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Legal Case-notes December 2019

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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 Court of Appeal decision relating to an appeal to the High Court following a prosecution for undertaking works in the bed of the Selwyn River. This decision will be particularly useful in determining obligations of subdividing land-owners to vest land for local purpose (esplanade) reserve or grant easements for esplanade strips;
- An unsuccessful application for enforcement order against a neighbour who had constructed a retaining wall in a flood-plain area on a property at Te Puke;
- Question: Who pays the water supply connections for a subdivision when the company undertaking the subdivision had been struck off the companies register? Answer: The person who signed the application form;
- An appeal relating to failure of the Queenstown Lakes District Council to adequately notify changes to proposed "outstanding natural landscapes" boundaries at Arthur's Point in its review of the district plan;
- An unsuccessful application for judicial review of a decision by Wellington City Council to approve a building development without appropriate notification of neighbours;
- An appeal against a sentence imposed on owners of a property at Avondale, Auckland who had undertaken unauthorised earthworks and other activities in close proximity to a stream and esplanade reserve;
- An appeal to the High Court about the status and level of protection that should be provided for eight sites of special significance to Maori, by rules in the district plan of Hastings District Council;
- An unsuccessful application for judicial review of a decision by Auckland Council to notify an application to build beneath a view-shaft to a volcanic cone, but the surveyor's certificate requested had not been provided.

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CASE NOTES December 2019:

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Canterbury Regional Council v Dewhirst Land Company Ltd _ [2019] NZCA 486

Keywords: Court of Appeal; leave to appeal; river; interpretation; flooding

Canterbury Regional Council ("the council") applied for leave to appeal against the High Court decision of 14 December 2018 ("the HC decision"). The matter concerned charges brought by the council against Dewhirst Land Co Ltd and Mr Dewhirst (together "Dewhirst") and related to the allegedly unlawful use of a riverbed and diversion of water in a river. Dewhirst owned and planned to develop land adjacent to the Selwyn River ("the river"), a braided river, on the

Canterbury plains. The council indicated that the proposal was within the flood control lines in the council's Flood Protection and Drainage Bylaw 2012 ("the bylaw") and therefore came within the definition of "bed" of the river in the Canterbury Regional Plan and was not permitted. Dewhirst disputed this and argued that the edge of the riverbed was the point where there was an existing formed bank. The HC found that the District Court Judge had applied the wrong legal tests in determining the bed of a river and that the correct legal test was the "bank to bank" test, meaning that the bed of a river extended only from bank to bank and comprised the area covered by water excluding the area covered by flood waters which overflowed the river margins.

The Court of Appeal stated that the appeal was concerned with the proper interpretation of "bed" as it related to a river, under s 2 of the RMA. The council's questions of law were: did the HC err in its assessment of the correct test for determining the extent of the riverbed in applying the definition in s 2 of the RMA; did the HC err in adding the phrase "usual or non-flood" into the definition of "bed" in s 2; and did the HC err in concluding that the assessment of various historical flow rates or return periods was an irrelevant consideration. The Court was satisfied that the issues raised were of general and public importance and so granted leave to the council to appeal the HC decision.

Addressing the first question of law, the Court reviewed the HC decision and ss 2(1), 5, 6 and 13 of the RMA before stating that the council's interpretation of "bed" centred on the area covered by the river at its fullest flow and less on the location of the river banks. Thus, the council could rely on a one in 50-year flood as a means of identifying where the boundary of the bed was. The Court now stated that it saw significant difficulties with that interpretation. To aid in its interpretation of the term "bed" in relation to a river, the Court traced the term back to its statutory origins in New Zealand (in the Coal-mines Act Amendment Act 1903, which defined "bed" as "the space of land which the waters of the river cover at its fullest flow without overflowing its banks") and the common law definitions and principles which preceded and followed 1903. The Court provided a summary of such common law principles pertaining to rivers and beds. After a careful analysis of the decision in *Kingdon v Hutt River Board* (1905) 25 NZLR 145 (SC), the Court of Appeal found that the HC in the present case made no error in relying on *Kingdon*; the Supreme Court of that time applied such principles emerging from the treatises on rivers, and the common law authorities, to the issues for determination involving the nature and scope of the Hutt River and its bed, at a time when the concept of "fullest flow" was already established. Furthermore, the Court now considered that the HC was right to apply the observations of Fogarty J in *Carruthers v Otago Regional Council* [2013] NZHC 632, (2013) 17 ELRNZ 156, namely that Parliament had never intended that the floodwaters or flows following only from major storms fell within the RMA definition of "river" when assessing a riverbed. Accordingly, the Court of Appeal agreed with the HC decision that a river's "fullest flow" must be something less than the point where it floods. The Court upheld the HC's interpretation as to the meaning of "bed" in relation to a river in s 2(1)(a)(ii) of the RMA. The first question of law was answered in the negative.

