer Willis Bond & Co. However, Willis Bond director David McGuinness and the Council have said the units will remain as social housing when sold in September 2017. Read the full story here.

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National park mooted by conservationists for third time. _ *RNZ News* reports on the call for the creation of a Remarkables national park by the Federated Mountain Clubs, the third attempt by conservationists to get the vast high country land area in Otago-Southland so classified. Read the full story here.

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Contention that Tauranga DC broke its own rules. _ *Stuff* reports on the contention of Welcome Bay resident Sheila Tippett that in allowing a subdivision of four new houses opposite hers served by the same right of way the Tauranga District Council has not followed its own district plan rules. In the application process the Council decided the right of way would be able to handle the extra traffic movements. Read the full story here.

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Mackenzie Mayor asks government for tourism infrastructure support. _

Radio New Zealand reports that, following an increase in tourism in the Mackenzie District by 19 per cent over the last 12 months, Mayor Graham Smith wants the cost of constructing and maintaining tourist infrastructure, mainly public lavatories and car-parking, to be borne more by the Government and not be wholly imposed on local ratepayers. Read the full story here.

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Fed Farmers withdraws appeal against Mackenzie Basin decision. _ *Radio New Zealand* reports that the appeal by Federated Farmers against the Environment Court's decision on Plan Change 13, which restricts the irrigation and agricultural conversion in the Mackenzie Basin, has been withdrawn. Read the full story here.

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Tauranga CC hired non-accredited companies to process building consents. _

The *Bay of Plenty Times* reports that a $60,000 report on complaints about the time taken by Tauranga City Council to process building consent applications has found that one of the companies to which the council outsourced the consent process, Holmes Farsight, was paid $1.3 million by the council but was not even an accredited building consent authority. Read the full story here.

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Auditor General's Office to make far-reaching examination of NZ's water supply systems.

Radio New Zealand reports that over the next two years the Auditor General will assess the effectiveness of water resource management by local and central government, the security of water supply, and the selection by the Ministry of the Environment of recipients of funding for water improvement projects. Read the full story here.

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Auckland Housing Taskforce reports to Goff. _ *The New Zealand Herald* reports that the Auckland Mayoral Housing Taskforce recommends that building needs to contine at scale, more land should be unlocked for housing, and the consenting process should be made more innovative if the city's housing crisis is to be addressed. Read the full story here.

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Auckland Airport's $1.8bn upgrade and expansion. *Radio New Zealand* reports that over the next five years Auckland Airport will build a second runway and expand both the domestic and international terminals, at an estimated cost of $1.8 billion. Read the full story here.

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$350 million tower block approved. *Stuff* reports that the Overseas Investment Office has given approval for the NDG tower and Ritz Carlton hotel to be built by Furu Ding's company NDG on the vacant corner bounded by Elliott, Albert and Victoria streets, Auckland. Read the full story here.

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Historic Christchurch convent and chapel to be saved. _ *The Press* reports that new owners will strengthen and fit out the historic St Asaph St convent and chapel – the former home of the Sisters of the Community of the Sacred Name. Local charity Home and Family will base its family counselling, therapy and other activities from the site and create a public cafe and wedding venue. Read the full story here.

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Possible New Zealand Oil and Gas, gas pipeline proposal for North Otago. The *Otago Daily Times* reports that New Zealand Oil and Gas is considering options for a seabed-to-shore gas pipeline and the construction of a gas production plant near Oamaru. Read the full story here.

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Papamoa East town centre development proposal endorsed. The *Bay of Plenty Times* reports that Tauranga City Council's City Transformation Committee has approved the framework plan for the establishment of Golden Sands town centre in Papamoa East. Read the full story here.

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High construction costs and worker shortage causing collapse of some building companies. _ *Radio New Zealand* reports that substantial increases in costs are making fixed-
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price building contracts unprofitable and this, coupled with skilled worker shortages, threatens the financial viability of many construction companies in New Zealand. Read the full story here.

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