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Legal Case-notes February 2020

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The Case-book Editor Roger Low can be contacted through the National Office, or by e-mail, Roger Low<rlow@lowcom.co.nz>

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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 prosecution of a developer of a large residential subdivision at Wanaka for allowing sediment discharge into the Clutha River;
- The decision of the Court of Appeal on jurisdictional issues involving the RMA and Fisheries Act in managing fishing activities and biodiversity protection near Motiti Island in the Bay of Plenty;
- A partly successful appeal to the High Court on points of law following an Environment Court decision on an application for consent to a residential cluster subdivision near the Cardrona River at Wanaka. Issues included appropriateness of consent notice conditions;
- The decision of the Environment Court on appeals relating to "outstanding natural landscapes" and "outstanding natural features" in the Queenstown Lakes DC proposed district plan;
- An unsuccessful application to the High Court by Waikato DC to join Auckland Council as a party to an appeal about transferrable rural subdivision lot rights between Port Waikato and Bombay;
- An appeal to the Court of Appeal about retrospective consent for an over-height earth bund against the boundary of a property at Speargrass Flat, near Queenstown;
- A jurisdictional appeal about planning provisions for quarrying in a "significant ecological area" at Brookby, Auckland.
- Another quarry-related appeal, this involved existing use rights for a quarry at Kamo, Whangarei.

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CASE NOTES FEBRUARY 2020:

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Otago Regional Council v Northlake Investments Ltd _ [2019] NZDC 17582

Keywords: prosecution; discharge to land

Northlake Investments Ltd ("Northlake") was sentenced in the District Court after being found guilty, following a trial, of one charge, laid by Otago Regional Council ("the council"), of unlawfully discharging silt and sediment to land, contrary to s 15(1)(b) of the RMA. The offence occurred as the result of a discharge of heavily sediment-laden stormwater from a site where Northlake was undertaking a large residential subdivision near Wanaka. In its previous decision of 21 June 2019, the Court found that the sediment which entered the Clutha River was a contaminant, and its discharge was in breach of s 15(1)(b) of the Act. The Court also found that Northlake was aware of the inevitability of stormwater flows from its property entering the river.

The Court now considered the relevant sentencing principles, as established by the Sentencing Act 2002 and case authority. The Court noted that the adverse effects of sediment discharges from earthworks on fresh and coastal water bodies were well recognised. In the present case, the environment affected by the discharge was the Clutha River, listed as having natural and tangata whenua values in the Regional Water Plan. The Clutha was the longest New Zealand river and was an important habitat for a range of fish and bird species. The Court accepted that there was no evidence that such environmental adverse effects actually occurred or persisted in this case. The reason for that was that the Clutha flowed at a very fast rate so that the effects of sedimentation were quickly dissipated. However, cumulative effects were to be considered, although these were not measurable. The Court stated that s 7(c) of the RMA required it to have particular regard to the maintenance and enhancement of amenity values. The amenity effects of the present offending, as evidenced by the complaints from members of the public who saw the discoloured sediment-laden water in the river, detracted from the qualities and characteristics of the river. In addition, the Court had regard to the cultural effect of the offending on the values of tangata whenua, as set out in the cultural impact statement provided to the Court.

The Court, after having regard to relevant case authority, considered that an appropriate starting point for penalty was $50,000. This took into account that the underlying cause for the offending was the failure by Northlake to ensure that the proper level of sediment protection was in place on the development site and that up to 20 hectares of the site was open, contrary to the consent conditions and the Site Management Plan. The Court considered that the starting point should reflect a degree of deterrence and denunciation. This was reduced by five per cent for previous good character. Addressing the issue of whether further credit should be given for additional remedial efforts by Northlake, over and above what was required to put things rights, the Court further reduced the starting point by 10 per cent. Accordingly, Northlake was fined the sum of $42,500 and directed to pay legal costs and disbursements of $2,998 and witness costs of $417. Ninety per cent of the fine was to be paid to the council.

Decision date 30 October 2019 - Your Environment 31 October 2019

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Attorney-General v Trustees of the Motiti Rohe Moana Trust _ [2019] NZCA 532.

Keywords: Court of Appeal; jurisdiction; fishing; interpretation; coastal marine area; Māori culture; tangata whenua; coastal plan; effects; sustainable management

The Court of Appeal considered the appeal by the Attorney-General ("A-G") from the decision by Whata J of 26 June 2017 ("the HC decision"). The matter concerned the boundary between the jurisdictions of the RMA and the Fisheries Act 1996 ("the FA") regarding the controls on fishing activities that regional councils might impose in the coastal marine area ("CMA"). Trustees of the Motiti Rohe Moana Trust ("the Trust"), which was the kaumatua of Motiti Island, brought the proceedings to protect the indigenous biodiversity ("IB") of waters around Motiti, which included the Astrolabe Reef. Bay of Plenty Regional Council ("the council") wished to prohibit fishing in three specified areas of outstanding natural character in order to protect IB from the effects of unsustainable fishing activity, which had been permitted under the FA. The question now before the Court of Appeal was whether the council might prohibit fishing in specified parts of the CMA to maintain IB, when the biodiversity concerned included fish species, the taking of which was separately regulated under the FA. The HC decision held that s 30(2) of the RMA did not prohibit the council from acting to maintain IB in the CMA if it acted: for the purpose of protecting IB; and only to the extent strictly necessary to perform that function.

