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Legislation Case-notes August 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 eight appeals covering diverse situations associated with subdivision, development and land use activities from around the country;

- A partially successful appeal against refusal of consent to subdivision of a 118 hectares of rural land in the Upper Clutha valley. The site was identified as part of an "outstanding natural feature" and "visual amenity landscape" in regulatory planning documents;
- A further case involving a shooting club which was holder of a CoC was issued with an abatement notice for noise effects. The club successfully applied for a stay of the abatement notice pending court decisions on judicial reviews of other decisions by Auckland Council;
- A High Court decision of several interwoven issues involving grant of retrospective consent for an earth mound on land near Queenstown that limited neighbour's views; the adverse effects on a neighbour and the status of an unregistered consent notice;
- An unsuccessful appeal against a sentence of imprisonment imposed on a property developer who had destroyed protected trees near Waiwera despite being told by Auckland Council staff to stop doing so;
- An application for judicial review of process and decision-making by Wellington City Council relating to consent for development and subdivision of land at Shelly Bay, Wellington for special housing;
- Decisions on further appeals relating to quarrying at Saddle Hill, Dunedin. Crucial issues to be considered included extent of existing use rights for quarrying which had commenced in the 1960s;
- An interim decision on an application for stay of an abatement notice relating to an appeal against a condition of land use consent that required trucks bringing fill material to a development site to use a longer and less convenient route than one which traversed the centre of the town of Waihi Beach;
- A prosecution of a farmer who had undertaken earthworks on land near the Hakataramea River for the purpose of establishing a centre-pivot irrigator. The works had extended into the bed of a stream and caused discharge of sediment into the river.

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CASE NOTES August 2018:

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Willowridge Developments Ltd v Queenstown Lakes District Council - [2018] NZEnvC 83

Keywords**: **resource consent; subdivision; rural; landscape protection

Willowridge Developments Ltd (WDL") appealed the decision by Hearing Commissioners for Queenstown Lakes District Council ("the council") to decline a proposal to subdivide WDL's 118 hectares of rural land ("the site"). The original proposal was for 13 lots, each with a building platform for a house, but this was now amended to a seven-lot subdivision involving landscape works and building controls. The site was in the Rural General zone and the activity status was

discretionary.

The Court considered the amended proposal under s 104(1) of the RMA. The site and its wider landscape setting were part of an Outstanding Natural Feature (ONF) which was the Clutha River Valley. The upper terrace on the site was part of a Visual Amenity Landscape ("VAL") of open grassland and scrub. The applicable statutory instruments were the Otago Regional Policy Statement, the Proposed Otago Regional Policy Statement, the operative district plan ("OP") and the proposed district plan. The Court observed that, regarding the lower terrace on the site, the policy direction for any ONL was to avoid subdivision and development unless it would result in no more than minor adverse effects on landscape values, natural character and visual amenity. Regarding the upper terrace, the principal landscape policy for a VAL was to avoid, remedy or mitigate any adverse effects of subdivision and development on landscapes which were highly visible from public places. In the present case, the upper terrace was prominent. The Court noted that the planning policy direction was to ensure that density of subdivision did not increase to a point where the planting and building benefits would be outweighed by the adverse effects of domestication of the landscape.

Turning to potential effects of the proposal, the Court said that there were two positive effects: the provision of housing; and the ecological benefits, which included removal of conifer wilding trees and new planting. Possible adverse effects included effects on visual amenity, especially regarding lots 1 to 3 on the upper terrace. On balance the Court found that housing on those three lots was likely to be sufficiently prominent from enough places to detract from public views. A further issue was whether development of the site as proposed would visually compromise the existing natural and arcadian pastoral character of the landscape, contrary to a rule in the OP. The Court predicted that the development of lots 4 to 7 would be consistent with the natural character of the site and the immediate landscape which, with the proposed planting, would be improved. The Court concluded that subdivision and development of lots 4 to 7 was appropriate, subject to conditions. However, subdivision of lots 1 to 3 should be refused. The Court gave directions as to the drafting of suitable amended conditions.

Decision date 27 June 2018 - Your Environment 28 June 2018

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Auckland Shooting Club Inc v Auckland Council – [2018] NZEnvC 65

Keywords: abatement notice; stay

Auckland Shooting Club ("the Club") and two others ("the appellants") applied for stay of the abatement notice issued by Auckland Council ("the council") on 4 May 2018, pending the resolution of the appeal against the notice. The matter concerned the relocation of the Club to a rural site. The appellants had obtained a Certificate of Compliance ("CoC") from the council for the activity. Subsequently owners of a neighbouring property, the Vipassanas ("V"), applied unsuccessfully for judicial review. The High Court's decision on such application was now under appeal to the Court of Appeal. V also had made application for enforcement orders in the Environment Court relating to earthworks undertaken by the Club, and the council issued an abatement notice relating to the earthworks. The present abatement notice was issued by the council in relation to a shooting competition due to take place at the Club site on 19 May 2018.

The Court considered the relevant provisions of s 325 of the RMA. Regarding the likely effects of a stay, the Court noted that the appellants had obtained a Noise Report which confirmed that the activity complied with the council noise standard. Further, the activity had been continuing for several years, prima facie in accordance with the CoC. Overall, the Court was satisfied that it would be unreasonable to comply with the notice. The Court stated that the substantive matter should proceed to a hearing as soon as possible and made directions. The abatement notice was accordingly stayed. Costs were reserved.