Turning to the second question, the Court noted that the council argued that the addition of the words "usual or non-flood" into the definition improperly constrained the RMA definition and undercut RMA purposes. The Court stated that the interpretation of "bed" would require the determination of the fullest flow of the river. In assessing that, a consideration of geographical and meteorological features would be required. What was ordinary or usual, as opposed to what was extraordinary or unusual, for that particular river would need to be assessed, as would normal or regular flows for a particular season. The abnormal, unseasonal or flood conditions of the environment would also be pertinent. There was no need to imply the words "usual or non-flood" into the statutory definition of "bed". The HC erred on this point.

Finally, the Court found that the HC had not erred regarding the third question of law. The HC had correctly rejected the methodology using data from 50 and 20-year flood returns. The appeal was dismissed. The first question of law was central to the appeal and was answered in the negative, as was the third question. Although the second question was answered in the affirmative, it concerned a peripheral issue. The Court stated that, as this was an appeal in a criminal matter, an award of costs was inappropriate.

Decision date 22 October 2019_ Your Environment 23 October 2019

Summary from Clauses 109 and 110 of the decision:

(1) **The High Court applied the correct test for determining the extent of the riverbed in applying the definition of "bed" in s 2 of the Resource Management Act 1991.**
(2) **the High Court erred in adding the phrase "usual or non-flood" into the definition of "bed" in s 2 of the Resource Management Act 1991 by implication.**
(3) **High Court was correct in concluding that the assessment of various flow rates or return periods was an irrelevant consideration in determining the extent of the riverbed.**

The appeal was dismissed.

The High Court's decision [2018]NZHC3338 was reported in Newslink May 2019.

This decision should be studied in its full detail because this decision includes essential background, case-law and analysis. It brings timely clarity to discussions with Council officers about width of streams, location of stream banks and hydrological assessments. – RHL.

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Vortac NZ Ltd v Western Bay of Plenty District Council _ [2019] NZEnvC 138

Keywords: enforcement order interim; procedural

The Court considered the application by Vortac NZ Ltd ("the applicant") for interim enforcement orders. The applicant had purchased a property at 29 Hookey Drive, Te Puke ("the property"), and wished to develop the lower part of the property. The applicant was concerned that a retaining wall, on an adjacent property owned by Mr and Mrs Hansen ("H"), had diverted water towards the property, leading to erosion.

The Court expressed reservations as to the completeness of the application, which did not include any application for a substantive enforcement order. However, the Court considered the application under s 320 of the RMA, and noted that it was clear that not all the papers submitted to the Court by the applicant had also been served on the respondent Western Bay of Plenty District Council. Although an application for an interim order was essentially dealt with as a matter of urgency, the Court had difficulty understanding what issue under the RMA was being raised by the applicant, or whether allegations were being made against H or the council. Further, no particular adverse effect was asserted by the applicant. An engineer consulted by the applicant submitted that in high water flows the entire area was subject to flooding and that at low flows the water bed was adjusted by the wall. From the evidence, the Court stated that the area had been receiving water for at least 34 years which flowed into the low-lying gully areas. The Court concluded that the effect of not making the order would be to allow the status quo to continue. The Court noted that the applicant had not made an undertaking as to damages, pursuant to s 320(3)(b) of the Act. If an enforcement order were to be made, this would require the council to undertake significant steps to prevent the waters entering the property and resource consent would be required for such works. Accordingly, the lack of a damages undertaking was of some significance in the Court's view.

The Court concluded that proper grounds had not been made out. Significant issues for local landowners in the area would be created if the order were to be made. The application was accordingly dismissed. Costs were reserved.

Decision date 5 September 2019_ Your Environment 6 September 2019

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Harvey v Tasman District Council - [2019] NZHC 2025

Keywords: High Court; council procedures; charges; resource consent; water supply

This decision concerned an action under the Local Government Act 2002 ("LGA") in debt by Tasman District Council ("the council") against M Harvey ("H"), who was the sole director and shareholder of Split Atom Marketing Ltd ("the company"). The debt related to the unpaid balance of $10,143 for 12 water service connections for a subdivision at Mapua ("the site"). The subdivision consent was issued by the council on 7 October 2011 to H personally. H claimed that the company was liable for the debt. Each of the water connection applications was on a council-generated request form. H was named on the form under the title "liability for connection costs, to be completed by the person liable". H signed this section of the application without altering the name of the property owner or changing the wording by which he agreed to pay the connection cost. Three days prior to the signing of these forms by H, title to the subdivision land was issued to the company. H argued that he signed the application form in his capacity as director of the company. The District Court by its decision of 20 February 2019, found that the

claim was proved against H. The company had been removed from the companies register and if H were not liable, the council would not be able to recover the debt from the company.

The Court considered what legal consequences flowed from H having signed the application which contained an express undertaking to be liable to pay for the water connection costs. Counsel for H now submitted that the District Court Judge had not considered s 134 of the RMA, which provided that where a local authority issued a resource consent, it "attaches to the land".

The Court concluded that nothing in the LGA or s 134 of the RMA dictated that, where there was a default in the payment of a charge rendered in relation to a water connection, the council was restricted from suing anyone other than the current registered proprietor of the land. Notwithstanding that H must have known that he intended to register the property in the name of the company, he applied for the subdivision consent in his own name and it was granted to him personally. Similarly, regarding the water connection consent, H could have, but did not, describe the owner as the being the company. He deliberately chose not to make it clear on the form that he was not accepting personal liability. The council was entitled to take the application forms at face value and to rely on the unequivocal representation signed by H that he agreed to pay the connection costs. The appeal was dismissed.

