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Legal Case-notes December 2018

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

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

- A summary of the environment court's decision on the application by Don McKay for a declaration to assist in the (desirable) conversion of cross leases to fee simple titles;
- An unsuccessful appeal to the Court of Appeal against lower court decisions relating to establishment of s mussel farm in the Marlborough Sounds;
- An application for judicial review of a decision by Hastings District Council not to require limited notification of an application for rural-residential subdivision;
- A High Court decision on an application for summary judgement by a quarry operator against Whangarei District Council which had issued infringement notices and lodged an application for an enforcement order although a consent had been previously granted for the activity;
- An unsuccessful application to the High Court for judicial review of a decision of Far North District Council which had granted consent to construction of two large sheds within the Te Waimate Heritage Precinct;
- An unsuccessful application for judicial review of a decision of the independent hearings panel for the Auckland Unitary Plan relating to zoning of two adjoining properties at Albany;
- An application by Tasman District Council to make certain rules in a Variation effective from the date of notification. The variation was introduced to correct an error in a plan change affecting subdivision and development of rural land;
- The final decision of the Court on an appeal against refusal of consent by Auckland Council to an application for subdivision of a property near Warkworth.

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CASE NOTES DECEMBER 2018:

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Re McKay _ [2018] NZEnvC 180

Keywords: declaration; cross lease; subdivision; procedural

The Court considered the application by D McKay ("M") for a declaration that the conversion of cross-lease titles to fee simple titles did not constitute a subdivision within the meaning of s 218 of the RMA. The Court stated that M was a surveyor, planner, and roading and services engineer with 40 years' experience and the Court readily accepted that he had substantial experience and expertise in the area of subdivision of land. The Court said that at issue was the greatest conveyancing matter since the introduction of the Torrens system: that the cross lease method of subdivision should cease to be used. M acknowledged that legislation would be required to end the method but meanwhile he sought the declaration to assist in the conversion

of cross leases to fee simple titles by confirming that such conversion did not require resource consent. The Court, because of the potential for consequences to the administration of the RMA, and for consent authorities and land owners to be affected, had directed that in the public interest certain public entities should be served with the application. However, none of the Ministry for the Environment, Land information New Zealand, the Local Government New Zealand wished to be heard. The New Zealand Institute of Surveyors ("NZIS") wished to be heard in support. The Court appointed Dr K Palmer as amicus curiae.

The Court stated that there were two elements to the issue: the strict legal issue, turning on the relevant statutory provisions and the law of property; and wider practical issues relating to the operation and consequences of cross leases. The Court reviewed the origin of cross leases and considered two reports, one by the Law Commission and the other by Auckland Council, which concluded that the cross lease scheme was flawed and recommended the enabling of conversion to freehold. The Court also considered expert evidence from witnesses for the NZIS. The Court considered the relevant RMA provisions, including the definitions in s 2 of "cross lease" and "survey plan", and ss 11, 87,106, 218, 226. From these the Court concluded, with reference to relevant case authority that: the RMA was a complete code for the control of subdivision of land in New Zealand; the text of the RMA regarding subdivisions was relatively crystalline, used transactional language and listed the forms of subdivision which were regulated; a cross lease as defined was the lease of all or part of a building and was not a lease of the land on which the building stood. The Court noted that there was no definition of "fee simple" in the RMA, the Land Transfer Act 1952 or the Property Law Act 2007 although the High Court in *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* [2017] NZHC 277, (2017) 19 ELRNZ 682 had considered its meaning, and this approach was upheld by the Court of Appeal. The Court stated that a cross lease was a title where the owner held a combination of a lease of a building or part of a building on land with an undivided share in the land under that building. However, the transfer of such undivided interest in land did not involve disposing of the fee simple to part of such land. Further, the grant of encumbrances and personal covenants did not affect division of the land nor destroy the unity of possession of the owners in common.

The Court stated that the issue now was whether or not an individual cross lease was by itself sufficient to be the subject of a separate certificate of title. The conversion of a cross lease to a fee simple title must constitute a subdivision of the allotment (under s 218(1)(a) of the RMA) on which the leased building sat. The Court concluded that if the cross lessees were to obtain their own separate freehold title, then each allotment must be divided to produce separate freehold titles, or unit titles. Accordingly, to separate the shares of a cross lease would necessarily involve a subdivision of land as defined in s 218, and as restricted by s 11, of the RMA. The Court declined to make the declaration sought.

Decision date 23 October 2018 _ Your Environment 24 October 2018

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R J Davidson Family Trust v Marlborough District Council _ [2018] NZCA 316

Keywords: Court of Appeal; Supreme Court; sustainable management; resource consent; marine farm; New Zealand coastal policy statement

RJ Davidson Family Trust ("the appellant") appealed against the decision of 31 January 2017 by the High Court ("the HC"). The appellant sought resource consent from Marlborough District Council ("the council") to establish and operate a mussel farm at Beatrix Bay in Pelorus Sound. At issue was whether and to what extent the reasoning of the Supreme Court in *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 ("*King Salmon"*), which involved an application for a plan change, should be applied in the case of applications for resource consent. The Court of Appeal granted leave to appeal on two questions of law: did the HC err in holding that the Environment Court ("the EC") was not able or required to consider pt 2 of the RMA ("pt 2") directly and was bound by its expression in the relevant planning documents; and, if yes, should the HC have remitted the matter back to the EC for reconsideration.

