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Legislation Case-notes June 2018

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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 seven appeals covering diverse situations associated with subdivision, development and land use activities from around the country;

- A partly successful appeal by NZ Forest & Bird Protection Society against decisions of the Environment Court relating to the Regional Coastal Plan in the Bay of Plenty;
- Alterations to the designation for Auckland Central Rail loop;
- A further decision of the Environment Court relating to a plan change (PC13) affecting farming activities in the McKenzie basin;
- A further decision involving a project at Island Bay, Wellington where heritage buildings are intended to be demolished to make way for a special housing project;
- A decision-west on an application for a declaration about forestry activities at the Waitakere Ranges;
- A case where the Environment Court considered an enforcement order against a Gun Club at Kaukapakapa, north-west of Auckland;
- An unsuccessful appeal by a landowner seeking residential zoning around a largely unaltered volcanic cone near the Manukau Harbour.

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CASE NOTES June 2018:

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Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council - [2017] NZHC 3080

Keywords: High Court; regional plan; coastal plan; interpretation; natural character

Royal Forest and Bird Protection Soc of New Zealand Inc ("FB") appealed against the Environment Court's ("the EC") decision of 31 March 2017. The appeal concerned the wording in certain policies in the proposed Regional Coastal Environment Plan ("RCEP") of the Bay of Plenty Regional Council ("the council") relating to the location of regionally significant infrastructure in areas identified in the RCEP as being Indigenous Biological Diversity Areas A ("IBDAA"). The basis of the appeal concerned whether the EC erred in its consideration and application of the decision of the Supreme Court in *Environmental Defence Soc Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 ("*King Salmon*") when considering policies in the New Zealand Coastal Policy Statement ("NZCPS") and other national policy statements, the Bay of Plenty Regional Policy Statement ("RPS") and the unchallenged objectives in the RCEP.

The High Court considered the RCEP policies in dispute and the relief sought by FB, noting that Natural Heritage policy 1 ("NH 1") provided that certain activities might be appropriate in the natural heritage areas of the coastal environment in certain circumstances. However, Policy NH4 provided that adverse effects must be avoided in any IBDAA. Further, Policy NH 5 provided that for consideration to be given to development proposal which would adversely

affect areas listed in NH 4, the proposal must have transient or minor effects or relate to regionally significant infrastructure. For a proposal to be appropriate under NH 5, it had to be demonstrated that there were no practical alternative locations and that the avoidance of adverse effects was not possible.

The Court reviewed the EC decision and addressed the alleged errors of law in the present appeal. These were that the EC erred: in its interpretation and application of *King Salmon*; in its interpretation and implementation of various provisions in the NZCPS and RPS; in its interpretation and implementation of relevant RCEP objectives; and in its interpretation of ss 87A, 104 and 104D of the RMA. Regarding the first ground, the Court considered the ratio in *King Salmon* was that the proposed plan change in that case would have significant adverse effects on an area of outstanding natural character and that the directions in policies 13 and 15 of the NZCPS would not be given effect to if the applications were granted. The majority of the Supreme Court held that the Board appointed by the Minister of Conservation was obliged to give effect to the NZCPS and had failed to do so. The plan change therefore did not comply with s 67(3)(b) of the RMA. The Court rejected the "overall broad judgement approach" taken by the Board. In the present case, FB submitted that the EC did not try to find a way to reconcile the evident tension between certain policies in the higher order planning documents and erred by holding that the meaning of the word "avoid" was contextual. The High Court made certain findings with regard to the EC's interpretation and application of *King Salmon* in the present case. First, the statutory provisions required that a proposed plan give effect to both any NZCPS and any RPS; neither the obligation to implement a proposed RCEP objective, nor the requirement for an evaluation report under s 32 of the RMA removed that necessity. While accepting that the ratio of *King Salmon* was relatively narrow, the Court did not consider that it could be distinguished in the present case, nor that it was of limited assistance only. The EC was not entitled to take the approach it did, in focusing on largely unchallenged provisions of the RCEP and ignoring or glossing over the higher order documents. The EC erred when it proceeded primarily by reference to the RCEP objectives, with only limited reference to the NZCPS and RPS, so failing to "give effect to" such documents, within the meaning of *King Salmon*. Further, the EC failed to seek to analyse the tensions between various policies in the RCEP, which approach was in conflict with the observations of the Supreme Court in *King Salmon*, and was an error. The EC also erred in its interpretation of the word "avoid". The EC should have considered the relevant avoidance, or "environmental bottom line", policies in the NZCPS. By finding that the word "avoid" was contextual, the EC erred. With reference to case authority, the High Court now said that although context might be relevant in considering whether an activity would have adverse effects, the EC had not considered context in that sense, but rather in the round. The EC's finding that the benefits and costs of regionally significant infrastructure seeking to locate in IBDAA, which might have adverse effects, should be assessed on a case by case basis was contrary to the Supreme Court majority decision and was an error of law.