The Court of Appeal noted that s 30(1)(d) of the RMA, which set out the functions of the regional council, expressly limited the power conferred stating, under s 30(2), that the council "must not perform" the three s 30(1)(d) functions "to control the taking … of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the FA". However, s 30(1)(ga) of the RMA separately assigned to regional councils the function of maintaining indigenous biological diversity in their regions, which function extended to the CMA. After considering the history of the proceedings, the functions and powers of regional councils in the CMA under the RMA, the relevant provisions of the New Zealand Coastal Policy Statement ("NZCPS"), New Zealand's international obligations to protect IB, and the concept of IB under the FA, the Court addressed the four questions of law in the appeal.

Question one asked whether s 30(2) of the RMA only prevented a regional council from controlling activity in the CMA if the purpose of those controls was either to manage the
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utilisation of fisheries resources or to maintain the sustainability of the aquatic environment as a fishing resource. The Court noted that the two statutes pursued different objectives. The FA was concerned with "sustainable utilisation of fisheries resources" and only to the extent appropriate to secure future stocks. The RMA objective in s 30(1)(ga) of protecting IB was much broader than sustaining yields of quota management fish species. Furthermore, the Court stated that maintenance of IB was deliberately assigned to regional councils, under the RMA regime, to give effect to New Zealand's international obligations and as an important part of the legislative scheme reflecting the objectives and policies of the NZCPS. The Court accepted that the two statutes were intended to complement each other. Further, the function of maintaining IB was not subordinated to other regional council functions, and was broader than merely controlling the use of land. The Court noted that the prohibition in s 30(2) of the RMA was aimed at the FA concepts of managing fishery resources. The Court concluded that a regional council might control fisheries resources in the exercise of its s 30 RMA functions, including the listed s 30(1)(d) functions in the CMA, provided it did not act to manage those resources for FA purposes.

The second question of law was whether a regional council could exercise all its functions under the RMA relating to the protection of Maori values and interests in the CMA, provided they were not inconsistent with special provision made for such interests under the FA. After considering the relevant provisions, the Court concluded that for the purposes of the present case, the control of fisheries, under the FA, extended to the provision, in pt 9 of the FA, for taiapure-local and customary fishing. A regional council might be required to bear that in mind when determining in any particular setting whether s 30(2) of the RMA precluded the exercise of its function under s 30(1)(d)(i), (ii) and (vii).

The third question was to what extent, if any, did s 30(2) of the RMA prevent a regional council from performing its functions to maintain IB under s 30(1)(ga). Further, was it correct to say that it was only appropriate for a regional council to exercise this function if it was "strictly necessary" to achieve its purpose (as the HC concluded)? The Court now found that the RMA did not specify that the function of maintaining IB under s 30(1)(ga) was subject to s 30(2). It was not correct that a regional council might exercise such function only when strictly necessary when dealing with fisheries resources controlled under the FA. However, s 30(1)(ga) policies could be subject to s 30(2) where specified s 30(1)(d) functions were also invoked.

The fourth question asked whether the High Court erred by setting aside the declaration made by the Environment Court. The Court now found that Whata J was correct, for the reasons he gave, and there had been no error. The Court considered that costs should lie where they fell.

Decision date 25 November 2019 - Your Environment 26 November 2019.

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Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council _ [2019] NZHC 2844

Keywords: High Court; resource consent; subdivision

Ballantyne Barker Holdings Ltd ("BBHL") appealed against the Environment Court ("EC") decision of 28 September 2018 ("the EC decision") by which BBHL's application for subdivision consent was granted but on modified terms. BBHL sought to create seven new rural lifestyle lots, with an eighth balance lot of 41 hectares, on its 48-hectare site on the eastern side of the Cardrona River, near Wanaka. The EC granted consent for only five lots.

The High Court reviewed the EC decision, noting that a key issue had been how to prevent further subdivision beyond that approved in order to protect visual amenity values and avoid "over-domestication" of the landscape. The original proposal, which was agreed to by the immediate neighbours of the site, was that a consent notice be registered which prohibited further subdivision on the site, unless it was rezoned so to allow such subdivision. However, the EC said that such a consent notice would be "relatively easy" to amend or remove and so issued a minute suggesting that BBHL volunteer instead a restrictive covenant against subdivision. In the event, the EC rejected the covenant offered by BBHL. The appeal raised two principal issues where errors of law were alleged: the EC's rejection of the proposed consent notice and the covenant; and the EC's rejection of lots 4, 5 and 7 of BBHL's proposed subdivision.