Decision date 7 June 2018 - Your Environment 8 June 2018

(Note – This situation of incompatibility of activities is becoming more common as the spread of residential activities in "lifestyle blocks" extends further into rural areas around existing urban areas. The application for an enforcement order was reported in Newslink June 2018. RHL)

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Speargrass Holdings Ltd v Queenstown Lakes District Council – [2018] NZHC 1009

Keywords: High Court; public notification; earthworks; resource consent; amenity values; effect adverse; judicial review

The High Court considered three proceedings by Speargrass Holdings Ltd ("Speargrass"),

owner of the property at 88 Speargrass Flat Rd, near Queenstown ("the Speargrass property"). The proceedings all concerned a large earth mound of more than five metres in height, constructed by the Flax Trust, on land owned by Flax Trust ("the Flax Trust property"), along the northern boundary of the Speargrass property. Flax Trust was granted resource consent by Queenstown Lakes District Council ("the council") for a mound of less than three metres in height, but the Environment Court ("the EC"), by its decision of 17 October 2016 ("the EC decision") granted retrospective consent for the higher mound which had been constructed. The occupiers of the Speargrass property considered that they were significantly adversely affected by the mound and considered the council had erred in consenting to it. The three proceedings brought by Speargrass were: an appeal against the EC decision which granted a variation of the consent; an application for judicial review of the council's decision not to notify Flax Trust's original application for consent for the mound; and an application for an order under s 333 of the Property Law Act 2007 ("the PLA") requiring the removal of the mound, at Flax Trust's cost.

The Court reviewed the background, including the history of the subdivision creating the two properties, before considering the appeal against the EC decision. Speargrass alleged that the EC: misunderstood and misapplied the law in deciding that what was built on the Speargrass property did not form part of the environment for the purposes of s 104(1)(a) of the RMA; wrongly concluded that the mound's effects were the same as those of trees; misunderstood and misapplied the law in deciding to disregard the adverse effects of the mound on the environment; and wrongly took into account matters relating to Speargrass's activities on its property when making its decision under s 104 of the RMA to grant consent for the mound. After reviewing the EC decision, concerning the first ground of the appeal proceeding, Speargrass submitted that the EC erred in holding that, because Speargrass's varied consent for the location of the buildings on its property had not yet been registered under the Land Transfer Act 1952 ("the LTA"), such buildings did not form part of the existing environment. Speargrass submitted that the existing environment was a factual and not a legal enquiry. The council agreed with Speargrass that its consents had commenced and whether or not changes to the consent were registered did not affect their legal validity. Flax Trust supported the EC's decision. The Court considered the decision in *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) which called for a "real world approach" to what might be included in the existing environment. The Court stated that the failure to comply with the condition in Speargrass's subdivision consent, which required registration of the consent notice under the LTA, did not render the development unlawful, contrary to the EC's findings. Indefeasibility of title was irrelevant to the issue before the EC. Furthermore, the Court found that the EC erred in relying on the registered consent notice as notification to the world of the "environment" proposed for the Speargrass property. The concept of the "environment" for the purposes of s 104 of the RMA must reflect reality. If a resource consent had been granted and was being implemented, that would need to be taken into account as part of the environment. In this the EC made a material error, on which basis alone the Court would allow the appeal. Regarding the second ground of the appeal, the Court now found that there was inadequate evidence to support a conclusion that the effects of the mound were the same as the effects of trees. Addressing the third ground, the Court rejected the EC's decision that trees could be trimmed through court orders under the PLA. More importantly, the Court stated that the permitted baseline comparison was between the effects of the proposal and those of what was permitted under the relevant plan, made within the framework of the RMA, not under other legislation. The Court now found that the EC Judge was in error to ignore the Speargrass existing subdivision consent when deciding whether it was appropriate to discount effects by having regard to what might be permitted under the plan. Further, the EC erred in viewing the Flax Trust earthworks consent as overriding the existing Speargrass subdivision consent. Regarding the fourth ground of appeal, the Court found now that the EC was wrong to conclude that the Speargrass buildings were illegal, and further the EC was not authorised to look behind the Speargrass consents when their validity was not in issue before it. Thus, the Court concluded that the EC's errors were material, the EC's decision to allow the appeal and to grant consent to vary conditions of the Flax Trust earthworks consent were set aside. The appeal was allowed. The Court pointed out that, for the avoidance of doubt, the original earthworks consent for the mound, less than three metres high, remained in force in the form originally granted by the council.

Turning to consider the judicial review proceedings, the Court addressed the alleged errors in the council's notification decision and concluded that the council had adequate information about the magnitude of the mound works proposed to assess the effects on views and amenity. However, the Court found that the council erred in discounting the effects of the earthworks by applying an incorrectly assessed permitted baseline, and such error could not be dismissed as immaterial. Further, the council made an error in calculating the extent of permitted earthworks

under the plan. Regarding the substantive consent decision, the Court found that the council did not err in a way that would engage the principles of judicial review. Having found material errors in the council's notification decision, the Court considered whether it was appropriate to grant the relief sought by Speargrass, namely that the original consent should be set aside. The Court concluded that if the relief were granted, the parties would be returned to the point they should have been over three years ago, with Flax Trust having to make a fresh application for consent for earthworks already in place. The Court emphasised that Speargrass's primary concern was with the as-built mound, over five metres high, rather that the much lower consented mound. The Court was satisfied that relief should not be granted in the present case.