Turning to the second ground of appeal, the Court stated that the EC referred only to a limited number of specified NZCPS provisions despite the fact that there were a large number of other more relevant provisions, including policies 6(1)(a), 7, 11, 13 and 15. The Court now concluded that the EC's consideration of the NZCPS was brief and incomplete. The EC erred in approving policies and a rule which did not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a) of the NZCPS. Similarly, the EC did not address the directive nature of specified policies in the RPS. Regarding the third ground of appeal, relating to the interpretation of the RCEP, the Court found that the EC misconstrued the objectives contained in the RCEP. These, following the approach in *King Salmon*, recognised that provision needed to be made for regionally significant infrastructure, but not in all locations in the coastal marine area. Turning to consider the fourth ground of appeal, relating to the correct interpretation of the relevant RMA provisions, the Court found the EC had made no erroneous finding.

The Court stated that each of the errors made by the EC with relation to the first three grounds of appeal were material to the EC decisions. The Court stated that the appropriate course was to remit the matter to the EC to for reconsideration in the light of the present decision. The appeal was allowed in part. The Court made directions as to costs.

Decision date 19 January 2018 Your Environment 22 January 2018

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City Rail Link Ltd ('CRLL') v Auckland Council - [2017] NZEnvC 204

Keywords: designation; railway; transportation; jurisdiction; effect adverse; alternatives

This decision concerned the application under s 198E of the RMA by Auckland Transport,
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succeeded by City Rail Link Ltd ("CRLL"), and Kiwirail Holdings Ltd for alterations to the City Rail Link designation 1714 and Kiwirail designation North Auckland Line 6300, seeking to have the Court confirm those requirements in the place of Auckland Council ("the council"). The City Rail Link ("CLR") was a 3.4-kilometre-long passenger railway line being built largely underground from Britomart Station to the North Auckland Line ("NAL") where it cut through Mt Eden. The CLR was the subject of confirmed designations (1-6). Subject to the confirmation of the designations, considerable further design work was undertaken, resulting in changes requested by the requiring authorities in the vicinity where the CRL and NAL intersect in the suburb of Mt Eden. The focus of the present case was the part of the proposed changes which included the removal of the vehicular component of the overbridge which had been required above the railway tracks at Porters Ave and Wynyard Rd.

The Court stated that the issues in dispute included: whether the Court had jurisdiction to make the decisions and directions sought; the connectivity effects of the proposed alterations; whether the proposal to remove the vehicular component of the overbridge should be confirmed, refused, or confirmed with suitable mitigation; the benefits and costs of mitigation options; and the nature of such mitigation options.

Regarding its jurisdiction, the Court found that, as a consequence of the narrowing of the issues between the parties, the Court might consider any mitigation options as coming within jurisdiction or, if not, it could direct further processes as an alternative to refusing the requirements for designation.

The Court considered the relevant statutory framework, being ss 181, 168-179 and 198E of the RMA. After considering the existing environment and evidence as to the effects of the alteration on the environment, including visual amenity and urban design effects, the Court concluded that there were no significant adverse effects and that adverse effects on the environment overall were no more than minor. Further, the Court held that consideration of alternatives by the requiring authorities had been more than adequate. Addressing the issue of whether the proposal was reasonably necessary to achieve the objectives, the Court noted that the proposal was for specified alterations to the designations and was therefore a confined enquiry under s 171(1)(c) of the RMA. The Court found that in the overall sense the proposed alterations were reasonably necessary because they would improve the transport mode choice in Mt Eden, result in significant operational benefits, result in significant capital savings, improve the amenity of Mt Eden Station and encourage business opportunities in the area.

The Court then considered that application of pt 2 of the RMA, to which all consideration under s 171(1) was subject. Citing recent case authority, the Court noted that there was some uncertainty about the application of the Supreme Court's decision in *King Salmon* in relation to notices of requirement. The Court held that in the present case the debate was academic as it considered that a pt 2 analysis would be satisfied on the evidence.

Regarding whether mitigation was needed of loss of connectivity in the street system, the Court found that the effects on the environment were so minor as not to warrant the imposition of any further mitigation. The Court made directions as to amended conditions proposed by the council and CRLL. The Court confirmed the alterations to the designations, subject to the changes in the present decision. The conditions were attached to the decision, modified as shown. Costs were reserved.