Addressing first the question of errors in the EC's decision to reject the consent notice, the Court rejected the appellant's allegation that the EC had erred in suggesting that the appellant volunteer a covenant. The EC's concern was wider than the effects on the immediate neighbour
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to the site and it was not obliged to accept the proposed consent condition. However, the real issue was whether the EC was wrong to assume that the consent notice was insufficiently effective to preclude future subdivision, particularly of the large balance lot. The EC's rationale was that it considered that such a consent notice was easily amended because it was a discretionary activity. The Court now stated that there was insufficient evidence to support such a bald statement. Furthermore, it contradicted the reliance which the Environment Court in previous cases had repeatedly placed on the use of consent notices. After reviewing case authority, the High Court said that it was clear that, because a consent notice gave a high degree of certainty both to the immediately affected parties and to the public at large, it should be altered only when there was a material change in circumstances (such as rezoning through a plan change process). In such an event, the consent notice would no longer meet the RMA purpose. The EC's assumption that a consent notice might be changed relatively easily was not a reasonable assumption, and was unsupported by evidence and inconsistent with decided cases. The EC was in error. A second error arose when the EC rejected the consent notice condition, and the covenant proposed in lieu, because it would lapse on the event of the land being rezoned rather than, as the EC sought, in a 40-60 year timeframe. The Court now stated it was difficult to see a logical basis for linking the removal of the consent condition to a time period rather than to the outcome of a public plan change process. It was difficult to see why a condition should preclude subdivision notwithstanding a plan change becoming operative in a way which met the RMA's purpose. The Court was satisfied that the EC erred in law in this respect, and that such error was material to the EC decision. Accordingly, the appeal was allowed.

Turning to the second main issue raised in the appeal, the Court disagreed with BBHL's submission that there was no proper basis for the EC to refuse consent for lots 4, 5 and 7. The EC, as a specialist tribunal, was entitled to come to its own conclusions on the evidence as to which combination of lots achieved the most appropriate landscape outcome. No error arose. The Court then considered the other nine alleged errors identified by BBHL and found that no error had been made by the EC in regard to any of them.

The Court held that the EC was wrong in law to reject the proposed consent notice (and subsequently offered covenant), which should not have been assumed to be ineffective to stop future inappropriate subdivision merely because an application to amend it would have discretionary status. Further, there was no evidence to support the EC's assertion that the lapsing of the condition should occur in a 40-to-60-year time frame. The application was remitted back to the EC for reconsideration in the light of the present decision. Costs were reserved.

Decision date 26 November - Your Environment 27 November 2019.

Thomson Reuter's summary of the Environment Court's decision in 2018 was as follows:

Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council _
[2018]NZEnvC181

Keywords: subdivision; district plan; district plan proposed

The Court made an interim decision regarding the appeal by Ballantyne Barker Holdings Ltd ("BBHL") against the refusal by commissioners of Queenstown Lakes District Council ("the council") of BBHL's proposal to subdivide 48 ha of land owned by it near Wanaka township into rural living allotments.

The Court considered the proposal, which now was to create seven smaller lots, and a larger balance lot, each with a residential building platform. The site was within the Rural General zone of the Queenstown Lakes Operative District Plan ("the OP"). it was within the "Rural Character Landscape" of the proposed District Plan ("the PP"). The council's decisions on the PP were issued shortly before the Court was ready to issue a decision on the case. The Court stated it was common ground that the consequence of this was that the rules applicable to the present case were those in the PP because they were to be treated as operative under ss 86B and 86F of the RMA. In the present case, the Court concluded that the objectives and policies of the OP were still relevant.

The Court considered the proposal under s 104 of the RMA and considered relevant provisions of the Otago Regional Policy Statement (operative and proposed), the OP and the PP. Issues addressed included the development's visibility, whether the development constituted sprawl along roads, form and density, and effects on rural amenity. The Court concluded that the existing development in the area was not yet at a threshold and that any adverse effects on

neighbours would be generally mitigated by the conditions. The Court found that positive effects of the proposal included the proposed landscaping and underground reticulation of services. The Court concluded that on balance a five-lot subdivision was appropriate, which would not be an over-domestication of the site and the area and that the appropriate lots were as specified.

Accordingly, the appeal was allowed and consent granted, subject to the conditions and amended plans being approved. A timetable was set for the parties to lodge amended conditions with an amended landscaping plan. Costs were reserved with any application to be lodged and served within 15 working days from the final decision.

Decision date 23 October 2018 - Your Environment 24 October 2018

(The circumstances of this subdivision application and the proposition that private covenants may be used in preference to consent notices are similar to nearby Criffel application and appeal. See Newslink November 2018 - RHL.)

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Hawthenden Ltd v Queenstown Lakes District Council _ [2019] NZEnvC 160.

Keywords: district plan; landscape protection; objectives and policies

This was the Environment Court's decision on appeals against decisions by Queenstown Lakes District Council ("the council") concerning Stage 1 of its review ("the Review") of the operative district plan ("ODP"). The present decision related to an aspect of Topic 2 of the appeals, "rural landscapes", in particular the mapping of the outstanding natural landscapes ("ONL") and outstanding natural features ("ONF") in the proposed district plan ("PDP"). The Court noted that such maps were provisions that served the application of related objectives, policies and rules for the control of subdivision, use and development of land for the protection of ONLs and ONFs. More than 95 per cent of the district's land was mapped as ONL or ONF.