Finally, the Court considered the application under the PLA. Addressing the provisions of ss 332 and 333 of the PLA, the Court found that: the earth mound was a "structure" as very broadly defined in the PLA; the mound blocked the views from the Speargrass property, but not unduly so; the evidence fell short of establishing that there was any undue interference caused regarding the use of the land for growing trees or access to light; but that the mound in its current form had an undue effect on the use of the Speargrass property for rural residential living. However, having previously found that the EC's decision should be overturned, the Court declined to make any order under the PLA. The Court stated that the only mound that could lawfully exist was the one permitted under plan and originally consented. In view of the fact that the council acknowledged it erred in the processing of the earthworks consent, the Court considered costs holistically and reserved costs, stating that its preliminary view was that costs should lie where they fell.

Decision date 1 June 2018 - Your Environment 5 June 2018.

(The decision on Queenstown Lakes District Council v Hawthorn Estate Ltd [*2006] NZRMA 424 referred to in this decision has been frequently referenced in other decisions involving effects of development on "Outstanding Natural Landscapes" and land similarly classified in district plans. Summaries of the decisions involving Hawthorn Estate Ltd have also been printed in Newslink case-notes in September 2004 and July 2005. See news item below - RHL.)*

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Lau v R – [2018] NZCA 151

Keywords: Court of Appeal; prosecution; prison; tree protection

The Court of Appeal considered the appeal by E Lau ("Lau") against the sentence of imprisonment imposed on him by Judge Kellar in the District Court on 24 January 2018. The charges, laid by Auckland Council ("the council") were of contravening or permitting a contravention of the RMA by damaging six pohutukawa trees and one totara tree ("the trees") on a rural property at 18 Weranui Rd, Waiwera ("the site"). Lau was a property developer and sole director of a company holding a lease over the site. The site contained areas of pasture and regenerating and remnant coastal forest of significant ecological value. There was evidence that Lau intended to build new dwellings in the location of the trees. Lau was tried by jury and pleaded guilty just as Judge Kellar was about to begin summing up. The sentence imposed was two months and two weeks in prison.

The Court noted that an appeal against sentence might be allowed only if the Court were satisfied that there had been an error (meaning a material error requiring correction such that the sentence was manifestly excessive or wrong) and that a different sentence should be imposed. The Court stated that at first sight, a sentence of imprisonment in response to the destruction of trees might seem unjustifiably heavy-handed, given the availability of alternatives and the requirement in ss 8(g) and 10A of the Sentencing Act 2002 ("the SA") to impose the "least restrictive outcome" appropriate. The Court reviewed the history of the case. Officers of the council had visited the site more than 20 times to inspect the works and had told Lau on numerous occasions to stop felling native trees. In June 2014, after a storm, Lau arranged for a contractor to push over the trees using a digger. All the trees were protected by the Operative District Plan and by the Auckland Unitary Plan. The sentencing Judge rejected Lau's explanation that the trees were damaged by the storm and found the damage to the trees, some of which were over 100 years old, to be "brutal", deliberate and terminal. The Judge concluded that Lau's purpose was to gain financially from the development of the property because the views from the sites would be considerably enhanced by the removal. Lau had shown no remorse, had attempted to diminish his role in the offending by claiming merely to be an interpreter and had declined to give consent to the consideration of electronically monitored sentences. The Judge stated that Lau was subject to bankruptcy proceedings and his belated and inadequate offer to pay reparation was not realistic. Moreover, although Lau had no previous conviction, his past misconduct in environmental matters was evidenced by his having
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been issued with numerous abatement notices and enforcement orders by the Environment Court regarding his breaches of the RMA on many different sites. Further, Lau owed the council $379,000 in unpaid costs awards. The sentencing Judge found that the sentencing objectives of the SA would not be achieved by a fine or community work; the offending was flagrant and deliberate, undertaken for the purpose of achieving what would have been significant financial gains. Judge Kellar took a starting point of three months' imprisonment and gave a discount of two weeks for the late guilty plea.

The Court of Appeal considered relevant case authority submitted by Lau regarding tree removal and found that the present case was more serious than such cases, given the aggravating factors. This was very serious offending of its type and, having regard to the maximum possible penalty, the Court considered that a higher starting point would not have been criticised. Further, the two weeks allowed for guilty plea was very generous in the circumstances. Lau was not a candidate for a community-based sentence and had declined electronic surveillance. He had demonstrated throughout a complete disregard for the law and orders of the regulatory authorities and failed to display acceptance of his responsibility for the offending. The nature of the environmental destruction involved, the cynical and deliberate nature of the offending, carried out with full knowledge of its unlawfulness and the absence of any mitigating factors such as genuine remorse, made a community-based sentence insufficient. In a case which involved deliberate, significant and financially motivated breaches of rules designed to protect the natural environment, anything short of a custodial sentence was unlikely to have the desired salutary effect.

