Newslink Case-notes for November 2017 prepared 26 October 2017.

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Legislation Case-notes – November 2017

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

This month we report on seven 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:

- An unsuccessful appeal to extend the scope of a proposed plan change by Tasman District Council to include provision for subdivision of rural-residential land;
- A High Court decision concluding the last appeals on bio-diversity and significant ecological areas in the Christchurch Replacement District Plan;
- A High Court decision and Court of appeal decision on points of law affecting timing and direction of post-earthquake re-zoning of land in the Christchurch area;
- Sentencing of the owner who had demolished a heritage-listed cottage at Huntly that had been allowed to fall into disrepair, but for which funding to maintain or restore it was not forthcoming from the Waikato District Council;
- A successful resolution of an appeal against refusal of consent by Auckland Council for establishment of a land-fill activity near Riverhead forest on Auckland's north shore;
- A further decision of the Environment Court approving conditions of consent to a residential subdivision and development of a property with a native-bush gully near Albany, Auckland.

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CASE NOTES NOVEMBER 2017:

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MacKenzie v Tasman District Council _ [2017] NZEnvC 136

Keywords: district plan change; subdivision

This was a preliminary decision on scope of whether the submission of C Mackenzie ("M") on Proposed Plan Change 60 ("PC60") to the Tasman District Council ("the council") district plan ("the plan") was "on" the plan change. M owned land at Awaroa in the Rural Residential Closed Zone ("RRCZ"). Subdivision of land in that zone was subject to r 16.3.8.7 of the plan. PC60 did not propose any changes to that rule. M's submission was that zoning of the land at Awaroa or relevant subdivision rules needed change, and that the prohibition of subdivision applicable to her land in the RRCZ should be uplifted. The council refused to consider M's submission on the basis it was out of scope.

The Court considered sch 1, cl 14 of the RMA and relevant case authority and in particular the tests expressed in *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003. The Court stated that it was apparent from the s 32 evaluation that PC60 was limited in scope. One of the remedies sought by M was the rezoning of her property. By

definition that was outside the scope of PC60 which did not propose any rezoning of rural land.

The Court stated that M's submission did not meet the first test in *Clearwater* as PC60 did not alter the pre-existing status quo of subdivision in the RRCZ because that matter was not the subject of the plan change. In terms of the second test, the Court stated it was not possible to discern from the plan change documents that a change to the provisions of the plan relating to subdivision of land in the RRCZ was contemplated by PC60 or might be the subject of a submission on it. An interested person considering PC60 would not anticipate that an outcome of the process might be changes to the plan of the sort suggested by M.

The Court stated that neither a plan review process done by the council, nor PC60 which emerged from it, were undertaken for the purpose of considering subdivision opportunities for the RRCZ. The Court determined that M's submission was not "on" PC60. It was not a valid submission and M had no right to appeal. The appeal was dismissed and there was no reservation of costs.

Decision date 27 September 2017 - Your Environment 28 September 2017

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Royal Forest and Bird Protection Society of New Zealand Inc v Christchurch City Council - [2017] NZHC 865

Keywords: High Court; district plan; rules; forest indigenous; consent order

This decision of the High Court followed that of 7 April 2017 ("the previous decision") by which the Court confirmed consent orders ("the previous orders"). The previous orders resolved all but one of the errors of law alleged by Royal Forest and Bird Protection Soc of New Zealand Inc ("RFB") in its appeal against a decision of the Independent Hearings Panel ("the Panel") on the Christchurch Replacement District Plan ("the plan"). The decision in question was Decision 50, Chapter 9: Natural and Cultural Heritage (Part) Sub-Chapter 9.1 – Indigenous Biodiversity and Ecosystems ("Decision 50"). The present judgment concerned the remaining unresolved issue on appeal, which related to the extent to which farm practices were relevant to determining whether an area was a significant ecological site ("SES").