The Court addressed the following issues: a preliminary matter as to the jurisdiction of the Court to determine mapping boundary matters; issues relating to principles for landscape assessment; and certain ONL and ONF boundary disputes, first, in relation to land along the Clutha River corridor, and second regarding the Mt Iron ONF. The Court stated that the statutory framework and related legal principles were considered in its previous decision of 5 August 2019 on Topic 1 Stage 1 and were now adopted and applied. The present decision concerned the proper application of s 6(b) of the RMA and whether the Review provisions gave effect to the higher planning instruments. Addressing the jurisdictional issue, the Court declined the application by the appellant Upper Clutha Environmental Soc Inc that the ONL and ONF mapping revert to the ODP provisions. The Court was satisfied that it could determine the relatively confined ONF and ONL boundary issues in the present appeals on the evidence before it.

Regarding the principles for landscape assessment, the Court considered the meanings of "natural feature" and "natural landscape" in s 6(b) of the RMA, together with the factors derived from case authority for assessing landscape significance. The Court stated that mapping of ONFs and ONLs was just one necessary part of ensuring the ODP properly responded to s 6(b) of the Act. Also required was an informed exercise of judgment as to the qualities or values in each landscape feature and whether in a comparative sense it is sufficiently natural to be classed as "outstanding". Furthermore, the Court of Appeal in the *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, (2017) 19 ELRNZ 662 decision had held that the planning context was not material for determining whether land was ONL or ONF. The Court now, guided by *Man O'War*, stated that, where inherent qualities of an area justified its inclusion in an ONL or ONF, the Court did not then disqualify it by reasons of what the PDP would allow by way of development.

The Court then turned to the specific boundary dispute matters in the appeals by Seven Albert Town Property Owners and by James Cooper, relating to the Clutha River corridor. Property owners were concerned that an ONL overlay might impede the capacity of the Otago Regional Council to undertake necessary work to stabilise the river bank and provide against flood or other hazards. The Court agreed that the council's listed values for the area were too generically expressed and should be amended to acknowledge the importance of hazard mitigation works. The Seven Albert Town Property Owners appeal was declined in part: the ONL notation on the relevant district planning maps was to be changed to an ONF notation but otherwise the present overlay boundary was confirmed unchanged. The James Cooper appeal was declined in part: the ONL notation on the relevant maps was changed to an ONF but otherwise the present landscape overlay boundary was confirmed unchanged. Regarding
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the Mt Iron ONF appeal by Allenby Farms Ltd, the Court allowed it in part: the relevant district planning maps were to be changed as specified but the other matters were reserved. Costs were reserved.

Decision date 4 November 2019 _ Your Environment 4 November 2019.

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Soroka v Waikato District Council _ [2019] NZHC 2940.

Keywords: High Court; procedural; jurisdiction; subdivision; district plan

The High Court considered an application by the defendant Waikato District Council ("WDC"), under r 4.56 of the High Court Rules 2016, ("the HC rule") to add Auckland Council ("AC") as a second defendant to the proceedings. AC consented to being joined but the plaintiffs, G Soroka and L Meredith, trustees for the Pakau Trust ("the Trust"), opposed the application. The Trust argued that WDC was the proper defendant and it should not be compelled to join AC. The matter concerned two proceedings relating to certain land owned by the Trust at Klondyke Rd, Port Waikato ("the Klondyke property") which was, until 1 November 2010, within Franklin District but thereafter had been in Waikato District. At issue was whether Transferrable Rural Lot Rights ("TRLRs"), introduced by Franklin District Council in 2003, might be used by the Trust for a subdivision proposal to transfer environmental lot rights to enable the subdivision of a 25 hectare block of land owned by the Trust at Chamberlain Rd, Bombay ("the Chamberlain property"). The Chamberlain property was formerly within the Franklin District but was now within Auckland Council territory. In 2012, the Trust applied to both WDC and AC to conserve 204 hectares in the Klondyke property, to create 29 lot entitlements and to transfer 13 of the 29 lots to the Chamberlain property using TRLRs. WDC issued a report ("the Report") confirming that 13 transferrable lots could be created on the basis that the Klondyke property would be protected by an appropriate covenant. The two councils determined to deal with cross-border TRLR applications jointly and made a joint decision ("the decision") whereby consent was granted to a transferrable rural lot subdivision to be created at the Chamberlain property, subject to provision of a covenant protecting a certain area of native bush on the Klondyke property. In February 2013, the Trust provided the required covenant on the Klondyke property. The present proceeding arose from a declaration sought by the Trust in the High Court that it was entitled to a further 35 TRLRs, a request for an order requiring WDC to consent to certain transfers and a claim for damages from WDC regarding the alleged unlawful exercise of its powers. WDC then applied to join AC. In support of the application to join, WDC argued that matters and decisions relating to the TRLRs were undertaken jointly by the two councils and that both were interested in the proceeding.