Decision date 19 September 2019_ Your Environment 23 September 2019.

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Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council _ [2019]NZEnvC 150

Keywords: council procedures; district plan proposed; public notification; landscape protection; zoning; enforcement order

Arthurs Point Outstanding Natural Landscape Soc Inc ("the society") applied under s 314(1)(f) of the RMA for an enforcement order requiring Queenstown Lakes District Council ("the council") to re-notify: a summary of two submissions made in response to a review by the council of parts of its operative plan; and certain proposed District Plan maps relating to the area around Arthurs Point, Queenstown. The matter concerned Stage 1 of the council's review of the proposed Queenstown Lakes District Plan, notified in August 2015 ("Stage 1"). The Court stated that Stage 1 was actually a large set of plan changes which included a Landscape chapter containing mapping of lines (identified in Stage 1 as a key substantive change) that identified outstanding natural landscapes ("ONLs") and features. The present application concerned the maps in Stage 1, specifically maps 13 and 39. Map 13 showed the Wakatipu Basin surrounded by a brown line which demonstrated the boundary between the ONL and the other urban, industrial and rural landscapes. Although the village of Arthurs Point was urban in nature, the Court noted that it was within the ONL boundary shown on map 13 and was therefore part of the ONL of Wakatipu Basin. On the larger scale map 39 of Arthurs Point and environs, no ONL boundary was shown because the brown line was off the map. In their decision on Stage 1, the council commissioners drew a circle on map 39 around the Arthurs Point urban area ("the Shotover Loop area"), and so in effect excluded such land from the ONL landscape, rezoning it within the Urban Growth Boundary ("UGB"). Submissions were made in response to Stage 1, including two by owners of properties in Atley Road, which were in the Shotover Loop land, and it was these which were now sought to be renotified.

The Court stated that the general issue was whether the council followed a fair process when identifying a new inside edge to the ONL around Arthurs Point. The Court noted that the treatment of Arthurs Point area in Stage 1 had been the subject of two previous procedural decisions between the same parties. The Court reviewed scheme of Stage 1, the maps and the submissions and stated that the notification of Stage 1 did not inform the reader which provisions or sets of provisions of the operative plan were being retained and which were not. The Court stated that after the initial notification of Stage 1, the next notice made was the council's notification of the summary of decisions requested ("SDR"), under the RMA, sch 1, cl 7. This included summaries of the relief sought in the two submissions in question in the present case. By the brown line, the Shotover Loop land was excluded from the ONL, and included within the UGB. As no submission had sought this outcome, the Court said the change was presumably made using powers in sch 1, cl 16(2) of the RMA. However, the Court now expressed doubts as to whether either of the tests applying to cl 16(2), namely where the change was of minor effect or where it was to correct minor errors, was satisfied in the present case.
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The Court then considered the requirements of sch 1, cl 7 and the issue of fairness, referring to the High Court decision in *Albany North Landowners v Auckland Council* [2017] NZHC 138. The Court stated that in the present case there were three ways in which persons interested in changes to the Arthurs Point zonings would find relevant submissions: by searching the online SDR; by examining the Online Rezoning Map ("ORM") or by inspecting the hardcopy SDR. The Court found that ORM was not reasonably accessible. Furthermore, the hardcopy SDR of the relevant submissions was arranged in an unhelpful way and was insufficiently accurate. The Court concluded that there were serious problems regarding the location of the ONL brown line around the Shotover Loop. The Court distinguished *Albany North Landowners*, finding that, while a reasonable level of diligence must be expected of landowners and potential submitters, the present case differed from that in the High Court case in that: the proposal was a series of plan changes, not a new plan; the s 32 reports recommended no general change to the ONL boundaries; there were no cross-submissions lodged on rezoning at Arthurs Point; and the online map was not reasonably accessible and was not linked to the Stage 1 webpage.

The Court determined that the requirements of the RMA, sch 1, cl 7 had not been observed because the two relevant summaries of submissions were "illogical (and therefore unreasonable) and misleading (and therefore unfair)". The Court acknowledged that if it were to exercise its discretion under s 314 of the RMA, this would delay Stage 1 becoming operative and would mean further costs would be incurred by the council. However, the Court stated that the public interest was in getting a fair hearing of the issues, and any delay or costs resulting arose from the council's own actions and the process it chose to adopt. Accordingly, the Court made enforcement orders that the council comply with sch 1, cl 7 of the RMA by re-notifying a summary of the decisions requested by the two submissions in the required terms. The drawing of the ONL boundary line, the movement of the UGB, and the rezoning of the Shotover Loop were suspended. Leave was reserved for any party to apply to amend the orders made. Costs were reserved.

Decision date 2 October 2019 _ Your Environment 03 October 2019.