The Court reviewed the background to the appeal and noted that RFB alleged that in Decision 50 the Panel had failed to give effect to the New Zealand Coastal Policy Statement ("NZCPS") and the Canterbury Regional Policy Statement ("CRPS") and had misapplied s 6(c) of the RMA when it concluded that farm practices played a part in the determination of the boundaries of SES. The parties had engaged in mediation and now had reached agreement that the assessment of significance of potential SES and the determination of the boundary of those sites was to be assessed on an ecological basis only. The parties agreed to an amendment of policy 9.1.2.4 of the plan and also that references to land use practices could properly be added to policy 9.1.2.5, as submitted.

Having considered the previous decisions and the present joint memorandum explaining the reasons for the proposed amendments to the policies, the Court said it was satisfied that it was appropriate to make orders that the plan be amended as specified because: the amendments were within scope of the appeal; the settlement amounted to a just, speedy and inexpensive way of determining the proceeding; the proposed orders were unopposed by any party; the amendments were consistent with the purposes and principles of the RMA, in particular with s 6(c), and gave effect to the NZCPS and the CRPS, as required by s 75 of the RMA; and the resolution was consistent with the agreement reached in mediation. Further, the Court stated that, given the narrow scope of the relief jointly sought, it was unnecessary to remit the matter back to the Panel. The Court made orders accordingly.

Decision date 25 May 2017 - Your Environment 26 May 2017

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Equus Trust v Christchurch City Council - [2017] NZHC 224

Keywords: High Court; district plan; regional policy statement; objectives and policies; zoning; industrial; traffic; stormwater; outline plan

Equus Trust and others ("the appellants") appealed against the decision of the Independent Hearings Panel ("the Panel") to decline the appellants' request to rezone their 14 ha of land in

Christchurch ("the land") as industrial. The Panel's decision was made under the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 ("the Order") for the formulation of the Christchurch Replacement District Plan ("the plan"). Under Chapter 17 of the plan, Greenfield Priority Areas ("GPAs"), which included the appellants' land, were zoned as Rural Urban Fringe, under which zone industrial or business use development was prohibited. The appellants appealed on three questions of law relating to the proper interpretation of the Land Use Recovery Plan, ("the recovery plan"), prepared under the Canterbury Earthquake Recovery Act 2011 ("CERA"), and the Canterbury Regional Policy Statement ("the CRPS"). These were: whether in giving effect to the CRPS under s 75(3)(c) of the RMA, the panel wrongly interpreted Chapter 6 of the CRPS as providing a discretion as to rezoning the land as industrial; whether the Panel misinterpreted Policy 6.3.3 of the CRPS regarding the level of certainty and detail required regarding stormwater and traffic matters to be shown in the Outline Development Plan ("the ODP"); and whether the Panel's decision not to rezone the land as industrial on the basis of "fundamental, irresolvable problems" with the ODP was a decision which, acting reasonably, the Panel could have come to. The appeal was opposed by Christchurch City Council, the Crown and Christchurch Airport Ltd ("the Airport").

After considering the relevant planning documents, the Panel's decision and the High Court's approach on appeal, the Court addressed the first question of law. The Court noted that the appellants challenged the Panel's interpretation of the words "enable", "to provide for" and "give effect to", with reference to the previous case authorities including *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) and the Supreme Court's decision in *King Salmon*. The Panel decided that "give effect to" in the CRPS did not automatically mean that the land must be rezoned at the present time, and the Court found no error in such conclusion, because there was nothing directive in the language of the CRPS and the Minister had not directed that the GPAs should be zoned industrial. The Court did not uphold the appellants' submission that the Panel wrongly interpreted the provisions of the CRPS. Regarding whether *Powell* was relevant, and whether the approach in *King Salmon* to the words "give effect to" required the Panel in the present case to rezone the land, the Court discussed the case authorities and concluded that the purposive approach to interpretation of plans in *Powell* was appropriate. However, the present case was contrasted with that in *King Salmon*. In the Supreme Court decision, the direction in s 75 of the RMA to "give effect to" was discussed in the context of the strong directive in the New Zealand Coastal Policy Statement to "avoid" adverse effects. However, in the present case the policies and objectives of the CRPS were less directive, and contained qualifications that development in GPAs should occur in accordance with ODPs. Accordingly, the Court found that there was no error of law relating to the first question.