After reviewing the decisions of the lower courts, submissions of the parties and the provisions of ss 104(1) and 5-8 of the RMA, the Court considered what had been decided in *King Salmon* which, the Court noted, concerned the same plan (the Marlborough Sounds Resource Management Plan ("the plan")) as the current appeal. Furthermore, the Court stated that in both cases there was acceptance that the New Zealand Coastal Policy Statement 2010 ("the NZCPS") conformed with the RMA's requirements, in particular pt 2. The Supreme Court held
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that the NZCPS would not be given effect to if the plan were changed as proposed, because of the Board of Inquiry's finding that to do so would result in significant adverse effects on areas of outstanding natural character and landscape. Citing specific passages from *King Salmon*, the Court now confirmed that the "overall judgment" approach was rejected by the Supreme Court because of the prescriptive nature of provisions in Policies 13 and 15 of the NZCPS.

The Court observed that the overall judgment approach was rejected by the Supreme Court in the context of plan provisions implementing the NZCPS. However, the Court did not consider that this could properly mean that the Supreme Court intended to prohibit consideration of pt 2 by a consent authority in the context of resource consent applications. The Court gave reasons in support of this conclusion. The *King Salmon* decision made no reference to s 104 of the Act, nor to the words "subject to pt 2". If it were intended that the decision was to be of general application, affecting not only plan provisions under pt 4 of the RMA but also resource consents under pt 6, the Court thought it inevitable that the Supreme Court would have said so. The overall judgment approach had been frequently applied in the context of resource consent applications. The Court now considered the Supreme Court's reasoning was expressly tied to the context of the plan change under consideration and was not intended to proscribe the overall judgment approach in resource consents generally. Moreover, the statutory language in s 104(1) of the RMA plainly contemplated direct consideration of pt 2. Where the NZCPS was engaged, any resource consent application would necessarily be assessed having regard to its provisions, under s 104(1)(b)(iv) of the Act, and it was inevitable that *King Salmon* would be applied in such cases. However, to resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would clearly be contrary to the Supreme Court decision. On the other hand, if a proposal were affected by different policies so that it was unclear from the NZCPS whether consent should be granted or refused, the consent authority would need to exercise judgment and the Court saw no reason why the authority should not consider pt 2 for assistance. A similar approach should be taken in cases involving consent applications considered under regional and district plans. In such cases, such plan provisions should be considered under s 104(1)(b) of the RMA, and "a fair appraisal of the objectives and policies read as a whole" made. In the case where a plan had been competently prepared, it may be that the consent authority would feel assured that there was no need to refer to pt 2 because to do so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it would be appropriate and necessary to refer to pt 2; this was the implication in the statutory words "subject to Part 2". The Court preferred such an approach to the expression employed in *King Salmon* of "invalidity, incomplete coverage or uncertainty", observing that while that language might be appropriate in the NZCPS context, more flexibility might be required in the case of other kinds of plan prepared without the need to comply with ministerial directions.

Turning to the present case, the Court found that the approach taken by Cull J in the HC was not correct and was contrary to what was said by the Privy Council in *McGuire v Hastings District Council* [2002] 2 NZLR 577, describing ss 6, 7 and 8 in the RMA as "strong directions, to be borne in mind at every stage of the planning process". However, in the circumstances of the present case, the Court considered that the error by the HC was not significant. Cull J was clearly correct in holding that it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general recourse to pt 2 in deciding resource applications. The EC had found that the impact of the proposal on the habitat of King Shags and adverse effects on the landscape and natural character of Beatrix Bay would be contrary to certain policies in the NZCPS. The Court now found no error in this approach. A reference to pt 2 would not have justified a decision which departed from what the NZCPS required. The Court concluded, however, that *King Salmon* did not prevent recourse to pt 2 of the RMA in cases of applications for resource consent. Its implications in such context were rather that genuine consideration and application of relevant plan considerations might leave little room for pt 2 to influence the outcome. This was so in the present case. Accordingly, the answers to the questions on appeal were: "yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence"; and "no". The appeal was dismissed. Submissions were invited as to costs.

Decision date 29 August 2018 Your Environment 31 August 2018

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Seafield Farm (HB) Ltd v Hastings District Council _ [2018] NZHC 1980

Keywords: High Court; judicial review; public notification; resource consent; effect;
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access

Seafield Farm (HB) Ltd ("Seafield") and Taranui Co Ltd ("Taranui") (together "the applicants") applied for judicial review of the decision by Hastings District Council ("the council") not to require limited notification of the resource consent application by Pattison Rural Holdings Ltd ("Pattison") for a rural residential subdivision. The applicants owned land adjoining that of Pattison. The grounds for the challenge to the lack of limited notification were: the council did not make a valid decision, but rather delegated the assessment to an independent contractor, S, who made the decision without authority; if a limited notification decision was made by the council, then by adopting S's assessment the decision contained material errors because it considered the effects on the environment rather than effects on affected persons; any non-notification decision was affected by bias and/or pre-termination; and the council's conduct was unreasonable in the *Wednesbury* sense.