Decision date 25 January 2018 Your Environment 30 January 2018

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Re Mackenzie District Council - [2017] NZEnvC 216

Keywords: district plan change; rule

Mackenzie District Council ("the council") applied for declarations and directions relating to when specified rules in Plan Change 13 to the district plan ("PC13") took effect. The Court stated that the question of law arising was when a proposed rule, amended under s 293 of the RMA, took effect as a rule. This arose because under the plan resource consent was required only if the proposed use contravened a rule in the plan or proposed plan.

In order to explain the background, the Court outlined the chronology of the12 decisions relating to PC13 starting with *High Country Rosehip v Mackenzie District Council* [2011] NZEnvC 387. PC13 was first notified in December 2007. A new s 293 "package" of the proposed amended PC13 provisions, which the Court referred to as PC13(293V), was publicly notified on 14 November 2015, The Court noted that a new definition relating to pastoral intensification within the Mackenzie Basin was added under PC13(293V), with a complex set of rules added relating
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to irrigators, fences and agricultural conversion. After notification of PC13(293V), the Court issued its Eleventh Decision on 13 April 2017 directing the council to prepare a new version of PC13 for final confirmation, following which there were various applications made for resource consents for farming activities. The Court stated that since PC13(293V) the status of many farming activities had changed, as set out in a table in the present decision, such that irrigation of land (agricultural conversion) activities were no longer permitted activities in specified areas. The Court considered arguments by Simon's Pass Station Ltd ("SPSL"), a s 274 party, that: the provisions of PC131(293V) were too inchoate to be enforceable until the Court issued its Twelfth Decision, on 7 September 2017; the rules in PC13(293V) did not take legal effect at the date of the Eleventh Decision; and that it was for the council to make the changes upon a final decision from the Court, which had not occurred until the Twelfth Decision. The Court concluded that the relevant version of the RMA was that prior to the 2009, 2013 and subsequent amendments ("RMA05"). The Court then considered the relationship between the plan change process and the legal effect/operation of proposed rules, noting the six "waypoints" in preparing a plan change under sch 1 of the RMA, which the Court stated to be: initial notification; release of decisions after hearing; appeal to the Environment Court and issue of Court's decisions; variation and "return loop" resulting in further decisions; the s 293 of the RMA process and approval; and approval and notification as operational.

The Court then considered the effect of s 88A of the RMA in the present case, holding that the orders of the Court under ss 290 and 293 of RMA05 which altered rules were decisions which qualified as "other alterations" for the purpose of s 88A(1)(b)(iii). From this the Court argued that if an application for consent was lodged before that date, the earlier rule as to activity status applied; if after, the status as altered by the Court applied. Further, the Court found that as each "waypoint" was reached, under sch 1, each new altered proposed rule superseded the previous one, from the date of alteration.

Turning to consider whether and when the pastoral intensification/ conversion rules had legal effect, the Court concluded that: on 13 December 2007, on notification of PC13 and again in 2009 on notification of the commissioners' decision, the unamended relevant rules became effective; on 14 November 2015, upon notification of PC13(293V) the amended rules had legal effect; and on 13 April 2017, upon the issue of the Eleventh Decision, the relevant rules were treated as operative. The Court concluded that the rules were not "too inchoate", and the scope for parties to seek change was limited. The only matters on which the Eleventh Decision was interim were the status of certain fencing activities and the boundaries of certain grasslands areas. The Court concluded that in the present case, the rules were sufficiently fixed at each of the "waypoints" so that the public and affected landowners knew what they were.

The Court found that in the present case the activities which variously comprised pastoral intensification and agricultural conversion were fairly caught first by the proposed rules in PC13(293V), effective on 14 November 2015, and later by the proposed rules in PC13, as in the Eleventh decision, on 13 April 2017. The Court made declarations accordingly. Costs were reserved.

Decision date 12 February 2018 - Your Environment 13 February 2018

(Note – This decision is the 12th from the Environment Court over the gestation period for this plan change of 10 years. – RHL.)

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The Wellington Company Ltd v Save Erskine College Trust - [2018] NZEnvC 6

Keywords: building; heritage value; resource consent; heritage protection authority