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Aspros v Wellington City Council _ [2019] NZHC 1684

Keywords: High Court; judicial review; resource consent; conditions; public notification; dwelling

P and B Aspros ("the plaintiff") applied for judicial review of Wellington City Council's (the council") decision to grant resource consent on a non-notified basis for the demolition of existing buildings and the construction of a new dwelling in Brooklyn, Wellington, zoned Outer Residential in the district plan. The dwelling was owned by P and D Lee and N Hughes ("the owners"), who were the plaintiff's neighbours.

The High Court reviewed the history of the application and the decision by the council, issued on 21 December 2017, to grant resource consent under s 104 of the RMA, subject to conditions. The council decided that under ss 95A and 95D of the RMA the effects of the proposal on the environment were minor and so it did not publicly notify the application. Further, under ss 95B and 95E of the RMA, the council decided that any adverse effects on any person were less than minor and no parties were adversely affected so as to justify limited notification. This was despite the fact that A had shown interest in the works. The Court reviewed the principles applicable to judicial review and noted that its role was not to substitute its opinion for that of the council; rather it was to consider the legality of the process by which the decision was made.

The four issues considered by the Court in the present case were whether the council erred by: accepting an application which did not comply with s 88 of the RMA; its application of the recession plane, the site coverage and the permitted baseline standards and so misapplied ss 92 and 104 of the RMA; failing to notify publicly or make limited notification of the application under ss 95A and 95B of the RM; and imposing unenforceable conditions. Considering the first alleged error, the Court stated that the completeness of an application was determined under s 88(2) and sch 4 of the RMA. In the present case, the plaintiffs argued that the council accepted the application when it lacked fundamental elements. However, with reference to case authority, the Court stated the discretion to decide whether or not an application was complete was an administrative function, to be made by the council in the light of the particular application, and was not a merits-based consideration. In the present case, the Court found that the council acted within its statutory authority to accept the application under s 88 of the RMA. In contrast, the process under s 92 related to whether there was adequate information before the council,
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and was a quasi-judicial decision. The Court did not find it necessary to decide whether adequacy of information for decisions under the RMA was a standalone ground of review, because it found that the standard in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 was met in the present case. The Court found that the council had the further information it sought under s 92 of the RMA before it made its decision to grant consent and not to notify the application. The Court listed the information available to the council, which included the earthworks assessment and information on the other matters in contention. In addition, an architect and the council's planner had provided further specified material to the council. Overall, the Court found that the approach in *Discount Brands* as to the adequacy of information was met. There had been no error by the council.

Regarding the issue of the application of the rules and standards, the Court found there had been no error made in applying ss 92 and 104 of the RMA. The application was for a restricted discretionary activity and the council's discretion was limited to the effect of the standards not complied with, namely the recession plane and earthworks. The plaintiff submitted that the measurements in application for consent were not accurate. However, the Court stated that judicial review was not an opportunity to revisit the merits of council decisions. The Court considered the issues raised regarding the application of the standards and found, absent clear error, that it could not uphold the plaintiff's submissions. There was no clear basis upon which to disturb the council's conclusions, and there had been no error of law.

The third issue concerned the standard for limited or public notification. The Court noted that the RMA provisions applying to this issue were those in force at 13 March 2017, which the Court now reviewed. The plaintiff argued that the council made errors under s 95A of the RMA in finding that the adverse effects would be no more than minor. However, the Court accepted council's submissions that there was no evidence of effects that were more than minor. There was no error in the decision not to publicly notify nor in the decision not to make limited notification, and further the council had not conflated the two decisions. Turning to address the fourth issue, the Court rejected submissions that the conditions imposed were unlawful or unenforceable. Accordingly, the application for judicial review was declined. Costs on a 2B basis plus disbursements were awarded to the owners and the council.

Decision date 16 October 2019 _ Your Environment 17 October 2019.

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Banora v Auckland Council _ [2019] NZHC 2545

Keywords: High Court; prosecution

A Banora ("B") appealed against the sentence imposed on him in the District Court ("DC") on 9 November 2018 after he pleaded guilty to two charges under the Building Act 2004 ("the BA") and two charges under the RMA. The total fine imposed was $67,050. B owned a house on Wolverton St, Avondale which was close to a stream and adjacent on one side to an esplanade reserve owned by Auckland Council ("the council") and on the other a fenced public footpath. The charges against B concerned B's construction of a retaining wall without resource consent, failing to comply with a notice to fix, undertaking earthworks contrary to the district plan and permitting contravention of an abatement notice.

The Court noted that to succeed on an appeal against sentence, the appellant had to satisfy the Court that there had been an error and that a different sentence should be imposed. The appeal court would intervene and substitute its own sentence only if the sentence was manifestly excessive or wrong in principle.