Turning to consider the second question, which related to the level of detail required regarding stormwater and traffic provisions in the ODP, the Court concluded that it was open to the Panel to conclude that Policy 6.3.3 of the CRPS required the ODP to contain sufficient detail about the roading network in the same way that the Panel required more detail on stormwater issues. The Court found no errors of interpretation made by the Panel and answered the second question no.

The third question concerned the Panel's finding of "fundamental, irresolvable problems" with the ODP and associated rules. The Court found that the Panel's findings were not unsupportable on the evidence before it. The Panel gave the evidence careful consideration, but did not uphold the appellants' views on roading and stormwater issues, and there was no error of law such that the Court might now interfere. Accordingly, all questions of law were declined and the appeal was dismissed. Counsel were directed to file memoranda on costs.

Decision date 22 March 2017 - Your Environment 23 March 2017

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Equus Trust v Christchurch City Council - [2017] NZCA 200

Keywords: leave to appeal; costs

Equus Trust ("the Trust") applied for leave to appeal to the Court of Appeal, following the decision of the High Court of 21 February 2017 to dismiss the Trust's appeal. The High Court upheld the decision of the Hearings Panel to reject the Trust's submission that certain of its land should be zoned industrial in the Christchurch Replacement Plan. The Trust now sought leave to appeal regarding four questions of law: did the objectives and policies of Chapter 6 of the
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Canterbury Regional Policy Statement ("RPS") impose a mandatory direction to rezone land identified on map A as a Greenfield Priority Area; was it lawful for an RPS to contain provisions that were directive to a territorial authority as to the zoning of land to be included in a district plan, including issues of timing; was it lawful for the Panel to decide that retaining the existing rural zoning of the land would "give effect to" the RPS, as required by s 75(3)(c) of the RMA; and whether, in terms of the Canterbury Earthquake Recovery Act 2011, the Panel's decision was inconsistent with the Land Use Recovery Plan.

The Court of Appeal stated that where an appeal was limited to a question of law concerning interpretation of legislation, it was not enough for an applicant simply to point to one interpretation being preferable to another. Further, the Supreme Court had made it clear that, where a legislative instrument genuinely made available a range of meanings, the Court was entitled to substitute its own opinion for that of the original decision maker "only if the decision is so aberrant that it cannot be classed as rational". The Court now stated that these principles applied with particular force in cases, such as the present one, where the decision maker was a specialist tribunal. Having considered the decisions of the Panel and the High Court, and the present submissions of the parties, the Court was satisfied that the interpretation adopted by the Panel was plainly available to it and was not irrational. In addition, the Court was not satisfied that the first question of law was of general or public importance deserving further hearing, as it concerned the particular application of the RPS in a context of very limited importance to persons other than the Trust. Further, the remaining three questions were subsidiary to the principal question and raised no independent justification for leave. Leave to appeal was accordingly declined. The Trust was directed to pay costs.

Decision date 8 June 2017 Your Environment 9 June 2017

(Note – the High Court decision of 21 February 2017was that issued on 22 March above- RHL.)

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Waikato District Council v Lynch - [2017] NZDC 13092

Keywords: prosecution; heritage value

K Lynch ("L") was sentenced, having pleaded guilty to a charge laid by Waikato District Council ("the council") of allowing the demolition and/or removal of an historic miner's cottage at 165 Tregoweth Lane, Huntly ("the site"), without obtaining resource consent. Consent was required by a rule in the district plan. L owned the site, on which there was a dwelling occupied by L, and a Victorian miner's cottage built in the 1880s. In 1995 Heritage NZ listed the cottage as an historic place and a Category 2 listed building. No-one had lived in the cottage since 2000. In 2004, the council informed L that the cottage had been listed in the plan and advised him that demolition of the cottage would require resource consent. Over the following decade the cottage fell into disrepair and was vandalised. Then, in January 2016, L approached a digger driver and asked him to demolish the cottage. This was done. The demolition was discovered by the council in November 2016.