The Court concluded that the sentence imposed was stern but justified, and was properly available to the sentencing Judge. The appeal was dismissed. Lau was ordered to surrender himself at the Auckland District Court on 18 May.

Decision date 24 May 2018 - Your Environment 25 May 2018.

(Note - This is one of several cases before the Courts arising from Mr Lau's approach to land development on several properties around the Auckland area. See also news item below. RHL.)

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Enterprise Miramar Peninsula Inc v Wellington City Council - [2018] NZHC 614

Keywords**: **High Court; judicial review; resource consent; public notification; time limit; council procedures

This was an application by Enterprise Miramar Peninsula Inc ("Miramar") for judicial review of two decisions by Wellington City Council ("the council"). The matter concerned the application to the council by The Wellington Company Ltd ("TWC") under s 25 of the Housing Accords and Special Housing Areas Act 2013 ("the HASHAA") for resource consent to redevelop and subdivide an area of land in Shelly Bay ("the site"). The two council decisions presently challenged were: not to engage independent commissioners to determine the application; and to grant the resource consent. The errors of law alleged by Miramar included: non-compliance by the council with HASHAA procedural rules and time limits; apparent bias and/or conflict of interest on the part of the council due to the fact that it owned some of the land at the site and had publicly promoted the proposal; improper delegation of the decision-making to council officers when independent commissioners should have been appointed; misconstruction and/or misapplication of s 34(1) of the HASHAA; incorrect reliance on s 72(3) of the HASHAA; and acting for improper purpose.

After reviewing the scheme and purpose of the HASHAA, the site and the development proposed, the High Court addressed the particular challenges. First, ss 29(4) and 41(1)(a) of the HASHAA imposed procedural rules as to time limits for an authorised agency to make decisions and to notify applications. Miramar alleged that the council had not complied with these in the present case and that such failures amounted to an error of law so as to invalidate the decisions. The Court noted that the HASHAA required an agency processing a resource consent to decide within 10 working days whether to notify the application to any of the persons specified and that there was a power to extend time limits. In the present case the extensions made had greatly exceeded the period allowed. In addition, the council had not put forward any explanation as to why the decision as to notification was incorporated within the substantive decision to grant consent. The Court referred to previous criticism by the High Court of the council's practice of conflating the notification and substantive consent decisions. However, the Court stated that a finding that the decisions were not made within the relevant time limits did not automatically make such decisions ultra vires and void. With reference to case and academic authority, the Court noted that, in contrast to the position in the RMA, under the
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HASHAA notification was not the expectation and was prohibited other than in limited circumstances to a limited range of parties. In the present case Miramar was not a party that the HASHAA permitted to be notified and had suffered no adverse effect from the failure to comply with time limits. While the council's failure to comply with the statutory timeframes was regrettable, such failure did not render the decisions invalid.

Turning to address the allegation of apparent bias, the Court considered what was the correct legal test in the present context. The Court agreed with High Court opinion that "the notion of bias for reasons of self-interest does not travel comfortably across from the role of a judge to that of a council which is in substance a trustee for its ratepayers". The Court now found that the statutory context in which the council exercised its powers was important and the Local Government Act 2002 provided guidance, providing that a local authority should ensure that decision-making processes for regulatory responsibilities were separated from those for non-regulatory processes. Distinguishing previous cases which involved apparent bias by judicial officers, the Court adopted authority which accepted that a decision-maker would bring a policy perspective to its determination, with a probable pre-disposition on the merits. However, provided the decision was made by "minds not closed to argument", it would not be invalidated for bias. In the present case the council officers to whom the decisions had been delegated submitted by affidavit that there had been a separation between their decisions and the commercial negotiations undertaken between the council and TWC concerning the Shelly Bay development. The Court found no evidence that the council officers had any personal conflict of interest which resulted in them being biased. Furthermore, the Court found that allegations of the council's pecuniary interest in the outcome were unfounded. The Court stated that the council owned and administered the land for the benefit of the inhabitants of the city and the fact that the council might receive some financial benefit as the result of its exercise of a statutory power did not vitiate the decision. It was inherent in the structure of the HASHAA that there would be a significant degree of cooperation between an applicant and a local authority in relation to a special housing area ("SHA"). Similarly, the Court concluded that in the present statutory context there was no duty on the council to appoint independent commissioners. Further, the Court noted that s 34A(1) of the RMA referred to "hearings commissioner" and not to "independent commissioner". The power to appoint a hearings commissioner was permissive and designed to assist councils obtaining additional resources, rather than being designed as a recusal mechanism. Even if all the alleged errors were looked at in combination, it could not be said that the decision-makers approached the matter with closed minds and were unwilling to consider the merits. There was no reviewable error on this ground.

The Court turned to consider the alleged error regarding the misinterpretation of s 34(1) and certain other provisions of the HASHAA. After undertaking a close analysis of the provisions, the Court concluded there had been no error of law made. In particular, the Court stated that the obligation on the decision-maker in s 34(1) of the HASHAA to "have regard to" the matters listed was fundamentally different from being bound to and required to apply such matters. A statutory requirement to "have regard to" was generally understood to require a decision-maker to give the matter genuine attention and thought. Finally, the Court rejected Miramar's argument that the council had used its powers under the HASHAA for an improper purpose. The application for judicial review was dismissed. Directions were given as to applications for costs.