A matter under contention was that of access to the applicants' land for possible future subdivision of such land. Pattison's proposal was to create eight new lots. Two of these were strips of land intended for possible addition to existing rights of way. The remaining six were intended for single dwelling rural residential sites. The proposed subdivision was a restricted discretionary activity under the district plan. When they heard about the proposal, the applicants made submissions to the council that they considered they were "affected persons" under s 95E of the RMA and expected to be notified.

After reviewing the process undertaken by the council leading up to its decision, the Court noted that S's report to the council was on a standard application page headed "Hastings District Council Non-Notified Application". S's analysis of adverse effects of the proposal did not address the concerns raised by the applicants in their prior representations to the council, such as potential right of way arrangement and access difficulties. Further, S did not acknowledge that the applicants considered themselves affected persons for the purposes of limited notification. The council made its decision which started with granting the application and then specified the conditions of consent and finally recorded that no persons were considered to be "affected persons".

The Court considered the first ground of review. The applicants submitted that the council failed to make a decision on limited notification at all. The Court stated that, although it was less than ideal for the council to have left all aspects of the application to S, there was a relatively low threshold required for a local authority to provide evidence of the separate notification decision having been made. The Court was satisfied in the present case, on the terms of the recommendations in S's report and then in terms of the council's decision, that the decision not to notify was one made by the council officer.

Regarding the second ground, the applicants argued that the council erred in its assessment of the adverse effects on them as affected persons of the subdivision proposal. In particular, provisions under the district plan required the council to have regard to how a proposed subdivision might be related to the development of adjoining land. This issue was not referred to in S's report. The applicants further submitted that unless the council facilitated a coordinated approach to access to the properties of the applicants, there would be an inefficient provision of several separate rights of way. However, the council denied that the applicants were affected persons under s 95E of the RMA, which the Court accepted. The Court found that it would be beyond the council's jurisdiction to grant financial conditions to the consent or to require the dedication of land to facilitate a wider right of way. Further, the Court, citing *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257, (1997) 3 ELRNZ 249, stated that the council should not have regard to subsequent possible subdivision applications and that competing applications were to be determined on a first come, first served basis.

The applicants argued that the test of adverse effects on affected person under ss 95B and 95E of the RMA, in the consideration of limited notification, was different from that under s 95A(2)(a), when adverse environmental effects were taken into account for the purpose of public notification. The applicants submitted that the range of effects to be taken into account regarding limited notification was wider, and was not limited only to "environmental" effects. The Court rejected this distinction, and concluded that the range of adverse effects to be taken into account under s 95E of the RMA was not "simply at large", but was confined potential adverse environmental effects. The council was not required expressly to refer to all relevant considerations in a notification decision. The Court found no error in this regard.

Similarly, the Court found that there was no error regarding bias or predetermination on the council's part in the use of the default council template for "non-notified application". Although

the Court considered that the council's presentation of its notification decision raised the risk of the distinction between the limited notification and the non-notification decisions becoming blurred, the Court was satisfied that there was no evidence of pre-determination. Furthermore, because the Court had held that the second challenge by the applicants had failed, the final, administrative law ground of unreasonableness failed also. The application for judicial review was declined. The council was entitled to costs on a 2B basis.

Decision date 5 September 2018 Your Environment 06 September 2018

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Daisley v Whangarei District Council _ [2018] NZHC 2211

Keywords: High Court; council procedures; quarry; enforcement; duty of care

This was the decision of the High Court on an application by M Daisley ("D") for leave and summary judgment on the issue of liability against Whangarei District Council ("the council") and Wayne Peters ("P"). From December 2004 until January 2010, D owned a property at Knights Rd, containing a quarry which was operating at the time of purchase by D. Prior to the purchase, D obtained a LIM from the council which made no reference to any consent for the quarry operation. D continued to operate the quarry through a company controlled by him but a series of abatement notices, infringement notices and an application for an enforcement order was issued by the council on the grounds that the quarrying activity was an unconsented and unlawful use of the land. Ultimately D ceased quarrying as the result of the enforcement action. However, on 21 September, after the quarrying had ceased, a land use consent for the activity, dated 1988, issued under the Town and Country Planning Act 1977, was discovered in the council offices by an employee of P.

D's claim against the council was based on the unlawful issue of the enforcement actions as the result of which D lost profits. Causes pleaded against the council were: breach of statutory duty under the RMA; negligence; and misfeasance in public office. The council raised defences, being: limitation; lack of standing (the quarrying having been carried on by a limited company); lack of caused loss; and contributory negligence. D's claim against P was that he was instructed to provide advice as to the legality of the infringement actions by the council and to advise as to the options available. The causes claimed were: breach of contract/negligence; misfeasance; and breach of fiduciary duty. In turn, P raised defences being: limitation; lack of caused loss; lack of loss suffered; and contributory negligence.

The Court first noted that D was required to obtain leave to bring summary judgment as it was not filed at the time that the statement of claim was filed on 6 June 2018. The Court noted that to succeed in an application for summary judgment, D had to satisfy the Court that the defendant had no arguable defence. Further, summary judgement was rare in negligence cases because frequently there were differences of matters of fact, and the power to grant summary judgement was related to the overall aim of the High Court Rules 2016, being to ensure a speedy and fair resolution of disputes.