The Court considered the charges against B and the decision of the DC. The grounds of the appeal were that the DC Judge: erred in setting starting points under the BA and the RMA; failed adequately to take into account mitigating factors; failed adequately to consider the sentencing principles; failed to apply an appropriate discount for guilty plea; and did not consider totality adequately. Considering first the issue of the BA starting point, the Court noted that three errors were alleged. The first was that B's culpability was wrongly assessed. After reviewing the DC judgment, the Court now was satisfied that the Judge correctly assessed the offending as deliberate and moderately serious. Second, B alleged that the Judge misapplied relevant case authority. The Court now considered the 20-year-old decision of *Wilson v Fowler* HC Auckland AP203/98, 16 March 1999 and concluded that the DC Judge was correct to increase the monetary penalties from those outlined that decision, to take into account inflation and also the increase in the maximum penalty since 1999. The Court was satisfied there had been no misapplication of case law. The third alleged error was that the Judge had treated the
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two charges (breach of s 40 of the BA and failing to comply with a notice to fix) as attracting a separate fine. Again, the Court determined there was no error; the two offences were distinct.

Turning to consider the RMA starting point set by the DC, the Court found, as with the BA offending, the Judge had not erred in assessing B's culpability under the RMA. B now raised that he disputed the summary of facts to which he had pleaded guilty in the DC. The Court said this could not be considered in a sentence appeal. Further, the Court found that the Judge had not overstated the potential environmental consequences of the offending, nor had she erred by failing to consider evidence of remediation. Regarding the allegation that DC had misapplied RMA case authority, the Court reviewed the relevant decision, together with B's culpability, and found that the starting points adopted in the DC were within the available range and there was no error made for imposing a separate fine for breach of the abatement notice. Regarding the issue of mitigation, B submitted that the DC Judge failed to apply correct discounts for good character and for the conduct of the prosecuting council. The Court noted that the Judge applied a discount of five per cent for good character, and considered that this was rather light, taking into account B's age (over 70 years old) and his lack of prior convictions. The Court now found that a discount of 10 per cent would have been more appropriate. However, the Court found the Judge made no error in not giving a further discount for the council's alleged misconduct. Further, the Judge had adequately considered the purpose and principles of sentencing. The Court then considered the 10 per cent discount given for guilty plea by the Judge. B argued that his plea was entered after the greater lead charge was withdrawn by the council and it was reasonable to wait until that time before pleading guilty. The Court now found that in the circumstances the discount should have been at least 15 per cent, probably 17.5 per cent. Finally, the Court considered the issue of totality. Taken as a whole, the Court considered that the total starting point of $80,000 for all the offending was high in what was an unusual case. In addition to the starting point for the charge under s 40 of the BA which the Court thought had been stern, although within range, the Court stated there was a degree of overlap in the offending. In the circumstances, the Court considered the total starting point should have been reduced to $60,000. With the discount of 10 per cent for good character, and with a further discount of 17.5 per cent for pleas, the fine reached by the High Court was $44,550.

The Court considered whether the difference between its final figure and that of the DC, being $22,500, made the sentence as a whole manifestly excessive. The Court was of the opinion that it did. Accordingly, the appeal was allowed and the following fines were substituted for those of the DC: $8,072 for breach of s 40 of the BA; $8,072 for breach of notice to fix; $11,361 for breach of abatement notice; and $17,042 for breach of s 9(3) of the RMA.

Decision date 23 October 2019 _ Your Environment 24 October 2019.

(Note – The previous decisions were issued in 2016 and 2017 but were not reported in Newslink If interested - see *Auckland Council v Banora [2016] NZEnvC 246* and *Banora v Auckland Council [2017]NZHC 1705.* – RHL.)

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Maungaharuru-Tangitu Trust v Hastings District Council - [2019] NZHC 2576

Keywords: High Court; district plan proposed; consent order; Māori culture

The High Court considered the agreement by consent submitted by the parties to the appeal, who submitted that the proceedings should be remitted to the Environment Court ("the EC") on terms and conditions agreed. The matter concerned the issue of which sites of special significance to Māori should be identified and protected in the proposed Hastings District Plan. Maungaharuru-Tangitū Trust ("MTT") which represented a number of hapū in the relevant area, and P and C Raikes ("R"), a private landowner, now appealed against the EC's interim decision on 28 May 2018, by which the status and protection of eight sites were decided. The EC agreed with the position of Hastings District Council ("the council") that the council's proposed regime would "strike a reasonable and achievable balance between the values of the sites to Māori and the ability of the owners of the land to make reasonable use of them". The EC found that the protections proposed by MTT went further than was reasonably necessary to protect such values. MTT now alleged that the EC erred in law by failing to consider the mandatory statutory considerations for a plan change appeal, including the relevant provisions of the Hawkes Bay Regional Policy Statement ("RPS"). The appeal by R alleged that the EC failed to provide sufficient reasoning for its conclusions.