The Court reviewed the legal principles and relevant case authority relating to joining defendants under the HC rule, noting that there were two limbs, either of which might be satisfied. In the present case, WDC relied on both limbs: first, that AC ought to have been joined; and in the alternative that AC's presence before the Court was necessary to adjudicate on and settle outstanding matters. The Court did not think that the first limb was applicable to the present case. The relief sought in the declaration proceeding concerned only the number of TRLRs to which the Trust was entitled regarding the Klondyke property. None of the declarations sought raised any issue for adjudication that would require AC's participation in the litigation. Whatever might have been the effect of the decision and the provision of the deed of covenant, the Court said it was hard to see how AC's joint participation in the decision could mean its presence was necessary. The issue to be decided was the effect on the Klondyke property, which affected only the Trust and WDC. Similarly, regarding the damages claim by the Trust, the powers alleged to have been unlawfully exercised were those of WDC, not of AC. The fact that the two councils had collaborated in the processing of cross-border TRLR applications did not affect the position. Regarding the second limb of the HC rule, the Court was unconvinced that there was any relevant necessity in the present case. In addition, no wider considerations of justice favoured AC being joined. The Court stated it was difficult to see why the Trust should be asked to bear the additional costs and delay involved in any order joining AC. The application was dismissed. The Trust was entitled to costs on a 2B basis.

Decision date 4 December 2019 _ Your Environment 5 December 2019.

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Speargrass Holdings Ltd v van Brandenburg _ [2019] NZCA 564.

Keywords: Court of Appeal; High Court; resource consent; conditions; judicial review; earthworks

Speargrass Holdings Ltd ("Speargrass") appealed against the High Court judgment of 9 May 2018 ("the HC decision"). The proceedings concerned a large earth mound constructed by the Flax Trust, of which the van Brandenburg respondents were trustees, on Flax Trust's property, on the boundary of land belonging to Speargrass in the Wakatipu Basin. The High Court decision: allowed the appeal by Speargrass against the Environment Court decision of 17 October 2016 ("the EC decision") by which the EC granted retrospective consent for the constructed mound which was higher by about two metres than that which had been consented to; in judicial review proceedings, declined, on the basis of delay, to grant relief to Speargrass, despite finding material errors in the decision by Queenstown Lakes District Council ("the council") not to notify the first application (RM130766) for consent for the earthworks; and declined to make any order under the Property Law Act 2007 ("PLA"). The present appeal was against the HC decisions declining judicial review and declining to make orders under the PLA.

The Court of Appeal reviewed the history of the proceeding and of the consent applications made by Speargrass and Flax Trust. On 10 January 2014, the consent RM130766 was granted to Flax Trust to construct the mound. This was the basis of Speargrass's application for judicial review; the HC decision found the application should have been notified. Having built a mound to a height exceeding by some metres that consented to, Flax Trust applied for retrospective variation and, by the EC decision, this was granted. The HC decision quashed the EC decision. Speargrass now argued that the HC: failed to apply authorities which emphasised the importance of public notification of consent applications; improperly weighed the significance of the council's error regarding the permitted baseline; gave insufficient weight to the fact that Flax Trust was not an innocent third party but had illegally constructed the as-built mound; and had proceeded to make findings about prejudice without proper foundation. The Court considered the statutory context to the issue of public notification of consent applications and reviewed relevant case authority. The Court noted that the application by Flax Trust, for consent RM130766, was for a restricted discretionary activity, and that the council had restricted the exercise of its discretion to matters addressed in six categories. It was plain that the HC decision found there had been a material error in relation to the permitted baseline, but the Court now stated that the significance of such error should be assessed against the background which included the fact that the application was required to be assessed as a restricted discretionary activity.

Regarding the issue of delay, the Court of Appeal noted that, unlike in the English jurisdiction, there was no particular time limit on commencement of applications for review. Case authority however established that the Court could insist on reasonable promptness. In the present case, the delay had been extensive. Speargrass complained to the council and reserved its right to challenge RM130766 in judicial review proceedings, but nevertheless chose instead to concentrate on its opposition to Flax Trust's application for retrospective variation of consent and, even after this was decided, it was a further 10 months before Speargrass finally filed the review application. The Court now did not consider that the HC decision placed too much weight on delay, given the extent of the delay and the lack of any proper reason for it.

Regarding prejudice, Speargrass alleged that the HC decision as it related to prejudice had insufficient facts to justify declining relief. The High Court's approach turned on the idea that an early application by Speargrass for review of RM130766 would have caused Flax Trust not to make the application for retrospective variation to authorise the as-built mound. The Court of Appeal was satisfied that the HC was correct to hold that Flax Trust was prejudiced by the delay in the commencement of the review proceedings. The Court emphasised that the present position was that the retrospective amendment consent granted by the EC had been set aside and the only extant consent for a mound was RM130766. In the further hearing in the Environment Court made necessary by the HC decision, there would be an opportunity for the parties to address the impact of the as-built mound on Speargrass. The Court concluded that in the circumstances the HC did not err in deciding to refuse relief.