Regarding the council, the Court found that summary judgment was not suitable and was declined. This was because: the Court was not satisfied that the council had no arguable defence; the application was brought over two years from the key factual matters becoming known to D; and the application was only a subset of claims against the defendants. In the present case, D relied on ss 35(5)(gb) and 322(4) of the RMA. The Court referred to case authority which called into question whether there was any action available for damages for breach of statutory duty under the RMA and stated that it was clearly not appropriate to enter judgment for summary liability on such a cause of action. Regarding the cause of negligence, there was a difference of legal opinion as to whether a council owed a duty of care when prosecuting a landowner and the presently alleged duty of care would be a novel one. To establish whether there had been a duty could be established only by considering the circumstances and determining whether there was the required proximate relationship. Summary judgment was clearly not appropriate based on negligence under the RMA. In addition, the council had raised affirmative defences, including limitation, which could not be ruled out. Accordingly, leave to bring the application for summary judgment against the council was declined.

Regarding P, the Court stated that summary judgment for liability was also not available against him. The claim depended on P having failed to prosecute a good claim against the council but until such time as that claim was established any such cause against P was incomplete. Further, there was a dispute as to what instructions P had received. The application was
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dismissed. The council and P were entitled to costs. The Court gave directions accordingly.

Decision date 25 September 2018 Your Environment 26 September 2018

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Mills v Far North District Council _ [2018] NZHC 2082

Keywords: High Court; judicial review; resource consent; building; heritage value; public notification; district plan; interpretation

G Mills and P Fieldman ("the applicants") applied for judicial review of the decisions by Far North District Council ("the council") to grant resource consent, and to grant such consent on a non-notified basis, for the construction by B and O Gan ("G") of two large sheds within the Te Waimate Heritage Precinct ("the Heritage Precinct"), recognised in the Far North District Plan ("the plan"). The site was located in the Rural Production zone of the plan and it was accepted that the proposal breached certain rules of the plan regarding stormwater management, setback from boundaries and visibility from a public place. Accordingly, the proposal's overall status was discretionary.

After reviewing the activities and communications between the parties prior to lodgement of the application, the Court considered the notification decision and the consent decision. The applicants made two arguments: that mandatory considerations were not considered by the council when making the decisions, in particular the provisions of ch 12.5 of the plan which gave substance to s 6(f) of the RMA; and that there was inadequate information to support any conclusion about the impact of the sheds on the Heritage Precinct. There were five causes of action: the council failed to have direct regard to pt 2 of the Act and to recognise and provide for matters in s 6(f); the council failed to consider plan provisions, particularly ch 12.5; the council had insufficient information to make the decisions; the consent decision was irrational; the notification decision was made in error because the council failed to consider whether there were "special circumstances", as provided by s 95A(4) of the RMA; and the council's decisions were unreasonable. Regarding the first cause, the Court noted it was not bound by the High Court decision in *RJ Davidson Family Trusts v Marlborough District Council* [2017] NZHC 52, (2017) 19 ELRNZ 628, (at the time of the present decision awaiting the decision of the Court of Appeal). The Court accepted the position of the council and G that the plan's historic heritage provisions were designed to discharge the council's duty under s 6(f) of the RMA. The Court stated that the issue was whether such matters had been taken into account by the council. The Court noted that "to recognise and provide for" was different from "to take into account". Regarding the former, it was not the function of the High Court on review to inquire into the substance of decision-making. In the present case, the resource consent decision expressly stated that the council had taken into account pt 2 provisions. The first cause was dismissed.

Turning to consider the second cause, concerning whether the council failed to consider relevant plan provisions, the Court was satisfied that ch 12.5 of the plan, concerning heritage, was a relevant provision for the purposes of assessing the application. The decision did not refer to those provisions and the Court was unable to find from the evidence that such matters were in fact considered. The second cause accordingly succeeded.

The third cause concerned the adequacy of information before the council. In this regard the Court conducted a detailed review of case authority, relating to the legal position both prior to and following the amendments made to the RMA in 2003 and 2009. The Court proceeded on the basis that while there was no separate ground for judicial review based on the (now repealed) statutory requirement for a consenting authority to be satisfied as to the adequacy of the information, a decision to notify a resource consent, and to grant a consent, must nevertheless be reached on the basis of adequate and reliable information, because, as the Court of Appeal had observed, "sound public administration permits nothing less". Applying this reasoning to the present case, the Court concluded that the council did not have sufficient or adequate information to make the decisions. The council itself had no specialist historic heritage expertise and the advice it received from Heritage New Zealand Pouhere Taonga ("HNZ") was based on mistaken facts as to the nature and scale of one of the sheds. The third cause was accordingly made out.

The Court found that the fourth cause, that the council's decision to grant the consent was irrational, failed. The fifth cause of action related to whether there were special circumstances under s 95A(4) of the RMA, which would justify notification of the application. The Court considered the provisions of s 95A of the Act and interpreted it to mean that a consent authority was enabled to consider whether special circumstances (which were not statutorily defined)
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existed. However, the broad nature of the discretion to determine whether special circumstances existed did not make the exercise of such discretion completely immune from review. The applicants alleged that special circumstances arose from the scale and nature of the sheds in the heritage, landscape and character setting. The evidence however demonstrated that the council did consider whether there were special circumstances for the purposes of s 95A(4) of the RMA, although it did not give reasons for its conclusion that there were no such circumstances. The fifth cause accordingly was dismissed. The sixth cause of action was that the council had demonstrated a *Wednesbury* unreasonableness in its notification decision. The Court was not satisfied that the decision was one which no reasonable consenting authority could have reached and so the sixth cause also failed.