The Court stated that parties to an appeal were not entitled to High Court orders simply because they agreed to them being made; in the context of an appeal from a lower court, the
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Court must still turn its own mind to the issues and be persuaded that the lower court was wrong, for the reasons specified. After reviewing the positions agreed to by the parties, and the EC decision, the Court addressed the appeals and noted that the main reason for them was that the EC did not properly outline reasons for its conclusions. The standard for the duty to give reasons depended on the particular circumstances and statutory context. Whether or not sufficient reasons were given depended on the legal question and the complexity of the legal issues. The present issue was whether the level of proposed protection under the plan was appropriate to the particular sites. What was required was for the reasons to be set out in the written EC decision to demonstrate that the analysis, required as a matter of law, had been undertaken. The Court stated there were two inter-related requirements: first, that the EC make effectively factual findings on the nature of the wāhi taonga/wāhi tapu status of the particular sites; and second to assess, as precisely as possible, how the proposed district plan provisions might potentially adversely affect the sites, as recognised by the factual finding. It was not appropriate for the EC to proceed directly to balancing interests without first engaging specifically with the potential impacts that the activities contemplated would have on the wāhi tapu status found to exist. The Court noted that Policy POL64 of the RPS provided that "activities should not have any significant adverse effects on wāhi tapu or Tauranga waka".

The Court then assessed the EC's conclusions and reasons for each of the sites. First, site MTT35 was owned by a private owner who intended to build a holiday home on it. MTT maintained that it was a pa site. The reasons given by the EC for finding that the level of protection proposed by MTT went further than necessary was that it was only a small pa and the evidence suggested that MTT overreached what was needed. The Court now said there was a lack of clarity as to why the site was regarded as wāhi tapu and how the plan provisions proposed would impact the sites. Also, there was no analysis of any particular activities, or their impact. The Court found that essential links in the chain of reasoning were missing and accordingly the reasoning was insufficient. Turning to consider Site MTT88, situated on the R farm, the precise nature of the restrictions proposed by MTT were uncertain. The EC had concluded that the site was a wāhi taonga site but, again, the level of protection sought by MTT "overreached" what was needed to provide for the hapū's relationship with the site. However, it was not stated why the level would overreach or what was meant by overreaching. The EC's findings regarding MTT88 were insufficient. Similar findings as to the insufficiency of reasoning were reached by the Court regarding sites MTT86, 90, 91, 38, 44 and 45. In addition, the Court accepted the position agreed between the parties as to certain evidence given by Mr Taylor, called by MTT.

The Court was satisfied that the appeals ought to be allowed, noting that the case was unusual and turned on its own facts and circumstances. The Court made orders to allow the appeal and to direct reconsideration by the EC.

Decision date 31 October 2019 _ Your Environment 6 November 2019

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Karmarkar v Auckland Council _ [2019] NZHC 2808

Keywords: High Court; judicial review; district plan; public notification; resource consent; view

Trustees of the SAI 1 Trust ("the Trust") applied for judicial review of the decision of Auckland Council ("the council") to notify the Trust's application for resource consent to convert an existing dwelling owned by the Trust at 325 Mount Albert Rd into three residential units. The consent application was first lodged with the council in September 2018. On 5 October 2018, a council planner sought further information from the Trust, under s 92 of the RMA, relating to compliance with the provisions in the Auckland Unitary Plan ("AUP") regarding volcanic viewshafts. The property was located within a Volcanic View Shaft Overlay in the AUP, which required building works carried out in the vicinity of such cones to remain below a certain height. The council required the Trust to provide a surveyor's certificate to be satisfied that the proposal did not infringe the AUP viewshaft restrictions. A strict deadline was set by the council for a response to request for information, which was extended at the request of the Trust. At the end of that deadline, the Trust provided the council with a body of material, but this did not include the required surveyor's certificate. The council then advised the Trust that the application would be publicly notified under ss 95C and 95A(3)(b) of the RMA if the information was not provided. The Trust replied that it was still waiting for the surveyor's response, which the Trust would send to the council when it was received. At the end of the further extended
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time limit, the council advised the Trust that the application would proceed on a publicly notified basis and requesting a notification deposit of $20,000.

The Trust, which was not legally represented, put forward three grounds of review which were that the council: should have used its own resources to determine whether the proposal would infringe the volcanic viewshaft requirements imposed by the AUP; was wrong to decide that the proposal failed to comply with the viewshaft requirements; and failed to give the Trust adequate time to respond to its request under s 92 of the Act. Addressing the first ground, the High Court stated that a consent authority had to be in possession of sufficient reliable information before it was able to consider whether a resource consent application should be notified. The onus was on the applicant which, as a matter of practicality, would hold the relevant information and, as a question of policy, should bear the cost of providing the information rather than the ratepayers. In the present case, the council had informed the Trust survey work needed to be done and was under no obligation to meet the costs of undertaking its own survey. This ground failed. Turning to consider the second ground of review, the Court stated that the requested surveyor's report was essential for the council to determine the viewshaft issue. The Trust now filed a deposition by a senior planner, who affirmed that the proposal would not be in breach of the viewshaft requirements of the AUP. The Court stated that the council may well have been willing to accept this if the Trust had provided it in response to the council's initial issues. Unfortunately, the council was unaware of the planner's conclusions until his affirmation was filed in support of the judicial review application. The Court stated that the fact that the Trust might now be able to establish that the proposal complied with the viewshaft requirements had no bearing on the judicial review issue, which was, solely, whether the council was able to require the public notification of the application because the Trust had failed to supply the requested information by the specified deadline. The second ground failed.