Turning to consider the PLA proceeding in the HC decision, the Court found that in the special circumstances of the case it was open to the HC to take the view that, although finding that the mound was so dominant in scale and so proximate to the Speargrass property that it had an undue effect, such an impact would be better dealt with under the RMA process, rather than making an order under the PLA. The Court was satisfied that the appeal against the refusal of

the PLA application could not succeed. The appeal was dismissed. Speargrass was ordered to pay costs to Flax Trust and the council on a band A basis.

Decision date 10 December 2019 - Your Environment 11 December 2019.

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Brookby Quarries Ltd v Auckland Council _ [2019] NZHC 2648

Keywords: High Court; quarry; zoning; district plan; objectives and policies; consent order

The High Court considered questions as to jurisdiction referred to it by the Environment Court ("the EC"). The matter concerned which planning provisions in the Proposed Auckland Unitary Plan ("PAUP") should regulate the removal of vegetation in a significant ecological area ("SEA") overlay, within a Special Purpose Quarry Zone ("SPQZ)". The Independent Hearings Panel recommended the deletion of the SEA overlay, together with the deletion of all the objectives, policies and rules relating to the overlay, where it overlaid the SPQZ, because the overlay would frustrate the purpose of the quarry zoning. The appeal by Royal Forest and Bird Protection Soc of New Zealand Inc against such deletion was allowed by the High Court on 18 May 2018 ("the HC decision"). All the parties agreed that the SEA overlay should be reinstated and furthermore, because the surrounding objective, policy and rule matrix had also been deleted, agreed to criteria that would constitute an "alternative solution" for the purposes of ss 148 and 156 of the Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA"). The High Court endorsed such approach and set out a draft consent order.

The Environment Court now asked three questions of law as to jurisdiction: did the HC decision intend to provide for an appeal under s 156 of the LGATPA; if so, did the draft consent order provide scope for a person to appeal the AUP provisions relating to the SEA overlay as it applied to mineral extraction on land in the SPQZ; and if the consent order did not provide scope, was there nevertheless scope for the parties to appeal to the EC any provisions of the SEA overlay applicable in the SPQZ. The Court stated that the answer to the first question was "yes", as per the HC decision. The PAUP contained bespoke provisions relating to the removal of vegetation in the SEA overlay. The IHP's decision to delete the SEA overlay from the SPQZ effectively removed all associated provisions, including those applying to the SPQZ itself. Fairness required that the affected submitters be afforded the opportunity to revisit the relevant provisions. Regarding the second and third questions posed by the EC, the Court stated that a person could appeal the AUP objectives and policies relating to the SEA overlay as it applied to mineral extraction in the SPQZ. The Court accepted that the EC was justified in taking a cautious approach. The Court agreed to certain amendments to the draft consent order as proposed by the council.

As the HC decision had not yet been sealed, the Court now recalled it, under r 11.9 of the High Court Rules 2016, for the purpose of amending the consent order to correspond exactly with the judgment. There was no order for costs.

Decision date 31 October 2019 - Your Environment 6 November 2019

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Whangarei District Council v CPE Trustee Ltd _ [2019] NZEnvC 152

Keywords: declaration; quarry; existing use; effect; landscape protection; district plan

The Court considered the application by Whangarei District Council ("the council") for a declaration as to whether there were existing use rights for the quarry operation known as Kamo Scoria Quarry ("the quarry"), located on the western flank of the extinct volcano Mt Hurupaki, at Kamo. The owner of the property was CPE Trustee Ltd. Stan Semenoff Ltd had leased it since 2019. If the quarry were found to have existing use rights, the council asked the Court: to what extent quarrying could take place; whether quarrying was permitted on those areas identified as outstanding natural landscape ("ONL"); and whether any rules in the district plan regulated the quarry.

The Court considered the history of the site, noting that scoria quarrying activity began in the 1950s, prior to the first relevant district plan of 1967. The Court traced the activity from that date through the subsequent planning provisions and considered the resource consents granted up to the present time. The latest resource consent was granted in July 2017, granting quarrying rights for 30 years, in acknowledgement of the existing use rights and "the lack of offsite adverse effects on water quality and soil conservation values". The Court considered the

provisions of s 10 of the RMA and noted it was accepted that the existing use had been established on the site from well before the establishment of the district plan and so met the requirements of s 10(1)(a)(i) and further that the activity had not been discontinued for a period of 12 months or more under s 10(2). The matter to be considered was whether, under s 10(1)(a)(ii), the effects of the use were the same or similar in character, intensity and scale to those previously existing.

After considering submissions by s 274 parties as to hours of operation and truck movements, the Court said it was satisfied that overall the effects were likely to be less than they were at the time the quarry became an existing use activity. Regarding the physical extent of the quarry, and whether quarrying activity was allowed within the ONL, the Court had no evidence other than its own observation on its site visit. The Court stated that there was a potential adverse amenity effect should the present ridge be removed by quarrying and if views of the quarry so became visible and part of the landscape character. However, the Court had no jurisdiction in the present application for declaration to impose any limitation on the operation which was an existing use. The Court concluded that the extent of the quarry footprint, shown on the diagrams as being outside the ONL, currently enjoyed existing use rights; however, it declined to make any declaration on that issue. Regarding the district plan provisions, the Court concluded that the activity relied on existing use rights and thus the district plan did not regulate the activity; no declaration was required.