Regarding relief, the applicants sought that the decisions be set aside. However, the Court concluded on balance that the appropriate outcome was to decline relief. This was because: there was no suggestion that the sheds would have any direct or prejudicial effects on the applicants themselves; there was a real risk of significant prejudice to G who had expended significant sums of money in building the sheds; the applicants' key concern was the height of the sheds, but HNZ had expressed no such concerns; and the applicants had delayed in bringing proceedings. The Court expressed a non-binding view that the applicants should be considered as the successful party overall and gave directions as to applications for costs.

Decision date 12 September 2018   Your Environment 13 September 2018

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North Eastern Investments Ltd v Auckland Council _ [2018] NZHC 916

***Keywords*: High Court; judicial review; evidence; zoning; district plan proposed; residential**

This decision concerned an application by North Eastern Investments Ltd ("NEIL") and Heritage Land Ltd ("HLL") for judicial review of recommendations made by the Independent Hearings Panel ("IHP") appointed by Auckland Council ("the council") to hear submissions and make recommendations relating to the Auckland Unitary Plan ("AUP"). The matter concerned the appropriate zoning under the AUP for certain land, comprising two adjoining sites, on Fairview Ave and Oteha Valley Rd in Albany which was owned by HLL and was to be developed by NEIL. NEIL made submissions to the proposed AUP by which it sought rezoning the land from Residential – Mixed Housing Urban and Residential – Mixed Housing Suburban to Residential – Terrace Housing and Apartment Buildings zone, with a strip fronting Oteha Valley Rd to be zoned Business – Mixed Use. In particular, NEIL proposed three sub-precincts which would enable 17 apartment buildings. The IHP recommended that all the land be zoned Terrace Housing and Apartment Buildings but found that the precincts proposed were not necessary or appropriate.

The Court divided the grounds of review into four categories. The first related to the evidence of a council planner "C". NEIL alleged it was unfair for the IHP to rely on C's statement of evidence when NEIL had waived its right to cross-examine her. The second ground related to the IHP's recommendation on the precinct suggestion, which NEIL said was flawed because there was no evidence for its conclusion, and because the IHP failed to consider relevant information. The third ground concerned the council's decision to accept the IHP's recommendations. In particular, NEIL alleged that the council should have considered two decisions of the Environment Court, relating to the land, but failed to do so. The fourth ground was related to the IHP's recommendation concerning the Macroinvertebrate Community Index (MCI); NEIL alleged that there was no evidence to support the recommendation that the MCI layer should have statutory effect as part of the proposed AUP.

After reviewing the relevant provisions of the Local Government (Auckland Transitional Provisions) Act 2010 concerning the IHP's procedure, the Court considered the first ground of review. C's statement of evidence had supported the existing zoning of the land, Mixed Housing Urban, be retained and did not support the precinct designation. The council advised that C and other witnesses would not be called to confirm their evidence at the hearing. Then, in response to an application by Housing New Zealand ("HNZ") for summonses for a number of witnesses, C filed her requested statement of evidence, which was posted on the IHP's website in accordance with the hearings procedure. NEIL now alleged that the summons was invalid because it did not comply with relevant regulations, did not require C to attend a hearing and did not identify the content of any report relied upon. The Court stated that while the summons was not in the form prescribed in the Resource Management (Forms, Fees, and Procedure for Auckland Combined Plan) Regulations 2013, it did not need to be. Further, the summons was
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not required to identify the contents of any report relied on. The Court considered that the summons was not invalid, but even if it had been, C's report was properly before the IHP. In addition, the Court disagreed with NEIL's submission that the IHP's reliance on C's report was unfair in the circumstances. The Court reviewed the communications between the parties and concluded that NEIL assumed mistakenly that C's report was no longer being relied on by the council. Further, the Court said that it was not as a matter of principle the responsibility of a decision maker to advise a submitter or a party of the evidence to which it must respond. Rather, it was for the submitter or party to inform itself as to the issues which it might wish to address in its own evidence or submissions. The Court found that any reliance by the IHP on C's report was not unfair in the circumstances.

Turning to consider the zoning and precinct recommendation, which NEIL alleged was irrational or not based on evidence, the Court noted that an applicant faced a heavy burden to overturn a tribunal's decision on that basis. The decision at issue, to recommend a Terrace Housing and Apartment Buildings zone, was a recommendation based not only on the evidence presented to the IHP but also on a wide range of other matters, including general policy and statutory considerations. The IHP was not acting as a judge, deciding between two parties. Rather, its recommendations were very much a value judgment and therefore there was no right or wrong decision. The recommendations made were quite rational, and were given with reasons. Furthermore, the Court stated that the IHP was not obliged to take into account a statement made in a different proceeding, namely an appeal to the Environment Court. There was no basis to the claim that the IHP acted on the basis of no evidence or irrationally. The Court referred to the two EC decisions, which concerned the land, which NEIL alleged the IHP should have taken into account. In the Court's view this ground must fail. First, s 148(2)(a) of the LGATPA provided that the council need not consider any other evidence and it would have been procedurally unfair for the council to consider factual material not part of the hearing. Second, EC decisions were not mandatory or relevant considerations for either the IHP or the council. The decisions referred to by NEIL were respectively related to a notice of requirement and a resource consent application; neither of these was relevant to a planning process and the considerations were fundamentally different.