Decision date 19 April 2018 - Your Environment 23 April 2018

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Saddle Views Estate Ltd v Dunedin City Council – [2018] NZCA 115

Keywords: Court of Appeal; leave to appeal

The Court of Appeal considered the application by Saddle Views Estate Ltd ("SVEL") for leave to appeal from the High Court decision of 25 July 2017 ("the 2017 HC decision"). The 2017 HC decision allowed in part and dismissed in part SVEL's appeals from two decisions of the Environment Court ("the EC"): that of 31 May 2016 ("the EC Interim decision"); and that of 13 October 2016 ("the EC final decision"). The matter concerned declarations sought by Dunedin City Council ("the council") relating to the existence and extent of rights held by SVEL to quarry Saddle Hill under the RMA. Quarrying activity has been ongoing at Saddle Hill since 1960. Previous litigation on the matter included a High Court decision of 20 November 2014 ("the 2014 HC decision"). SVEL now applied for leave to appeal, alleging that in the 2017 HC decision the Judge made three errors: first, in finding that the EC had jurisdiction to enquire into and make the declarations it did in the EC final decision; second, that the EC erred in failing to find there was an estoppel (or abuse of process) precluding the council from contending there
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was not a deemed land use consent under the RMA for the quarrying activity; and third, that the EC erred in finding that the assessment of relevant facts preceding a determination as to the existence and terms of a statutory consent did not engage a question of law, unless tainted by some reasoning error.

The Court stated that under s 308 of the RMA and s 303 of the Criminal Procedure Act 2011, it must not give leave to bring a second appeal unless it was satisfied that the appeal involved a question of law of general or public importance. After reviewing the background to the case and the previous decisions of the High Court and the EC, the Court stated that it was satisfied that none of the present grounds satisfied the statutory criteria and that the issues raised by SVEL arose out of circumstances of the case and lacked any quality of general importance that would justify a second appeal.

Regarding the first issue, the Court stated that SVEL essentially asked it to give a "kind of advisory opinion" on the extent of the power granted by s 313(b) of the RMA. The Court noted that under such provision the EC might make a declaration sought, without or without modification and might make any other declaration it considered necessary or desirable. The Court now stated that this was a very broad conferral of power, and it would not be appropriate to try to define any limits on such power except in the broadest terms suggested by concepts such as rationality, relevance and natural justice. In the present instance, the council had applied for an order that SVEL had a resource consent to operate the quarry, restricted to a specified area and subject to the condition that earthworks carried out would not visibly change the profile of the Saddle Hill ridgeline. The only issue for a second appeal was whether the EC had jurisdiction to declare that consent was granted to commence quarrying subject to a limitation as to volume. The Court was clear that it did, under s 313(b), if not s 313(a) of the RMA, and there was no arguable question of law arising.

Regarding the second issue, SVEL sought for a second time to raise the cause of action estoppel, or issue estoppel, arguing that the 2014 HC decision precluded the EC from making findings inconsistent with SVEL having some lawful right to quarry. The Court now said that the issues all related to the circumstances of the case and there was no general legal issue arising which might be said to be of general importance. Even if leave were to be granted on the issue, the Court saw no prospect of success. This was because Whata J in the 2014 HC decision did not determine that there was a deemed permission authorising ongoing quarrying activity for the purposes of s 383 of the RMA.

Finally, the Court stated that by the third issue SVEL sought to challenge the EC's findings that the 1960 consent was limited by quantity and purpose. The Court now agreed with the Judge in the 2017 HC decision that such issues were essentially factual in nature. The Court noted that SVEL argued that the construction of the 1960 consent was a question of law; however, in the particular circumstances of the case, that required factual findings and the drawing of inferences. These tasks the EC had carried out. There was no legitimate question of law raised, still less one of general importance. Accordingly, the application was declined. SVEL was ordered to pay costs to the council on a Band A basis with disbursements.

Decision date 4/5/2018 - Your Environment 7 May 2018

(See previous decisions reported in Newslink in September, November and December 2016 October 2017 and in several earlier years. – RHL.)

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Double R Developments Ltd v Western Bay of Plenty District Council – [2018] NZEnvC 41

Keywords: abatement notice; stay

Double R Developments Ltd ("the appellant") applied for stay of the abatement notice issued by Western Bay of Plenty District Council ("the council"), pending the determination of the appellant's appeal against a condition of its resource consent. The consent related to a subdivision at Hanlen Ave, Waihi Beach ("the site"). Condition 7 of the consent ("the condition") required the appellant to use a particular route ("the condition route") to bring fill material from a source on Waihi Beach Road to the site, rather than use the most direct route through the centre of town. The condition route was significantly longer than the direct route but resulted in heavy traffic avoiding the town.

The Court noted that the appellant said it had not realised that the council had imposed the condition and the condition route would add significantly to its costs and the extra time involved meant it might not be able to complete its fill operation in time. The council in response said that the condition was in the draft resource consent which the appellant had not challenged. The
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issue arose when the council received complaints from the public about heavy traffic through the town. The council submitted that a stay of the abatement notice would result in the condition being rendered ineffective, without an appeal or application for variation having been made.