This was the Interim Decision of the Court relating to the appeal by The Wellington Company Ltd ("WCL") under s 195 of the RMA against decisions by Save Erskine College Trust ("SECT"), a Heritage Protection Authority, refusing consent for WCL to demolish or remove heritage items at a site at 31-33 Avon St, Island Bay. WCL had obtained consent from Wellington City Council ("the council") under the Housing Accords and Special Housing Areas Act 2013 ("HASHAA") to develop the site for residential purposes and demolish heritage structures on the site. By its previous decision of 22 December 2016, the Court held that the HASHAA consent did not remove the jurisdiction of heritage authorities under s 193 of the RMA. After mediation, SECT agreed for WCL to develop the greater part of the site, outside a "reserved area". The reserved area contained two heritage buildings: the chapel and the main building, acknowledged by all parties to be of very high heritage quality. WCL's proposal now before the Court was to demolish the main building in order to be financially able to retain, strengthen and re-use the chapel.
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The Court stated that the appeal was to be determined by reference to matters specified in s 195 of the RMA, having regard to SECT's decision. After reviewing the background facts, the Court addressed the "vast" quantity of materials and expert evidence relating to heritage issues, taking notice of the ICOMOS NZ Charter 2010, which the Court found was to be used as a guide and not as a set of rules, the possibility of adaptive re-use of heritage buildings on the particular site, any residual values of the chapel if the main building was removed and options for partial retention of the main building. Engineering issues were considered and the Court found that there was a risk that the buildings if left standing, would significantly collapse, so putting the safety of the public at risk. The Court concluded that if demolition consent for the main building was refused there was uncertainty whether the Court had jurisdiction to impose any obligation on the owner to even temporarily stabilise the building.

The Court considered the statutory framework and the three factors set out in s 195 of the RMA, noting that there was a scarcity of case law concerning the section. Starting with s 195(3)(b), the Court considered expert evidence as to whether the land was incapable of reasonable use. In this regard, the Court considered whether commercial feasibility was the essence of reasonable use. With reference to case authority, the Court found that the phrase "incapable of reasonable use" imported an objective test and further that WCL had not made out a case under s 195(3)(b) of the RMA in the present case. Turning to consider whether, under s 195(3)(a) of the RMA, serious hardship was likely to arise. The Court found that that this was unlikely, given the finding that the refusal of consent would not render the land incapable of reasonable use.

The Court addressed the matters in s 195(3)(c), informed by s 6(f) of the RMA, which the Court said was at the crux of the present case. Considering whether SECT's decision might be amended with partial nullification of the heritage order, the Court stated that WCL had demonstrated to the Court's satisfaction that by maximizing development potential of the land, using the HASHAA legislation, it could be in a sufficiently strong position to strengthen, refurbish and re-use the chapel as part of the residential development proposed. However, it would not be so financially feasible to do the same, even on a partial basis, for the main building as well. The Court said it considered the rather pure reliance by SET and Heritage New Zealand Pouhere Taonga, a s 274 party, only on the terms of the heritage order and the district plan to be unrealistic. The Court was persuaded by expert opinion that central New Zealand had entered an era of high seismicity and that the proximity of the Wellington Fault to the system of recently ruptured fault lines should be taken into account. In the present case the evidence was that there was real, present and serious risk of earthquake damage to the buildings and that the better outcome for heritage was to agree to a partial nullification of the heritage order and allow demolition of the main building, in order, upon appropriate conditions, to secure long term retention of the chapel.

The Court indicated that it contemplated differing from the SECT decision and granting approval for demolition of the main building, on strict conditions and with regard to certain concerns raised by the Court. A draft timetable was set for further steps to be taken and for draft conditions of consent to be lodged. Costs were reserved.

Decision date 15 February 2018 - Your Environment 16 February 2018

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Mawhinney v Auckland Council - [2018] NZEnvC 15

Keywords: declaration; existing use; forestry

P Mawhinney, as sole trustee of the Waitakere Forest Land Trust and of the Forest Trust (together "M"), applied for a declaration to the effect that the owners, occupiers and forestry right holders in the land listed in Schedule 1 to the decision ("the land") had the right to carry out the planting, maintaining, growing and harvesting of tree crops with effects that were the same or similar to those of silviculture and harvesting activities carried out in the land since 20 December 1984 without first obtaining resource consent under the district plan. Auckland Council ("the council") opposed the declaration being made, submitting that M had no property rights in respect of the land and related rights of access and in particular had no existing use rights.

The Court stated that the essence of M's claim was that forestry was an existing use on the land subject to the application. M accepted that resource consents would be necessary for some logging to be carried out under the regional plan rules. The Court considered the land and the trees on it and the various properties concerned. The Court state there were six potentially relevant territorial authority plans: the Waitemata City District Scheme, which came in to force
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on 20 December 1984; the First Review of that Scheme, which came into force on 2 June 1988; Scheme Change 129, which became operative on 14 June 1988; Scheme Change 3 to the Waitemata Scheme which became operative on 26 February 1992; the Waitakere City District Plan which came into force on 27 March 2003; and the Auckland Unitary Plan (AUP) which became operative on 15 November 2016. Further, the Court noted that the AUP made existing "forestry" a permitted activity if it existed on 30 September 2013. The Court reviewed the activity status and rules applying to forestry on the land in dispute under such specified plans before considering the provisions of s 10 of the RMA. The Court considered how s 10 of the RMA was to be applied when there were a number of relevant plans. Following *Rodney District Council v Eyres Eco-Park Ltd* (2007) 13 ELRNZ 157, the Court determined that it needed to assess the factual situation at each of the dates at which the relevant plans came into force. To establish whether or not forestry was an existing use of the land, the Court considered: the facts – the history of use of the land; and whether the claimed existing use of forestry was lawfully established at the dates on which the relevant plans came into force. After following that process the Court made certain findings regarding the use of the land on the relevant dates, concluding finally that, as at the date that the AUP became operative, there was the existing use of exotic forestry over an area corresponding to the planted areas shown on the relevant maps and the Court found that this use had not been discontinued as at the date of the hearing.