The Court considered the sentencing principles as established by the Sentencing Act 2002 and case authority. The Court acknowledged the difficulties of private landowners where there was a public benefit created by a heritage listing in a district plan, but where there was little real financial or other support provided to maintain such public benefit. There was evidence that L had approached a committee of the then Huntly Borough Council to explore the possibility of financial assistance to preserve the cottage, but this was not forthcoming. In fact the council did not have a dedicated heritage fund until 2006. Until the present year, owners of heritage-listed buildings were not specifically advised that such funding was open to them.

In the present case the Court found that the offending was deliberate. The effect of the offending was that the heritage values associated with the cottage were lost forever. Overall, the Court found L's culpability to be at the upper middle to higher end of the scale. After considering relevant cases, the Court set the starting point for a fine at $35,000. A five per cent discount was allowed for previous good character and a further five per cent for remorse, in addition to 25 per cent being allowed for early guilty plea. This gave a fine of $23,625. The Court then considered L's personal circumstances and found he was of modest means and that a fine of $23,625 would be disproportionately harsh. The Court decided that an end fine of $10,000 was appropriate. Ninety per cent of the fine was to be paid to the council.
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Decision date 16 August 2017 - Your Environment 17 August 2017

(Comment - This appears to have been the result of a public decision to classify a privately owned building as a heritage building, a decision that unfairly penalised a private land-owner when it fell into disrepair and was demolished. – RHL)

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Norsho Bulc Ltd v Auckland Council - [2017] NZEnvC 109

Keywords: resource consent; conditions; landfill; district plan; district plan proposed; effects

Norsho Bulc Ltd ("NBL") appealed against the decision of Auckland Council ("the council") to decline its application for resource consent to establish a managed landfill operation at a site at 294 Blackbridge Rd, Pine Valley. The council refused consent on grounds including adverse effects on amenity values at adjacent properties, effects of truck movements and because the proposal was contrary to the relevant provisions of the then operative district plan and the proposed Auckland Unitary Plan. NBL now proposed a modified application, with fewer daily truck movements and increased fencing and planting. The application was to import and place 940,000 m^3 of managed fill to specified gullies on the site over a period of 10 years. Blackbridge Environmental Protection Soc Inc ("the Society") was a party to the appeal under s 274 of the RMA. It was agreed that on a bundled basis the proposal was a non-complying activity and so was considered under ss 104D and 104 of the RMA.

The Court stated that following a mediation and caucusing process, the two main remaining issues were: whether the character and amenity of the area around the site was sufficiently compromised by the effects of the proposal to warrant declining it; and whether a review condition proposed by the council was appropriate. The relevant statutory instruments were the National Environmental Standard for Assessing and Managing contaminants in Soil to Protect Human Health, the National Policy Statement for Freshwater Management 2014 and the Auckland Unitary Plan ("the AUP").

The Court considered the potential effects of the proposal, including dust, landscape effects, noise and traffic effects about which the members of the Society expressed concerns. After considering the expert evidence, the Court found that such adverse effects would be no more than minor. Similarly, the ecology experts agreed that the mitigation and compensatory measures proposed in the revised application would significantly enhance the ecological value of the site. Regarding road and traffic effects, the Court acknowledged that heavy traffic movements would potentially damage Blackbridge Rd and that a solution might be for Auckland Transport to upgrade the road. However, the Environment Court had no jurisdiction in relation to matters of road transport funding, and there were no provisions in the AUP which enabled any condition of consent requiring a financial contribution for that purpose to be imposed. However, the Court considered that the road upgrading issue in the present case could be addressed by Auckland Transport thorough a number of options.

The Court next addressed the relevant objectives and policies of the AUP, directed at clean fills and managed fills within rural zones. The Court agreed with expert planning evidence that the proposal was consistent with such provisions and the actual and potential effects were consistent with those expected within a rural zone.