Finally, with regard to the MCI layer, the Court concluded that the IHP's recommendation was based on evidence and submissions received and was clearly within scope. Moving the MCI layer to a control layer in the planning maps was a reasonably foreseeable consequence of submissions made about the uncertain status of the non-statutory layers in the proposed AUP and their relationships to policies. The process was not unfair. The application for judicial review was declined. Costs were payable to the council and to HNZ.

Decision date 11 May 2018   Your Environment 14 May 2018

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Re Tasman District Council _ [2018] NZEnvC 54

***Keywords**: district plan change; error; variation; rule; soil high value*

By its application under s 86D of the RMA, Tasman District Council ("the council") sought that amendments to certain rules ("the rules") in the Tasman Resource Management Plan should have legal effect from the date that Variation 1 to Plan Change 60 to the district plan ("PC60") was publicly notified. The rules were introduced by PC60, which addressed the cumulative adverse effects of the subdivision, development and use of rural land other than for plant and animal production. PC60 sought to regulate such subdivision and land use in Rural 1 and 2 zones.

The Court stated that PC60 had all but completed its process, with only one remaining appeal awaiting a decision from the High Court. However, at some stage after the council had made decisions on PC60, an error was discovered in the rules. Variation 1 was introduced to remedy such error. The consequence of the error was that subdivision in Rural 1 zone would be considered as discretionary activity rather than non-complying activity, which was the clear intention and purpose of PC60. The present application by the council was to ensure that the defect would be remedied at the time of notification, to avoid the possibility of a "gold rush" of resource consent applications.

The Court now reviewed case law relating to ss 86A – 86G of the RMA, noting that the key consideration in such cases was that if a gold rush took place it would "undermine the sustainable management of a vulnerable resource". In the present case, however, the council had failed to provide the Court with adequate information to support findings that an order
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should be made under s 86D of the RMA. The Court stated that it had considered declining the application or seeking further information of the council. However, there was an additional factor which made it appropriate to grant the application. This was that the outcome sought by the council arose from a mistake or omission in PC60, the result of which was that the rules failed adequately to give effect to the objectives and policies sought by PC60 in the rural zones. Under such circumstances, the Court considered it appropriate to make the order sought by the council. Orders were made accordingly.

Decision date 22 May 2018 Your Environment 23 May 2018

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Albert Road Investments Ltd v Auckland Council _ [2018] NZEnvC 121

Keywords: resource consent; conditions; subdivision

This final decision followed the Court's interim decision of 29 June 2018, by which the Court determined that the proposal for a two-lot subdivision at Hudson Rd, Warkworth, would satisfy pt 2 of the RMA and other RMA requirements and should be granted resource consent, subject to specified issues concerning the wording of condition 5(b). Subsequently the parties filed a joint memorandum containing the agreed modification to the condition's wording and setting out a full set of the final proposed conditions.

The Court now stated it was satisfied that the jointly proposed modifications properly responded to the reasons in the interim decision and that the proposal satisfied all relevant RMA requirements. Accordingly, the appeal was allowed in part and consent granted subject to the conditions set out in the annexure to the present decision. Costs were reserved.

Decision date 22 August 2018 Your Environment 23 August 2018

(See previous report in Case-notes October 2018)

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

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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 December 2018

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NZLS: New Land Transfer Act 2017 on 12 November. (Media release 7 November 2018.)

The Land Transfer Act 2017 will come into effect on Monday, 12 November 2018.

The new Act, which repealed the Land Transfer Act 1952, makes a number of changes, including in terminology: **"record of title"** replaces "certificate of title".

LINZ has compiled a page of resources on the new legislation which outline the changes and new requirements.

Landonline unavailable over weekend

Land Information New Zealand (LINZ) says Landonline will not be available from 7pm Friday, 9 November until 6am Monday, 12 November, to make the changes required to support the new Act.

LINZ says due to how instruments containing images are compiled in Landonline, any part signed instruments with an image will have certifications and signatures cleared as at 12 November 2018. This is required to maintain the integrity of these instruments and to preserve non-repudiation.
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This means that on Monday 12 November 2018 any part signed instruments with an attached image, will have reverted to a 'Draft' status in Landonline. So the instrument will need to be re-certified and signed.

Any instrument with an image that is fully signed will not be affected. So if any part signed instruments are fully signed before 5pm, Friday 9 November, their signatures and certifications will not be cleared.

Changes to Authority and Identity forms

From 12 November practitioners who certify electronic instruments must use new standards and directives.

Before making certifications relating to client authority and verification of identity, practitioners must satisfy the requirements set out in LINZS20018 Authority and Identity Requirements for E-Dealing Standard 2018 (Standard) and LINZG20775 Authority and Identity Requirements for E-Dealing Guideline 2018 (Guideline).

The Guideline describes two ways in which practitioners can satisfy the requirements for identity verification – 'safe harbour' and 'equally effective means'.

LINZ says Safe Harbour is considered best practice, and when followed, constitutes reasonable steps for identity verification purposes. It may not always be possible for practitioners to use the 'safe harbour', and instead they may choose to use an alternative method to verify identity, referred to as 'equally effective means'.

Change to lodging paper instruments

Under the new Act, paper instruments are to be lodged by posting them to one of two LINZ offices - in Hamilton, or in Christchurch. Instruments can also be delivered in person to a LINZ drop box at the offices.