The Court accordingly held that forestry as defined was an existing use on those planted parts of the land shown on Attachment D to the decision. On the basis of its findings, the Court considered that declarations A and B should be made, with amended wording as specified. The Court considered that there should be no award of costs. The Court added that the decision might be a pyrrhic victory for M because it was unclear whether the land could be logged without first obtaining water and/or discharge permits from the council as regional council. The Court made Declaration C to that effect.

Decision date 7 March 2018 - Your Environment 08 March 2018

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Vipassana Foundation Charitable Trust v O'Brien - [2017] NZEnvC 188

Keywords: enforcement order; abatement notice; earthworks; gun club

Vipassana Foundation Charitable Trust and Keep the Peace Makarau Valley Inc (together "the applicants") applied for an interim enforcement order against the first, second and third respondents requiring them to cease all earthworks at a site relating or incidental to a shooting range. The first respondents were joint owners of a property at 287 Tuhirangi Rd, Kaukapakapa ("the site") and an adjoining property. The second respondent was the Auckland Shooting Club. The third respondent was an earthmoving contractor engaged to undertake works on the site. The fourth respondent was Auckland Council ("the council"), which abided by the Court's decision.

The Court stated that at about the same time as the applicants initiated the present application, the council served abatement notices on the first respondent and on E, a principal of the second respondent, requiring them to cease the earthworks on the site related to the establishment of firing ranges until resource consent was obtained. The first, second and third respondents did not lodge an appeal against the abatement notices sought but advised that they had lodged an application for consent for the relevant activities with the council.

The Court considered the provisions of s 320 of the RMA which prescribed the Court's authority relating to interim enforcement orders. The Court compared an application for such orders to an application for an interim injunction in the civil courts, noting that the three matters to be addressed regarding the grant of interim injunctive relief were: whether there was a serious question to be tried; where the balance of convenience lay; and the overall justice of the case. The Court concluded that the threshold for the first matter had been reached. The applicants had presented an arguable case that there had been a contravention of the relevant plan provisions, which was a serious matter. Although the term "balance of convenience" was not expressly identified in s 320 of the RMA, the Court considered under this matter whether the Court should exercise its discretion to make an interim enforcement order when the council was taking contemporaneous enforcement action. The Court disagreed with the applicants' contention that there were important differences between the interim enforcement order now sought and the terms of the abatement notices applied for by the council. Turning to the third matter regarding overall justice, the Court stated that although there was clearly a serious issue it was one better left to be addressed at a substantive hearing. Further, under s 320(3)(b) of the RMA, the Court stated that the absence of an undertaking as to damages was a factor weighing against the grant of the application. The Court was not satisfied that it was necessary to make
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an interim enforcement order in the present circumstances. Costs were reserved.

Decision date 13 December 2017 - Your Environment 08 January 2018

(Comment: This may be another situation where established activities with land use consents or existing use rights find their activities being constrained and threatened by approaching urban development.-RHL.)

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Self Family Trust v Auckland Council - [2018] NZEnvC 49

Keywords: district plan; New Zealand coastal policy statement; regional policy statement; landscape protection; soils; rural; Maori values

The Self Family Trust ("the Trust") appealed, under s 156 of the Local Government (Auckland Transitional Provisions) Act 2010 ("the LGATPA") to the Environment Court against the decision by Auckland Council ("the council") not to accept the recommendation of the Independent Hearing Panel ("the IHP") that two areas of land, namely Crater Hill (Nga Kapua Kohuora) ("the Hill") and the Pukaki Peninsula ("the Peninsula"), east of Auckland International Airport, should be included on the urban side of the Rural Urban Boundary ("RUB") in the Auckland Unitary Plan ("the AUP"). The council concluded that the two areas should be on the rural side of the RUB. The Trust owned most of the Hill and, if the appeal was allowed, sought that the land be rezoned to allow for 575 new dwellings. The Trust was joined in the proceeding by land owners on the Peninsula. Other parties under s 274 of the RMA included the Auckland Volcanic Cones Soc Inc ("the Society"), seeking to protect the values of the Hill, and Auckland International Airport Ltd ("the Airport"), which raised concerns about reverse noise sensitivity.