As it was not in dispute that the proposal passed the gateways in s 104D of the RMA, the Court then considered it under s 104. Positive effects included the fact that cleanfill and managed fill operations were a consequence of residential, commercial and industrial development projected for that part of the Auckland region. The location of the site close to such development reduced the need for long traffic journeys and avoid the inefficient deposition of clean material at sanitary landfill sites. Riparian protection and enhancement proposed for the streams and wetlands outside the operational fill area were a positive environmental gain and the completed site would enhance the suitability for pastoral farming. Although many local residents feared adverse effects on their lifestyle amenity, the Court had found such effects to be no more than minor, and not enough of themselves to warrant decline of consent. The AUP provided for managed fill operations. The Court approved the conditions of consent and found them very comprehensive. The Court saw no need for a general review provisions, and accepted that a 10 year consent period was reasonable in the circumstances. Under s 290A of the Act, the Court
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placed little weight on the council's decision because this had been made under the provisions of the then operative plan, whose provisions relating to managed fills were quite different from those in the AUP. Further, the proposal had been amended as described. Accordingly, the appeal was allowed. The resource consents were granted, subject to the conditions attached as Appendix 1 to the decision. Costs were reserved but not encouraged.

Decision date 17 August 2017 - Your Environment 21 August 2017

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3RD Fairway Developments Ltd v Auckland Council - [2017] NZEnvC 127

Keywords: resource consent; conditions

On 18 May 2017, the Court issued a minute and directions relating to the application for resource consents to enable further development at 84 Laurel Oak Dr, Albany ("the proposal"). By the present decision the Court approved the grant of consent for the proposal, on the conditions of consent as annexed as "B" to the decision. The Court stated that costs should lie where they fell.

Decision date 19 September 2017 Your Environment 20 September2017

(Note: The previous Environment Court decisions relating to the proposed application were reported in the November 2015 and March 2016 issues of Newslink.)

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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 October 2017

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Queenstown Lakes District Council votes to increase housing development. *Radio New Zealand* reports that Queenstown Lakes District Council has unanimously voted in support of the recommendations of the Mayoral Housing Affordability Taskforce and has also set a target of building 1000 community homes by 2028. The council also voted to add Ladies Mile to the district's special housing area accord. Read the full story here.

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Regional fuel tax to fund Auckland light rail. *The New Zealand Herald* reports that the Government will introduce a regional fuel tax on Auckland motorists to fund investment in light rail to the airport and West Auckland. Read the full story here.

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OIO keeps price of Queenstown lakeside deal secret. *Stuff* reports that, as it is entitled to do under the Overseas Investment Act (s 9(1)), the Overseas Investment Office has kept secret the price of a 39 hectare Walter Peak lakeside property bought by the Australian billionaire Tim Roberts because he intends to subdivide it and his future commercial negotiations might be jeopardised by any disclosure. Read the full story here.

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NZ Aerial Mapping's final rites. *Stuff* reports on the final rites (ie the bankruptcy and liquidation) of the historically notable company NZ Aerial Mapping, which was founded by Henry Drury Piet van Asch in 1936 and operated as the country's aerial mapper for 78 years. The

Bank of New Zealand has lost $2.8 million in the receivership and the unsecured creditors received nothing. Read the full story here.

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QLDC considers proposal for $43m parking buildings. The *Otago Daily Times* reports that Queenstown Lakes District Council is considering a report proposing two new parking buildings to be constructed in Queenstown at a cost of $43 million at the edges of the town. The proposal is part of the council's plans to ease the parking shortage in the resort. Read the full story here.

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$2 billion KiwiBuild scheme. *The New Zealand Herald* reports that Housing Minister Phil Twyford has revealed details of the new Government's $2 billion KiwiBuild scheme which aims to build 100,000 new residences in the next 10 years. Measures include a special KiwiBuild visa that will allow people in the construction industry to fast-track temporary work visas. Read the full story here.

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Queenstown development upsets Fernhill residents. The *Otago Daily Times* reports that a proposed 110-unit, 2.2 hectare residential development on the hillside of Fernhill could spoil views and worsen existing traffic and infrastructure problems in the area, according to concerned residents. Developer Min Yang is in discussions with Queenstown Lakes District council about the project. Read the full story here.