Giving notice to Registrar-General of Land

LINZ says there are a number of situations under the new Act when people need to give notice to the Registrar-General of Land. For example, a caveator is required to give notice they have applied for a court order for their caveat not to lapse; or someone who uses a right of way or other easement over someone else's land will need to give notice that they object to their easement being extinguished.

Notice may be given to the Registrar by email to customersupport@linz.govt.nz, from a Landonline workspace, or by post to the Hamilton or Christchurch offices.

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

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LINZ: Landonline issues.

Some confusion has arisen due to changes to the A&I forms which were received too late for inclusion in Release 3.19.

The Landonline-generated A&I forms may still be used, even though these look different to the A&I forms on the LINZ and Property Law Section websites.

Updates to the Landonline A&Is have been made to Section 4 and will be made to the 'Notes to the Form' in the coming days however the changes to sections 3 & 5 (reflected in the website A&I forms) will not display in the Landonline-generated A&I until May 2019.

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

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Land Information Minister criticised for approving land sales to foreigners.

Radio New Zealand reports Green MP and Land Information Minister Eugenie Sage is being accused of continuing the previous Government's practice of "rubber-stamping" the sale of sensitive land to foreigners, after new figures have been released showing the Minister approved nearly every application to cross her desk over nine months, rejecting just 30 hectares out of almost 60,000 hectares. - Read the full story here.

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Small change to Residential Land Statement format. A *New Zealand Gazette* notice dated 7 November 2018 has made a small change to the manner in which a Residential Land
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Statement made under s 51A of the Overseas Investment Act 2005 must be made.

The previous notice on the manner of making the statement, notified on 5 October 2018, has been revoked.

Since 22 October 2018 every sale of residential property in New Zealand has required completion of a Residential Land Statement.

The change has involved splitting Part 1 into Parts 1a "Individuals" and 1b "Entities (non-individual/corporate)".

- Please follow the link below for the full report. Media release

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Government announces two-stage process to reform the RMA.

Interest.co.nz reports that Environment Minister David Parker has announced a two-stage process to reform the RMA. The Government will begin by reversing some of the changes made last year by the previous Government and stage two will be a more comprehensive review covering areas such as urban development, climate change, and freshwater management. Read the full story here.

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Auckland Council sharply increases fees to developers.

The New Zealand Herald reports that Auckland Council has increased developer fees to help fund the massive $26 billion infrastructure expenditure in the city over the next 10 years. Of this figure, the council seeks to recover $3.3 billion from development contributions. Read the full story here.

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Waitara residents voice concerns to Minister as bill reading looms.

Stuff reports Minister of Justice Andrew Little has attended a meeting with about 70 Waitara leaseholders concerned about the recently revised New Plymouth District Council (Waitara Lands) Bill, under which 770 Waitara properties would be able to be purchased freehold at market value by the current leaseholders without restricting the ability of the council to sell its interest in any property before the option is exercised. A key concern held by the leaseholders related to re-financing in order to buy the land and how this was unaffordable for many. - Read the full story here.

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Dunedin substation move costs $15m.

The Otago Daily Times reports that Dunedin's North City zone electric substation will have to be moved to permit construction of the city's new hospital. The relocation will cost $15 million and as yet no alternative site for the substation, which provides power for 1400 businesses and homes, has been found. Read the full story here.

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Eco-friendly energy system proposed for central Dunedin.

Stuff reports Dunedin City Council, University of Otago, Southern District Health Board and the Ministry of Health have agreed to jointly investigate the development of a low-carbon energy system that could provide cost-effective heating in central Dunedin. Read the full story here.

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Dunedin's new hospital to cost more than budget.

The *Otago Daily Times* reports that costs of constructing Dunedin's planned new hospital will run over budget due to geotechnical issues with the soils on the site, and the start to the building works has been delayed. Read the full story here.

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Codemark certificates for high-rise building cladding revoked by MBIE.

Radio New Zealand reports that the Ministry of Business, Innovation and Employment has revoked four of the six Codemark certificates for aluminium composite panels after audits found safety claims regarding their use were unsubstantiated. The Ministry says that local
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authorities can no longer rely on such certificates when approving consents. Read the full story here.

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Letting fees banned, "tenancy fees" introduced.

Stuff reports an impending law change under which letting fees charged to tenants will be banned has led property managers to introduce a "tenancy fee" charged to owners. - Read the full story here.

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Review may remove Fonterra's obligation to buy from farms with poor environmental standards.

Radio New Zealand reports that the review of the Dairy Industry Restructuring Act 2001 may change the existing requirement that Fonterra buy milk from any farmer who wants to sell. Instead, Fonterra may be given the discretion to refuse to purchase milk from any farm with poor environmental standards. Read the full story here.

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Construction of stalled Union Green apartments due to restart.

The New Zealand Herald reports that building work on the $100 million Union Green development at Union St, Auckland, which was abandoned earlier this year when the main contractor Ebert Construction went into receivership and liquidation, will be restarted later this month. Read the full story here.

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Conservation group alleges failure to enforce ban on Waitakere Ranges access.

Radio New Zealand reports that conservation group Waitakere Rahui Team has found that 14 tracks in the Waitakere Ranges, which should have been closed to prevent the spread of kauri dieback disease, are in fact still open and that few biosecurity measures are in place throughout the Ranges, despite the support by Auckland Council of the rāhui, or closure. Read the full story here.