The Court considered the chapter in the AUP on the RUB, which identified land potentially suitable for urban development. Having concluded that it had jurisdiction to consider the RUB, the Court reviewed the environment and the landscape of the Hill, the Peninsula and surrounds, noting the presence of two low volcanic craters, the Pukaki-Waokauri Creek system ("the Creek"), horticulture and farmland, and the coastal environment. The Court considered the Maori cultural landscape and the strong connection of mana whenua, specifically Te Akitai Waiohua, to the landscape containing the sites, which were closely linked to the historic portage routes from the Tamaki River to the Manukau Harbour. The Court found that the volcanoes Crater Hill and Pukaki Crater, physically connected to Pukaki Marae, via the Peninsula, the Creek and other coastal margins, lay at the centre of a "cultural landscape" of significance to Te Akitai Waiohua. In the centre of this was a Maori Reservation under the Te Ture Whenua Act 1993, reserved to the exclusive use of the Marae as a place of historic spiritual and cultural significance. Also relevant were the elite soils of the Peninsula, in continuous use for market gardening for decades.

The relevant statutory instruments considered included: the New Zealand Coastal Policy Statement ("the NZCPS"); the National Policy Statement on Urban Development Capacity ("NPSUDC"); the RPS in chapter 8 of the AUP; the proposed Regional Coastal Plan; the AUP, comprising the regional and district plans and the Auckland Plan. The Court referred to the Supreme Court decision in *King Salmon* and that of the Court of Appeal in *Man O'War Station v Auckland Council* [2017] NZCA 24 , (2017) 19 ELRNZ 662, noting how the words "avoid" and "inappropriate" in planning documents were properly to be interpreted. The Court noted that the NPSUDC focused on planning decisions made regarding the development capacity and infrastructure provision to meet the demand for housing and business land. However, the Court agreed with submissions that these objectives were not to be read at the expense of other values to people and communities and it was required that regard be had to the benefits and costs of the efficient use of urban land. The Court noted that in the AUP, the Hill was identified as an outstanding natural feature ("ONF"), but was not scheduled as having historic heritage status or being a site of significance to Mana Whenua.

The Court then turned to consider the environment and context, and issues raised in an evaluation under s 32 of the RMA, relating to the Hill and the Peninsula. Regarding the Hill, the Court concluded that the status quo, leaving the council's RUB where it was, was more effective than the counter view of the appellants and that the net social benefit also favoured the status quo. While acknowledging that the Self family would lose the potential for profit from land sales, and the community would lose the opportunity for over 500 new houses, the Court also took into account the subjective elements on other "owners" if the RUB was moved as sought. The proposed development on the Hill would be the last of a line of disappointments for Te Akitai, going back to the Land Wars, including the taking of the land for the Airport and the urban development in the area. Furthermore, the RPS provisions of the AUP relating to the ONF and
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volcanic cones meant that these had to be protected from inappropriate subdivision, use and development and also that the visual and physical integrity of the volcanoes were to be protected. The Court concluded that the AUP's objectives would be better achieved if the RUB were not moved. The combined circumstances in the present case of a volcano, being an ONF and also in the coastal environment meant that the policy common theme was that the volcanoes should be protected from urban and other development. Regarding the Peninsula, the Court similarly concluded that the overall status quo better achieved the objectives of the RPS than the proposed alternative. The Peninsula was surrounded by tidal creeks lined with mangroves and was the last piece of continuous water/land interface within the rohe of Te Akitai. It was a matter of national importance that the council recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, under s 6(e) of the RMA. Further, Policy 13 of the NZCPS required that significant adverse effects on the coastal environment be "avoided". Taking the two sites together, the Court concluded that, notwithstanding that the appellants proposed to transfer 60 per cent of the Hill to Te Akitai, the further fragmentation of the two sites into more allotments and building of housing and light industrial structures would neither improve nor maintain the mauri of the Te Akitai's world view of the coastal environment.

Overall, the Court stated that after taking into account the various positive features of the appeal, it found that there was one characteristic of each site which outweighed the alternative. These were the ONF on the Hill and the elite soils on the Peninsula, when assessed under the RPS and the NZCPS. The Court stated that when the consideration of the coastal environment and the need to recognise Te Akitai's values were added, the case for the status quo clearly outweighed the counterfactual. The Court concluded that the council drew the RUB in the correct place and its decision was accordingly confirmed. Costs were reserved.