The Court stated that the general situation, which was that the use of roads was not controlled under the RMA but by specific roading and transport legislation, did not apply where traffic generated by land use affected other road users in a way that control of the effects was necessary. In the present case, therefore, there was jurisdiction for a consent authority to impose a condition such as the present one. Further, the appellant now accepted that it did have notice of the condition prior to the grant of consent. In the circumstances, the Court declined to grant a stay of the abatement notice, and accepted that to do so would effectively delete the conditions. However, the Court recognised that the appellant was now faced with the impending end of the earthworks season and the subdivision might be delayed as a result. The Court directed counsel to confer and come back with a suggested timetable to bring on the hearing of the appeal quickly. Costs were reserved.

Decision date 1 May 2018 - Your Environment 2 May 2018

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Canterbury Regional Council v MFS Ventures Ltd – [2017] NZDC 27548

Keywords: prosecution; river; discharge to water; earthworks

MFS Ventures Ltd ("MFS") and its director G Nelson ("N") were sentenced in the District Court having each pleaded guilty to two charges laid by Canterbury Regional Council ("the council"). MFS owned and farmed land near Kurow, bordering the Hakataramea River ("the river") and its tributary Sisters Creek ("the creek"). During a programme to install central pivot irrigation to create dairy pasture on the farm, the defendants undertook earthworks on an area of land including part of the bed of the creek. The charges concerned disturbance of the creek bed, under s 13(1) of the RMA and the discharge of sediment to water in breach of s 15. Council officers, investigating a complaint, observed extensive earthworks on the bed of the creek. The creek was an intermittently flowing alluvial fan river, which was not now flowing. A significant quantity of sediment flowed from the creek to the river, resulting in a discoloured plume of river water. Expert evidence was presented to the Court that this would have resulted in a significant detrimental effect on ecological values in both the creek and the river.

The Court considered the sentencing principles as established by the Sentencing Act 2002 ("the SA") and case authority. The environment affected had community and recreational values and the regional plan provided that natural character of rivers was to be preserved by preventing encroachment onto beds and margins of braided rivers. The Court found these factors relevant to both the offences under ss 13 and 15 of the RMA. The Court found that the dispute between the council and the defendants as to the extent of the bed disturbed by the offending was not material in the sense of significantly contributing to the sentence. The Court accepted there was no evidence to permit quantification of the extent of harm caused by the sediment discharge. However, the Court inferred that some ecological harm would have been caused by the discharge. Regarding culpability, the Court did not accept that the defendants were justified in assuming that there were no legal obligations to seek consent for their activities. The environment was self-evidently riverine. The Court found that the actions of the defendants were reckless and their culpability moderately serious.

After considering relevant case authority, the Court declined to set a global starting point for both offences, finding there was an insufficient relationship between them to do so. The starting point for the bed disturbance was set at $20,000 and that for the sediment discharge was set at $10,000. The Court declined to grant an uplift to take into account the defendants' previous conviction in 2011. A 20 per cent discount for less than prompt guilty pleas was allowed by the Court. This resulted in fines of $16,000 and $8,000 respectively. These figures were further reduced to $15,000 and $7,000 respectively by consideration, under s 85 of the SA, of whether the sentence was disproportionate. Accordingly, the Court ordered that N was fined $11,000 in total, MFS was fined $11,000 in total, the defendants were jointly and severally ordered to pay the solicitor costs and 90 per cent of the fines were to be paid to the council.

Decision date 30 January 2018 - Your Environment 31 January 2018

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understanding of the subject matter.

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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 August 2018

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Developer jailed for ignoring RMA. This news report relates to the conviction and sentencing of Mr A Lau reported above for other infringements of the Resource Management Act. See link:

http://www.radionz.co.nz/national/programmes/checkpoint/audio/2018653033/property-developer-sentenced-to-15-months-for-ignoring-rma

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MF urges New Zealand to reconsider ban on foreigners' home ownership.

The International Monetary Fund called on New Zealand to reconsider a controversial plan to ban foreigners from buying residential property, warning the move could discourage foreign direct investment necessary to build new homes.

The Labour-led coalition government won September's election with a pledge to clamp down on soaring housing prices and reduce high rates of homelessness, partly by banning foreign buyers.

Foreign ownership has attracted criticism in recent years as New Zealand grapples with a housing crisis that has seen average prices in the main city of Auckland almost double in the past decade and rise more than 60 percent nationwide.

In its annual assessment of member countries' economies, the IMF said on Wednesday [4 July] New Zealand's ban was unlikely to help much in making housing more affordable.

"This ban on foreign home ownership could discourage potential foreign direct investment that could help build more houses," the IMF said in a staff report.

Other policies, such as tax incentives and the government's "Kiwibuild" programme to build new affordable homes, would be enough to address a shortage of housing, it said.

Many directors of the IMF's executive board "encouraged the authorities to reconsider" the ban in a meeting to finalise the consultations, a summary of IMF discussions showed on Wednesday.

"They considered that (the planned ban) would be unlikely to improve housing affordability, while the broad housing policy agenda, if fully implemented, would likely address most of the potential problems" associated with foreign buyers, it said.

In the staff report, the IMF said New Zealand authorities disagreed with its assessment on the view the ban was needed to address inequality and prevent foreign investment driven by "unproductive speculation."