Regarding the third ground and whether the council gave the Trust adequate time to respond, the Court reviewed ss 92 and 92A of the RMA and the timeline in the present case. In total the Trust had had 31 working days within which to supply the information initially. The Court found that the Trust did not provide the information sought by the council within the stipulated time. The council was accordingly required under s 95C(1) of the Act to publicly notify the application. The final ground failed. The application for judicial review was dismissed. Directions were given as to costs.

Decision date 19 November 2019 - Your Environment 20 November 2019.

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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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Accuracy of Surveyed boundaries. See the summary of the Court of Appeal decision on *Hojsgaard v Chief Executive of Land Information NZ,* ([2019]NZCA) by Stephanie Harris and Mitch Singh of Glaister Ennor, Lawyers published in Surveying + Spatial Issue 98, June 2019.

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Other News Items for December 2019

Government may lend money to Auckland Council to purchase disputed land from Fletcher Residential

Radio New Zealand reports that the Government is working to enable Auckland Council to buy the land owned by Fletcher Residential at Ihumatao, by extending loan money to the council. Heritage New Zealand is considering extending the Ōtuataua Stonefields Historic Reserve to include the disputed area of land. Fletcher is reported to be asking $40 million for the land, for

which resource consent was granted for the construction of residential housing. Read the full story here.

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Sydney in blanket of bushfire smoke

The Sydney Morning Herald reports that air quality has fallen to "hazardous" levels in parts of Sydney which is covered by smoke blown over the city from the bushfires in the area. Read the full story here.

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Dunedin CC's plans for new luxury hotel development called into question

The *Otago Daily Times* reports that the Scenic Hotel Group considers that the Dunedin City Council's call for developers to construct a luxury hotel complex on the Filleul St car park site near the Town Hall is misguided because visitor numbers from China are dropping and occupancy rates are falling in the city. Read the full story here.

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Melting glaciers reveal five new Arctic islands

The Guardian reports that the Russian navy has charted five new islands in Vize Bay off Novaya Zemlya, previously covered by arctic glaciers. Rising temperatures in recent years have led to new shipping routes opening up, enabling access to mineral resources in the Arctic region. Read the full story here.

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Social housing on the way for Masterton

Radio New Zealand reports that developer David Borman says he is working with community housing providers to construct 20 new social houses on his site in Masterton. Meanwhile, Masterton City Council, in its submission concerning national urban planning policies, has said there are over 1,000 allotments with subdivision consents within the Masterton urban boundary. Read the full story here.

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Subdivision in Mt Dewar approved

The *Otago Daily Times* reports that Treespace Queenstown Ltd has been granted resource consent for a 55-lot residential subdivision for a native reforestation project, with 43 cabins, 10 chalets and a lodge, to be built on what was a Crown-owned farm. Read the full story here.

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Dunedin CC to purchase controversial archaeological site to preserve it

The *Otago Daily Times* reports that Dunedin Mayor Aaron Hawkins says the city council plans to purchase the Foulden Maar site near Middlemarch, using the Public Works Act to do so if necessary. The Mayor said the council wanted to restore the archaeological site, with its 23-million-year-old crater lake, to public ownership and prevent any mining from occurring in future. Read the full story here.

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Contractors for Raglan development being prosecuted over alleged sediment spill

Stuff reports that Waikato Regional Council is prosecuting contractors for a large housing development in Raglan for an alleged sediment spill into Raglan harbour that allegedly came from the Rangitahi Development site. The Rangitahi Development is a 550-section subdivision on Raglan west's peninsula, and building of the houses is expected to begin in February 2020. Read the full story here.

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Port Waikato houses lost due to coastal erosion

The *Waikato Times* reports that Waikato District Council have been unable to assure owners of Port Waikato, whose waterfront properties have been condemned as uninhabitable due to coastal erosion, whether a new district plan change will prevent them reconstructing their existing houses further back from the shore line. Read the full story here.

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Phil Twyford wants law whereby property levies help pay for infrastructure
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interest.co.nz reports Urban Development Minister Phil Twyford hopes to introduce a Bill to Parliament before the end of 2019 that will make it easier for the cost of infrastructure in new suburbs to be covered by homeowners, an arrangement Crown Infrastructure Partners says is proving difficult to pull off beyond an Auckland development. - Read the full story here.

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Dunedin water catchment contaminated by firefighting foam

The *Otago Daily Times* reports that Dunedin City Council is considering regulating the use of firefighting foam by Fire and Emergency NZ in the district, following the contamination of the Deep Stream Catchment, which supplies 80 per cent of the city's water supply. Foam and ash entered the catchment after the vegetation fire that burnt across 5000 ha of land at Te Papanui Conservation Park at the weekend. Read the full story here.

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$208m for wind farm near Palmerston North

Radio New Zealand reports that Mercury Energy will build a further 27 wind turbines, at a cost of $208 million, to complete the Turitea windfarm which will produce in total up to 840 gigawatt hours of electricity annually. Read the full story here.

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Controversial Wellington development proposals

The *Dominion Post* reports that developments in Karori and Miramar are meeting opposition from concerned residents. The attitude of residents who are opposing construction developments at Karori and Miramar will have to change if progress is to be made in the city, according to director of The Wellington Company, Ian Cassels. Read the full story here.