Decision date 15/5/2018 - Your Environment 16.05.2018

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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 June 2018

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Capital spending boost for infrastructure. *Radio New Zealand* reports that the Government has announced it will invest $42 billion in net capital spending over the next five years to support its plan to rebuild infrastructure and critical public services. Read the full story here.

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Nelson CC retires forestry areas following concerns about sediment runoff in fresh water. *The Nelson Mail* reports that Nelson City Council, following its publication of Niwa data linking pine forestry to sediment-caused environmental damage of the Maitai River, has decided to retire more than 20 per cent of its forestry blocks in the catchment. Read the full story here.

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Iwi to appeal to Supreme Court over exclusive rights to Hauraki Gulf islands. *Stuff* reports that Ngāi Tai ki Tāmaki Tribal Trust has been granted leave to appeal to the Supreme Court claiming rangatiratanga and exclusive rights over Rangitoto and Motutapu Islands in the Hauraki Gulf. Read the full story here.

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NZLS: Tenancy Tribunal decision sends clear message on landlord maintenance obligations. The New Zealand Law Society noted that the Ministry of Business, Innovation and
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Enterprise said a case decision sends a clear message to all landlords that failing to address maintenance issues impacts severely on the wellbeing of tenants.

The Tenancy Compliance and Investigations Team has successfully taken a Rotorua property management company to the Tenancy Tribunal for failing to fix serious problems in a rental property it manages. The issues left the property cold, damp and draughty forcing the tenants to tape up the holes with cardboard.

The Tenancy Tribunal has ordered McDowell Real Estate Ltd pay $3,000 in exemplary damages for failing to provide and maintain the premises in a reasonable state of repair in accordance with the Residential Tenancies Act and regulations. Please follow the link for the full statement. Media Release.

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Fence battle back in court for costs ruling. *Radio New Zealand* reports Peter and Sylvia Aitchison have gone to the High Court seeking costs from Wellington City Council following a long-running dispute over a four metre high fence their neighbour built in 2015 blocking their harbour views. The Environment Court and the High Court ruled that the fence had to come down. Read the full story here.

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QC to head Bella Vista housing enquiry. *Radio New Zealand* reports that Tauranga City Council has appointed Paul Heath QC to conduct an investigation into the council's responsibilities and possible failings with respect to the construction of the Bella Vista Housing Development which went into receivership last year, forcing residents to evacuate their homes on safety grounds. Read the full story here.

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Apartment block demolished for construction of Auckland's rail link. *The New Zealand Herald* reports that an apartment block, comprising 11 residential units, on Auckland's Mt Eden Road is being demolished to make room for the city's $3.4 billion Rail Link. The apartments, built in 1997, were purchased by City Rail Link Ltd at market value at a cost of $7.8 million. Read the full story here.

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Neighbours use barbed wire to prevent students from jumping fence. *Papakura Courier* reports Papakura residents have had to resort to wrapping razor-sharp barbed wire around sections of their property's fence in an effort to keep students from neighbouring school, Rosehill College, from scaling the fence and legging it down their driveway. The problem escalated when the college started locking its front gates during school time in late 2017, and a cage over a gas line became a handy leg-up. Read the full story here.

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Dunedin Hospital site revealed. The *Otago Daily Times* reports that Health Minister David Clark has revealed that the new Dunedin Hospital will be built on multiple blocks in central Dunedin. It will cover all of the former Cadbury factory site and Cadbury World and the Cadbury Cafe on the site will close. Read the full story here.

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High Court decision on $500m Shelly Bay development appealed. *Stuff* reports that Enterprise Miramar will go to the Court of Appeal to try to overturn a High Court decision that dismissed its application for a judicial review of the $500m development of Shelly Bay. Read the full story here.

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Problems at Albany's Rose Gardens apartments. *The New Zealand Herald* reports that purchasers of apartments at the Rose Gardens development in Albany are objecting to allegedly being asked to pay price rises of over $100,000 and having to suffer delays in obtaining title. Read the full story here.

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Building and forestry restrictions proposed for Tasman slip-prone areas. *The Nelson Mail* reports that Tasman District Council is reviewing rules applying to slip-prone catchments in the district, following cyclone Gita. In particular new restrictions may be imposed relating to plantation forestry and new dwellings in certain areas. Read the full story here.

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Walking track on Te Mata peak not so easy to remove. *Radio New Zealand* reports that
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Craggy Range Winery has proposed to council and iwi representatives five possible options for fixing the walking track it carved into the side of Te Mata Peak. However, the winery's Michael Wilding says that completely removing the track is not a simple matter and would involve landscape and resource consent issues. Read the full story here.

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Whanganui DC to subsidise restoration of historic buildings. *The New Zealand Herald* reports that owners of historic buildings listed in the district plan will be eligible to apply to Whanganui District Council for up to 50 per cent of the cost of restoration which enhances the city's heritage. Read the full story here.