"Given the central role that home ownership plays in New Zealanders' sense of well-being, the government has taken steps to ensure that housing prices will be shaped by domestic market forces," the authorities were quoted as saying in the report.

In a statement released on Wednesday, New Zealand Finance Minister Grant Robertson said the IMF's annual review praised the government's economic policies. But he conceded that IMF officials held "a range of views" on the foreign ownership ban.

Government data in June showed foreigners bought only around three per cent of properties nationwide, but targeted hotspots such as central Auckland where one in five properties were sold to foreigners.

The majority of overseas buyers were from China and neighbouring Australia, according to Statistics New Zealand. Buyers from Australia and Singapore are excluded from the ban.

The government last month rewrote a proposed law on the ban to relax some regulations on

foreign ownership, following concerns the ban could hurt foreign direct investment. The law needs Parliament's approval to take force but is expected to take effect by the end of the year.

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Environment Court rejects Okura development. *Newshub* reports that the proposal by Todd Property Group to build 1,000 houses beside a marine reserve in north Auckland has been declined by the Environment Court. The proposal required a shift in the Rural Urban Boundary in the Auckland Unitary Plan, which Auckland Council refused to agree to. Read the full story here.

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Queenstown mound dispute heading to Court of Appeal. The *Otago Daily Times* reports that there will be a further appeal relating to the litigation concerning the 5-metre high earth mound built on a property between Queenstown and Arrowtown. The High Court last month allowed the appeal against the Environment Court's decision granting consent for the mound. One of the parties has now lodged an appeal to the Court of Appeal against the High Court's decision not to order the mound's removal. Read the full story here.

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Index of historic Māori Land Court records now open access. Vital information relating to historic Māori land records is now freely accessible to the public through a brand new website.

The Māori Land Court Minute Books Index has been made available by Libraries and Learning Services at the University of Auckland, run as a joint project by Special Collections and Digital Services.

The index covers the Native Land Court (as it was then called) for the years 1865-1910. The Court established in 1865 to award titles and partition surveyed blocks of Māori land, was renamed the Māori Land Court in 1954. Minute books were kept of all proceedings.

Finding information in the handwritten minute books can be difficult, so a group of librarians and researchers created the index in the 1990s. Over the years the information was attainable in the then modern formats of floppy discs, CD-ROMs, and a subscription database. Now anyone, anywhere, via the internet, can use the open access website to locate the relevant minute book.

- Please follow the link for the full statement. Media release

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New Britomart hotel to be built. *The New Zealand Herald* reports that Cooper and Company have announced that Bracewell Construction Ltd will build a new 104-room, 10-storey hotel in Britomart in Auckland's CBD. Read the full story here.

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Seven-storey hotel proposed for Taupo. *Stuff* reports that a seven-storey hotel featuring 86 rooms and a roof-top pool, restaurant and bar is proposed for Taupo. The building, if approved, would be the tallest building in the town. Read the full story here.

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New Quest $5.7m development for Tauranga CBD. The *Bay of Plenty Times* reports that Quest Apartments NZ will construct a new $5.7 million 42-apartment hotel and retail development in Devonport Rd in downtown Tauranga. Read the full story here.

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Plans for 23,600 new homes to be built on state land in Auckland. *The New Zealand Herald* reports that Housing New Zealand Corporation is planning a 10-year building project that will result in over 23,600 new residences in Auckland being built on government-owned land in Northcote, Avondale, Mt Roskill and Mangere. Read the full story here.

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Investors in Christchurch's Harley Chambers redevelopment withdraw due to planning red tape. *The Press* reports that the owner of the heritage building Harley Chambers in Christchurch, Gerard McCoy, says that foreign investors in the project to build a luxury hotel on the site have pulled out of the proposal because they were exasperated with the planning process. McCoy is now contemplating invoking the Greater Christchurch Regeneration Act, and requesting that the heritage classification of the building be revoked. Read the full story here.

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$40m hotel proposed near Waitomo caves. The *Waikato Times* reports that a proposal to build a resort hotel with 120 beds on the Waitomo Golf Club site is being considered in order to meet the demand for hotel accommodation for visitors to the Waitomo Caves. Read the full story here.

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NZLS: Landonline's property transactions secure. The New Zealand Law Society notes the comment from Land Information New Zealand (LINZ), that Landonline is a secure and robust property transaction system which does not have any connection with Australia's PEXA property exchange system. LINZ's comments follow recent reports of thieves hacking PEXA to steal money put aside by the lawyer of an Australian Masterchef star to purchase a property. - Please click on link for full statement. Media release

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Unprecedented glitch in some Auckland property rates valuations. *Stuff* reports on an unprecedented dispute between the Auckland Council and state-owned valuer QV regarding the latter's failure to carry out on-site inspections where property owners had objected to their valuations. An audit by the Valuer-General advised the Council that QV was not properly following the rating valuation rules. With 2018/2019 rates bills about to be mailed out the Council is faced with the prospect of adjusting some of them later once it has checked QV's work. Read the full story here.

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Still no decision on blocked freedom camping site. *The Otago Daily Times* reports Land Information New Zealand is considering options for Craigburn reserve. The entrance to the freedom camping site is currently blocked off. Linz general manager Crown property John Hook said a balance was needed between continued public access and the ability to manage increasing visitor numbers. - Read the full story here.