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New modular house building system

The *Otago Daily Times* reports that the Nautilus Modular building system devised by Peter Marshall has been launched in Wanaka. The modules are produced by Farra Engineering Ltd of Dunedin and can be constructed within a week. Mr Marshall said the houses, which include a lounge, bathroom, storage, one bedroom and two covered decks could be built for $2700 to $2800 per square metre. He is in discussion with Far North District Council about establishing a factory in Kaikohe. Read the full story here.

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1080 poison unlikely to be cause of death of hundreds of washed up rats, says DOC

Radio New Zealand reports that results of tests on samples of the rats found dead on West Coast beaches will not be known for some days, says the Department of Conservation, although it was unlikely that the deaths of the rodents, along with those of fish and birds also washed up, were caused by a drop of 1080 poison. Read the full story here.

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Work begins on Pyramid Bridge replacement over Mataura River

Stuff reports that work has begun on the replacement of the Pyramid Bridge over the Mataura River, two years after the bridge was washed away in a flood. New Zealand company Concrete Structures (NZ) Ltd has began earthworks at the site and it is hoped the bridge will be completed within six months. Read the full story here.

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State of emergency declared in NSW regarding wild fires crisis

The Sydney Morning Herald reports that New South Wales Premier Gladys Berejiklian has declared a state of emergency for seven days to enable the Rural Fire Service Commissioner to control government resources to deal with the fires raging in the state, where a catastrophic fire warning has been issued. Read the full story here.

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Zero Carbon Bill passed, setting climate change targets into law

Stuff reports the Zero Carbon Bill has been passed with near-unanimous support. The legislation will set up an independent climate change commission, which will advise governments on how to meet targets set in law – zero net carbon emissions by 2050 and a reduction of between 24 and 47 per cent of methane emissions by 2050. These targets are intended to keep global warming to within 1.5C by 2050. Read the full story here.

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NZ methane emissions to be measured from space

Radio New Zealand reports that the head of New Zealand's space agency, Dr Peter Crabtree, and the Minister of Research, Science and Innovation Megan Woods have announced that, in partnership with a US NGO, the Environmental Defense Fund, they will launch a satellite to measure methane emissions on earth. The New Zealand Government is contributing $26 million to the project. Read the full story here.

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$14m for new landfill system

The *Otago Daily Times* reports that landfill operator Scope Resources and Queenstown Lakes District Council will share the costs of building and developing a new landfill gas capture and destruction system at Victoria Flats, estimated to total $14 million. The new system is planned to be installed and commissioned by the end of next year. Read the full story here.

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Volcanic cones to be closed during future fireworks season

The New Zealand Herald reports that Tūpuna Maunga Authority, which directs Auckland Council on the management of Auckland's volcanic cones, says that the public will be banned from the cones during the Guy Fawkes fireworks period, following the outbreak of two serious fires this week. Read the full story here.

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GNS Science prepares post-earthquake tsunami scenario for Wellington

The *Dominion Post* reports that in order to help with the development of a response plan to a tsunami disaster, GNS Science has prepared a scenario of the results of a possible large earthquake creating a slip on the ocean floor, which would cause thousands of deaths and injuries and extensive destruction along the east coast of the North Island. Wellington Region Emergency Management Office and councils have been working with businesses and communities to encourage them to be better prepared. Read the full story here.

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Waitaki DC says no jurisdiction to require bond to secure compliance with pipeline abatement notice

The *Otago Daily Times* reports that Kurow-Duntroon Irrigation Co, which is replacing about 44km of open canal with 37km of piped irrigation infrastructure in the Waitaki Valley, cannot be compelled to lodge a bond to ensure the remediation ordered to be undertaken in the abatement notice issued by Waitaki District Council. The council says that a bond is not available under the RMA in the circumstances. Concerns have been raised that the irrigation company might run out of funds before undertaking the remediation.

Read the full story here.

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Court of Appeal fishing decision

Newshub reports that the Court of Appeal has decided that regional councils can protect marine environments by placing controls on fishing. It was previously accepted that fishing rules were regulated solely under the Fisheries Act. However, the decision confirms the arguments of a hapu from Motiti Island off the Bay of Plenty, supported by the Forest and Bird Protection

Society, that regional councils can regulate fishing under the RMA, if to do so would protect biodiversity in coastal areas. Read the full story here.

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Indian air pollution "unbearable"

bbcnews.com reports that Delhi's Chief Minister Arvid Kejriwal has called on the Indian government for help to combat the city's dangerous level of air pollution. The thick smog has forced schools to close and flights to be cancelled. Levels of hazardous air particles, called PM2.5, have been recorded in Delhi seven times higher than those in Beijing. Millions of masks have been distributed to reduce adverse effects of breathing the air. Read the full story here.

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Construction of Karangahape Rd City Rail Link station starts

Radio New Zealand reports that City Rail Link Ltd chief executive Sean Sweeney does not anticipate that retail businesses won't be as badly disrupted by the recently begun works to construct the new Karangahape Rd station as those on Albert St were. Read the full story here.

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