Two new buildings in Christchurch's Cathedral Square. *The Press* reports that two new buildings, a gift shop for Redson Corporation and a new office for the Spark telecommunications company, will be constructed in the southern part of Cathedral Square in Christchurch. The new buildings will occupy sites left vacant since the ANZ and BNZ buildings were demolished after the earthquakes. Read the full story here.

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Two light rail lines proposed for Auckland. *The New Zealand Herald* reports that Transport Minister Phil Twyford and Finance Minister Grant Robertson have announced plans to build two new light rail lines, one to the airport and the other to Kumeu, to be built and owned by the New Zealand Superannuation Fund. Read the full story here.

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Agreement reached in Kapiti expressway land valuation dispute. *The Dominion Post* reports a Kāpiti businessman who took the New Zealand Transport Agency to court to seek compensation for land the Government acquired in 2014 under the Public Works Act for construction of the Kāpiti Expressway, has reached an agreement out of court with the agency over the compensation figure. Read the full story here.

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QLDC to consider application for 92 more housing units at Arthurs Point. The *Otago Daily Times* reports that Bullendale Development Ltd has applied to Queenstown Lakes District Council to construct a further 92 housing units immediately west of its existing 88-unit SHA development at Arthurs Point, Queenstown. Read the full story here.

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$820k on cycle trail maintenance. *Radio New Zealand* reports that the Government will spend $820,000 on cycle trail maintenance around the country including storm damage repairs, trail surface improvements, weed control and installation of signage. Read the full story here.

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Hutt CC prosecutes building owner for failing to undertake earthquake repairs. *The Dominion Post* reports that in one of the first prosecutions of its kind, Hutt City Council has prosecuted Alura Ltd for failing to meet the deadline to earthquake strengthen its building at 307 Jackson St. The company pleaded guilty to the charge, which carries a maximum fine of $200,000. Read the full story here.

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Land blocks information now accessible via Māori Maps pilot. Māori Maps announced that a new pilot project has added Māori land information for the Waitangi Catchment Area in the Bay of Islands/Peowhairangi to the Māori Maps website.

Through links to Māori Land Online and Landcare Research, the website's core map displays information for the catchment — including block name and area, total owners, management name details and soil information.

Browsers to the site can select land blocks displayed in vivid colour in proximity to marae in the Waitangi Catchment Area. Based on user feedback, Te Potiki National Trust (the charity that administers Māori Maps) will add land information nationwide. Please follow the link for the full statement. Media Release

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A$500m Australian government funding for Great Barrier Reef. *Stuff* reports that Australian Federal Environment Minister Josh Frydenberg and Foreign Minister Julie Bishop have pledged half-a-billion dollars to finance various measures to try to save the Great Barrier Reef, although Mr Frydenberg acknowledges that global warming remains the biggest threat to the Reef. Read the full story here.

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Summerset applies for consent for new retirement village in Lower Hutt. *The Dominion Post* reports that Summerset Holdings Ltd has applied for resource consent for its $150 million, 274-unit Boulcott retirement village development in Lower Hutt, but certain residential neighbours have raised concerns. Read the full story here.

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Ratepayer calls on Ombudsman in effort to reveal council's land assets. *The Timaru Herald* reports ratepayer Janelle Bilcliffe has asked the Ombudsman to find out why the Waimate District Council refused her request for details of council-owned land. Read the full story here.

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Christchurch to get a new covered stadium. *The New Zealand Herald* reports that the Government has announced that Christchurch will get a new covered stadium which is large enough to host test matches and entertainment events. Read the full story here.

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Skypath project fully funded. *Stuff* reports that the Skypath, a cycling and walking path annexed to Auckland Harbour Bridge, has had full funding guaranteed by Auckland Council and the Government. Read the full story here.

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Mayor regrets land sale after proposed school zone shift. *Stuff* reports Christchurch Mayor Lianne Dalziel has said she would not have championed selling council land to the Ministry of Education had she known it would "exclude" families from two local high schools because of proposed enrolment zone changes. Read the full story here.

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Landlord in "David and Goliath" battle against MFAT and EU. *The New Zealand Herald* reports the Tenancy Tribunal has reversed a ruling against the EU delegation's deputy head of mission, Eva Tvarozkova, and in favour of Wellington landlord, Matthew Ryan, for unpaid rent and property damage amounting to $20,000, and ordered a re-hearing for June 2018. Mr Ryan said he had effectively been crushed by the might of New Zealand and the European Union's legal teams, who argued for the tribunal to consider the impact of diplomatic immunity in the case. Read the full story here.

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