The Court made declarations that: the quarry was an existing use and was protected by s 10 of the RMA; and the effects of the activity were the same or similar to the character, scale and intensity of the activity at the time it became an existing use and therefore met the requirements of s 10. Directions were given as to applications for costs.

Decision date 4 October 2019 - Your Environment 7 October 2019.

Whangarei District Council v CPE Trustee Ltd _ [2019] NZEnvC 186

Keywords: declaration; quarry; existing use; costs

By its decision of 12 September 2019, the Environment Court made declarations regarding certain quarrying activities, finding that the quarry was an existing use and was protected by s 10 of the RMA and that the effects of the current activity, being less, the same or similar to those of the activity when it became an existing use, met the requirements of s 10. The Court gave the parties an opportunity to try to settle the final wording. Whangarei District Council ("the council") filed a memorandum seeking that the declaration be amended to record details of the extent of the quarrying operations which could take place. The respondents opposed such amendment.

The Court stated that it had deliberately limited the declarations made to the existing use issue without defining the extent of the operations. Reasons for this included that: the regional council consent conditions were explicit and publicly available, and other issues raised were putative. The Court now did not consider it necessary to refer the matter further to the Commissioners for a decision. The scope of the declaration was contained in a statement of existing use rights. Accordingly, the Court confirmed the declaration.

The Court then considered applications for costs by the respondents against the council and s 274 parties. They claimed $33,000 which they claimed related to the proceedings and further $2,869 relating to planning evidence. The Court noted that under the principles relevant to its discretion to award costs under s 285 of the RMA, costs against councils were normally not awarded absent some blameworthy conduct on the part of the consent authority. In the present case, the Court observed that the council required the applicant to prove it had existing use rights and did not undertake investigations itself. It appeared that the council was motivated by complaints from residents in the area about traffic movements. The residents undertook an extensive surveillance programme. The applicant admitted that there had been some breaches of conditions concerning the hours of operation and this demonstrated that the council had a basis to require further information. Although the matter was finely balanced, the Court concluded that it was not appropriate to order costs against the council to the respondents. Similarly, the Court declined to order costs in favour of the s 274 parties. Costs were ordered to lie where they fell. The Court stated that the file on the matter was now closed.

Decision date 18 December 2019 – Your Environment 19 December 2019.

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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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River bank location for application of Section 230 RMA and obligations for vesting esplanade reserves or granting of esplanade strips:

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

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

The decision summary is included in Newslink December 2019.

Summary from Clauses 109 and 110 of the decision:

- **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.**
- **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.**
- **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 and obligations for vesting of esplanade reserves. See the report on this decision in Survey + Spatial issue 100 December 2019 by Mick Strack and Kendall Reid and also a summary of the decision on Hojsgaard v LINZ *in the legal column of Survey + Spatial issue 98 June 2019 which addresses the standard of evidence required to change a boundary definition – RHL.*

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Other News Items for February 2020

Wanaka residential development opposed by neighbours

The *Otago Daily Times* reports that a proposal by Varina Pty Ltd to build an eight-unit, 20-room accommodation complex in four new buildings in central Wanaka will be opposed at an Environment Court hearing later this month. Although the development is in the high density residential zone in the district plan, neighbours Craig and Wendy Sheppard and Phil Bloxham object to it on a number of grounds. Read the full story here.

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New Ngāi Tahu development proposed for Queenstown

Stuff reports that construction work will soon begin on a 350-home residential development in central Queenstown, to be built by Ngāi Tahu Property on the site of the former Wakatipu High School, which has been demolished. The development will include 105 KiwiBuild homes. Read the full story here.

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$3.9 m investment plan for sustainable tourism in Westland
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Radio New Zealand reports that almost four million dollars of the International Visitor Conservation and Tourism Levy will be used by the Government to develop a sustainable tourism plan and initiatives for Westland. Read the full story here.

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Uncertainty about former Dunedin hospital building

The *Otago Daily Times* reports that the derelict building which was the former Glamis Hospital in Dunedin is remaining neglected and gutted by fire while the building's owner declines to decide its fate. There have been concerns expressed about the safety of the building but Dunedin City Council has no power to compel demolition. Read the full story here.

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Possible expansion of oil drilling activities off Otago coast

The *Otago Daily Times* reports that global oil company OMV has confirmed that its giant drilling rig, the COSL Prospector, is on its way to the Great South Basin. The Environmental Protection Authority has granted consent to OMV to drill up to 10 exploratory and appraisal wells in the area. Read the full story here.

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Completion of new mass scale retail building in Henderson delayed

The New Zealand Herald reports that Vinod Kumar, managing director of Nido Living furniture retailer, says that completion of the company's new eight-storey building in Henderson has been delayed by windy conditions but when construction is finished in late February it will be the largest store of its kind in the country. Read the full story here.