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$11m Arrowtown School redevelopment to start in early 2019.

The *Otago Daily Times* reports that an eleven million dollar project to fix, demolish and rebuild leaky buildings at Arrowtown School is expected to begin in the New Year. According to Principal Chris Bryant, the rebuild will increase the school's capacity from 600 to 700 pupils. Read the full story here.

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Auckland Council re-issuing resource consents previously issued invalidly.

Radio New Zealand reports that about half of the consents invalidly issued by Auckland Council, in the mistaken belief that special character rules in the plan overrode the regular consent process, have now been re-issued correctly to affected homeowners. Read the full story here.

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1,200 new residential sections to be created in Dunedin District Plan.

The *Otago Daily Times* reports that the final version of the new Dunedin District Plan, released this week, provides for 190 ha of new residential land for 1,200 houses, with an additional 132 ha of land being been earmarked by the council for future housing. Read the full story here.

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High lead levels found in water, leaching from tested taps.

Radio New Zealand reports that the Master Plumbers industry group have raised public concern about unpoliced imports of plumbing products into New Zealand and have called on the Building Minister to take action, after kitchen mixer taps tested were found to have 70 per cent more lead levels leaching to water than the standards allow. Read the full story here.

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Wellington Children's Hospital gets $45 m government funding.

The Dominion Post reports that construction of the new children's hospital in Wellington, kick-started by a $50 m private donation by Mark Dunajtschik in 2017, has now commenced after Health Minister David Clark has promised a further $45.6 m government funding for the proposal. Read the full story here.

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Palmerston North bridge nears completion.

Stuff reports that Palmerston North's 190-metre-long cycle and pedestrian bridge, He Ara Kotahi, is almost complete. However it is expected to be April before the connecting pathways and ramps are in place and it is ready for use. Read the full story here.

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480-unit Auckland housing estate at Ihumātao to proceed.

The New Zealand Herald reports that the Environment Court has rejected the appeal against Fletcher Residential's proposed 480-unit Auckland housing estate at Ihumātao. The company can now begin developing 33.4 ha beside the historic Ōtuataua Stonefields at Māngere near the airport. Read the full story here.

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Landfill dump proposed for Dome Valley near Wellsford.

Radio New Zealand reports that the Waste Management operation, 80 per cent owned by the Chinese government, will apply next month to Auckland Council for resource consent to construct a dump in the countryside between Warkworth and Wellsford, after receiving permission from the Overseas Investment Office to purchase land in the Dome Valley. Read the full story here.

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St James Theatre strengthening costs increase by $16m.

The Dominion Post reports that Wellington City Council is facing having to pay an extra $16 million for the earthquake strengthening of the St James Theatre, in addition to the original approved costs of $17 million. Read the full story here.

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Further delays to SkyCity convention centre's construction.

The New Zealand Herald reports that SkyCity Entertainment Group say that building of the International Convention Centre project and the Horizon Hotel in Auckland will be further delayed. Read the full story here.

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Government's $1.5 billion plan for Porirua.

The New Zealand Herald reports that the Prime Minister had announced plans to rejuvenate Porirua, which include the redevelopment of 3,000 state houses, with a total of up to $1.5 billion to be spent on the project. Read the full story here.

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Court of Appeal rules against West Coast mine.

Stuff reports the Court of Appeal has found that the Buller District Council misinterpreted its role under the Reserves Act in granting Stevenson Mining access to conservation land at Te Kuha for a coal mine. The Court said the council could not let the economic benefits of the mine to the region outweigh the requirement to protect the reserve. Read the full story here.

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Report shows Auckland and Northland hospital buildings have problems.

The New Zealand Herald reports that the DHBs for Northland, Waitemata, Auckland and Counties Manukau have issued a report which shows that one-fifth of Auckland and Northland hospital buildings and facilities are "not fit for purpose" and that a new hospital needs to be built
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in the Auckland region. Read the full story here.

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Auckland Council's development arm significantly under-spends development budget.

Radio New Zealand reports that Auckland Council's development organisation Panuku has spent less than 30 per cent of its $57.2 million capital expenditure budget in the current year and several projects have been delayed. Read the full story here.

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Puriri Park state house development in Northland.

The *Northern Advocate* reports that Housing New Zealand will begin construction of state houses on part of a Whangarei recreational park, Puriri Park, next year. Housing New Zealand bought part of Puriri Park in June from the Ministry of Education and the land is zoned as residential. Read the full story here.

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Negligence action in the US against suppliers of e-scooters as Lime releases 1,000 in New Zealand.

The New Zealand Herald reports that Auckland Transport says it has worked closely with Auckland Council on the licensing of Lime e-scooters in the city and is monitoring their use. This comes as a class action has been launched in the United States accusing the suppliers of e-scooters of negligence following injuries involving the scooters. Read the full story here.

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Forest and Bird wins appeal against opencast coal mine.

Radio New Zealand reports that the Court of Appeal has upheld the appeal by Forest and Bird against Stevenson Mining's proposal for a new opencast mine at Te Kuha on the West Coast, using reserve and conservation land. Peter Anderson, Forest and Bird's lawyer, says the decision is a precedent for future coal mine applications on reserve land.

Read the full story here.

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