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Major repairs for Orewa apartment building. The *Rodney Times* reports that residents of a 34-unit apartment block in Orewa, built in 2005, will have to leave their homes before Christmas so that major remediation works can be undertaken. Auckland Council has confirmed it faces legal proceedings regarding the issue of a code of compliance for the building by the then Rodney District Council. Read the full story here.

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Christchurch red-zone building plans. *Radio New Zealand* reports that previous residents of the now vacated Avon-Otakaro red zone say that a proposal by Regenerate Christchurch to build new houses in the zone does not make sense and is unfair. Read the full story here.

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Auckland Housing Accord said to fail on affordability. *Radio New Zealand* reports that Auckland Councillor Chris Darby says that newly published figures show that only 98 free-market affordable homes have been built under the Government's Auckland Housing Accord scheme, which Mr Darby has called a "dismal failure". Read the full story here.

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Dunedin hotel decision to be appealed. The *Otago Daily Times* reports that Anthony Tosswill, whose proposal for a multi-storey hotel opposite Dunedin Town Hall was recently declined by commissioners for Dunedin City Council, says he will appeal to the Environment Court. Read the full story here.

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Future of Napier CBD revealed by council following poor seismic ratings of civic buildings. *Hawke's Bay Today* reports that Napier City Council has presented to residents its proposal to sell off an earthquake-prone area of the CBD for commercial redevelopment. Recent seismic assessments showed that the city's civic administration building met only 10 per cent of new building standards and the library building only 15 per cent. Read the full story here.

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Plans for new Wellington hotel thwarted. *Stuff* reports that plans for a proposed apartment and hotel complex - Lambton on Waititi, have been halted by a heritage substation next door. The High Court has ruled that the granting of consent was unlawful, because the council's assessment of the hotel's likely effects was flawed. Read the full story here.

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Building to be demolished for Hundertwasser project. The *Northern Advocate* reports that the former Northland Regional Council building at Whangarei Town Basin will be demolished to

build the $20.97 million Hundertwasser Arts Centre with Wairau Maori Art Gallery. Read the full story here.

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Lake Tekapo developments. The *Timaru Herald* reports that construction is set to get underway this summer on projects including a multi-million dollar youth hostel, a luxury five star hotel, and the new Earth and Sky building. Read the full story here.

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Wellington apartment block consent might hamper Basin Reserve traffic solution. *The Dominion Post* reports that a seven-storey apartment block at Hania St, Wellington, recently granted resource consent, could complicate any future traffic proposal for the nearby Basin Reserve. Read the full story here.

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Dunedin's second generation district plan delayed for a year. The *Otago Daily Times* reports that Dunedin City Council, which has spent five years developing its second generation district plan, will now take a further 12 months to complete the process. Read the full story here.

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New golf resort for Cromwell. The *Otago Daily Times* reports that Tony Quinn, owner of Cromwell's motorsport park, is planning a $40 million 18-hole golf course and 100-section residential property development in Cromwell. Read the full story here.

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Todd Property building new $70m town centre and road at Long Bay. *The New Zealand Herald Herald* reports that Evan Davies, managing director of Todd Property, says the Long Bay housing estate will have a new town centre and 1.1 km entranceway road, under an agreement with Auckland Transport. Read the full story here.

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Six fast-track housing areas proposed for Hamilton. *Stuff* reports that six locations have been suggested for fast-track housing developments in Hamilton, which could provide more than 2000 new homes. Read the full story here.

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Call for wooden public buildings. *Radio New Zealand* reports that the Wood Council of New Zealand says the Government could help revive forestry by favouring wooden public buildings, such as schools and office blocks. Read the full story here.

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Christchurch City Council needs $2.1 m to finish Nga Puna Wai sports project. *The Press* reports that Christchurch City Council has still to find more than two million dollars to complete stage one of the $100m council-led project to build the Nga Puna Wai Sports Hub. Read the full story here.

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