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Ten thousand new homes for Mangere. *The New Zealand Herald* reports that the Minister of Housing, Phil Twyford, has announced plans to construct 10,000 new dwellings in South Auckland's Mangere. Read the full story here.

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Property lawyers call for specialist building court. *Stuff* reports high costs and lengthy delays of building-related cases before the High Court have prompted a number of property litigators in New Zealand to call for a specialist construction and building court, with a panel of skilled judges. - Read the full story here.

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Plan to tackle renting issues launched by rent advocacy group. *TVNZ* reports Wellington-based advocacy group Renters United has put forward a plan, supported by other advocacy groups around the country, to improve New Zealand's renting conditions.The groups say urgent change is needed as current laws do not adequately protect tenant rights. Renters United's plan addresses issues around a lack of security for renters, unaffordable rent rises, and damp and mouldy homes leading to health concerns. It also demands regulation of the industry and harsher penalties for law-breaking landlords and property managers. - Read the full story here.

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Over half of Wellington's most earthquake-prone buildings secured. *Stuff* reports that three months from from an extended deadline, just over half of Wellington's buildings with dangerous masonry have been secured. Wellington Mayor Justin Lester has applauded the owners who have completed, or have at least begun work to secure their buildings. Read the full story here.

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NZLS: Real estate agent fraudulently obtained commissions. A real estate agent has pleaded guilty to fraudulently obtaining commissions from a local council on charges brought by the Serious Fraud Office (SFO).

The SFO says Shirley Anne Johnston, 66, obtained 13 commission payments from the Selwyn District Council between March 2007 and July 2015 for work that she did not do. Nearly $150,000 of these payments were transferred into a bank account controlled by her and her husband and business partner, Stephen Gubb, 62.

Ms Johnston received the commissions on 13 land sales as a Phoenix Harcourts agent in Christchurch. However, Ms Johnston was not the real estate agent for these property sales at Izone - a Selwyn District Council business park development in Rolleston.

Mr Gubb, who was a property consultant at the business park, instructed Buddle Findlay to pay $300,829 in commissions to Phoenix Harcourts which then paid Ms Johnston $149,094 for her purported work.

Ms Johnston has been remanded on bail until sentencing on 20 September at the Christchurch District Court. - Please follow the link for the full statement. Media release

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New $24m Cardrona development planned. *The Otago Daily Times* reports that an accommodation complex, featuring 16 apartments and 12 hot pools, is planned for a 6,600 square metre section in Cardrona Village. Metta Collective Ltd plans to apply for the necessary resource consents for the $24 million proposal by the end of July. Read the full story here.

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Floating hotel for Oamaru? _ *Radio New Zealand* reports that the Oamaru Licensing Trust is considering a proposal for a floating hotel to be built on a barge to provide 25 rooms of luxury accommodation for visitors to Oamaru. Read the full story here.

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Heritage building's $9m rescue. *The Press* reports that Michael King, owner and restorer of Christchurch's Woods Mill complex, has completed stage one of the $9 million conversion into offices of the abandoned and earthquake-damaged 19th century Mill building. The second stage, which involves creating restaurants, apartments and a community centre from what was a grain store, has now begun. Christchurch City Council has contributed $900,000 to the renewal. Read the full story here.

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Ageing State school buildings fail to meet standards. *Radio New Zealand* reports that a Cabinet paper has reported that almost a third of State school buildings, over half of which are more than four decades old, do not meet minimum health and hygiene standards. Read the full story here.

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Diplomatic immunity asserted in rental arrears case. *Stuff* reports that European Union deputy chief of mission in New Zealand, Eva Tvarozkova, has been successful in a Tenancy Tribunal proceeding brought by landlord Matthew Ryan to recover $14,314 in unpaid rent and incidentals. The European Union refused to waive her diplomatic immunity. Apart from not having to pay the claimed arrears of rent she is to be refunded her $6,000 bond. Read the full story here.

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New $200m state housing development in central Auckland. *Radio New Zealand* reports that Housing Minister Phil Twyford has announced that a new "state of the art" public housing development comprising 280 units, will be constructed at 139 Greys Ave, and that the current 60-year-old high-rise flats on that site will be demolished. The project will cost Housing New Zealand around $200 million and construction will commence in 2019. Read the full story here.

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New hotel development for Oamaru. The *Otago Daily Times* reports that developer Philip McNicholl says that the former Stringer and Co building in Oamaru is being converted into a new 15-bed boutique accommodation and an art gallery after completion of a seismic upgrade and is expected to be open for business by the end of this year. Read the full story here.

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Community and judicial review campaign to stop Auckland Council selling public land in Takapuna. *The New Zealand Herald* reports that Trish Deans, of the group Heart of Takapuna, says the organisation has erected three signs to protest Auckland Council's plans to sell the Anzac St, Takapuna car park for development. Following a judicial review application proceeding being brought by Miriam Clements to prohibit the sale, the council has given an undertaking that it would not enter an unconditional sale and purchase agreement for the land until the proceedings are resolved. Read the full story here.

More than 19,000 people sign up for KiwiBuild. *Newshub* reports that almost 20,000 people have so far registered their interest for the Government's affordable housing initiative KiwiBuild. Read the full story here.