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Cardrona resort cancels chairlift plan to protect lizards

Radio New Zealand reports that Cardrona Alpine Resort near Wanaka has abandoned its plans for a new chairlift, as it was found that construction would disturb a native lizard stronghold. Surveying recorded the highest diversity of reptiles known on the mainland.
Read the full story here.

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No decision on Taranaki $200m road project

The *Taranaki Daily News* reports that five months after the appeals against resource consents granted for the $200 million Mt Messenger bypass were argued in the Environment Court, no decision has yet been delivered. It is understood that Te Rūnanga o Ngāti Tama, who hold mana whenua in the area where the new road is proposed, are considering a compensation package and, without iwi approval, the works to construct the north Taranaki roading project could not proceed. Read the full story here.

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Waikato RC active in taking enforcement action against district councils for wastewater discharge offending

The *Waikato Times* reports that district councils in the Waikato region were charged with 38 enforcement actions, relating to the unlawful discharge of wastewater, over the last five years. In particular, Waikato District Council received seven formal warnings, four infringement notices and one abatement notice issued by Waikato Regional Council during that time.
Read the full story here.

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Environment Commissioner says no clear plan to tackle environmental degradation by increased tourism

Radio New Zealand reports that a report by the Environment Commissioner, Simon Upton, says the Government and the tourism industry have no clear plan for dealing with the likely environmental degradation from increasing tourist numbers in the coming decades.
Read the full story here.

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Tauranga courthouse building to be replaced at cost of $100m

Radio New Zealand reports that Justice Minister Andrew Little has announced that Tauranga's current courthouse, affected by weathertightness issues, will be replaced by a newly constructed facility at a cost of $100 million. Building works are expected to start at the end of next year. Read the full story here.

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Criticism of Christchurch Justice Precinct after $5.5m repairs

Radio New Zealand reports that the Public Service Association says that the new Justice and Emergency Services Precinct in Christchurch is too small to accommodate its 1100 staff and the 900 people who visit daily. Construction was completed by Fletcher Building in 2017 and since then there have been 1,800 unplanned repairs at the Precinct due to the many building problems, including faulty air-conditioning and incorrectly fitted glass. Read the full story here.
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Resolution of district plan appeal opens way to development of new housing areas in Dunedin

The *Otago Daily Times* reports that Dunedin City Council says that an appeal against the new district plan, which has been holding up the development of new housing areas and has affected 2,600 sites, has been resolved. Read the full story here.

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Christchurch City Council backs new $470 m stadium

The Otago Daily Times reports that Christchurch City Council has voted 15 to 1 to accept an investment case to build a new, $470 million, multi-use stadium. Mayor Lianne Dalziel said the stadium would be a game changer for the city. Read the full story here.

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Possible fast-tracked plan change for Plimmerton Farm housing project

Stuff reports that Environment Minister David Parker will decide whether to consider proposed changes to allow the 386-hectare Plimmerton Farm development under a fast-tracked process. The development would create about 2000 homes, and include a retirement village, and a retail area. Read the full story here.

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Wellington City Council staff shortages slowing building consents

The New Zealand Herald reports that Wellington City Council is struggling to meet statutory timeframe requirements for building consents due to a staff shortage and increasing construction projects. City consenting and compliance manager Mark Pattemore said staff have been working overtime to plug the gap. Read the full story here.

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Christchurch City Council refuses to sign off on new building due to faulty design

Radio New Zealand reports that Christchurch City Council is refusing to sign off on a new and unoccupied central city multi-storey building after a determination from the Ministry of Business, Innovation and Employment that the building does not comply with the Building Code but is not dangerous. The council says it will refuse to give the building a code compliance certificate. Read the full story here.

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New Catholic cathedral, school, hotels and car parking in central Christchurch

Stuff reports that the half-billion-dollar North of the Square project - announced jointly by the Catholic diocese of Christchurch, property developer the Carter Group and Crown rebuild company Ōtākaro - will develop sites between Cathedral Square and the River Avon. The development will include up to four hotels, a new Catholic cathedral, school, church accommodation and offices plus a 600-space parking building. Read the full story here.

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Greater Wellington Regional Council requests Government help for rail network upgrade

Stuff reports that Greater Wellington Regional Council has put together a case for acquiring a new fleet of 15 electric hybrid trains to operate on the Manawatū and Wairarapa lines at a cost of $415 million. The council has asked the Government for a significant handout to fund the upgrades. Read the full story here.

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Prime Minister states Auckland port needs to move

Radio New Zealand reports that the Prime Minister has stated that it is no longer viable for the car and container port to remain in Auckland's CBD, but has not said where it should move. A relocation is estimated to cost $10 billion. Read the full story here.

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Sink holes in Dunedin suburb may be caused by old mines

The *Otago Daily Times* reports that geotechnical engineering consultant GeoSolve has told Dunedin City Council that significant areas of Dunedin's suburb Fairfield might be at further risk, following the discovery of sink holes above an abandoned underground coal mine. Engineering geologist Patrick Lepine's report warns that there might be some risk to the public from sudden collapses and that remedial work would be complex and costly to the council.
Read the full story here.

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