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Legal Case-notes May 2020

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We would appreciate comments and suggestions from members on content, format or information about cases that might be of interest to members but may have not been reported in "Your Environment".

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

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

- An appeal against a decision of NZTA seeking to determine whether the Court had jurisdiction to amend the NOR for a new route for SH3 through the Manawatu Gorge beyond the designated alignment;
- An appeal relating to rules in the Thames-Coromandel proposed district plan limiting subdivision to create of new "conservation lots" in Rural zones;
- An appeal to the High Court against grant of consents to take water from the Aupouri aquifer north of Kaitaia for horticultural purposes.
- A joint application to the court by parties to an appeal relating to the proposed. Kapiti District plan to resolve issues beyond the scope of the original appeal;
- A procedural decision relating to provisions regulating mangrove removal in the Northland Regional Plan;
- An application to the Court of Appeal about construction of an earth bund in the Speargrass Flat area near Queenstown.

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CASE NOTES May 2020:

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Director-General of Conservation v New Zealand Transport Agency _ [2020] NZEnvC 19

Keywords: procedural; requirement; designation; road; vegetation indigenous

This decision concerned whether the Environment Court had jurisdiction to modify a notice of requirement ("NOR") lodged by the New Zealand Transport Agency ("NZTA") in order to avoid two areas of indigenous vegetation. NZTA proposed to construct 11.5 km of new State Highway in the Manawatu to replace the closed SH3 route through the Manawatu Gorge. Three NORs identified the areas of the proposed designation. The territorial authorities affected appointed a hearing panel which issued its recommendations confirming the NORs in May 2019, which NZTA accepted in part. Three appeals were lodged against NZTA's decision on the recommendations. Of relevance was the appeal by the QEII National Trust ("the Trust"), which sought modification of the designation route in the Tararua District in order to avoid two areas of indigenous vegetation which were subject to open space covenants in favour of the Trust, on a property owned by J & G Bolton Ltd ("BL"). NZTA in response sought a modification of the NOR by moving part of the proposed road northwards ("the Northern Alignment") outside the area of land identified within the NOR. The Court now considered if it had jurisdiction to so modify the NOR at the hearing of the appeal, notwithstanding that the Northern Alignment did not lie within the area originally identified.

The Court reviewed the background and the NZTA proposal, noting that it was common ground between the NZTA, the Trust and the Department of Conservation ("DOC") that the proposed modification would reduce adverse effects of the road on the Trust areas and give a better outcome for the road. The Court considered the provisions of ss 171, 172 and 174 of the RMA and observed that the powers to modify contained in ss 171(2)(b) and 174(4)(c) were not expressly constrained or limited, other than by the need to interpret the word "modify" which was not defined in the RMA. The Court referred to dictionary definitions of the word and noted that these appeared to be consistent with submissions by the NZTA that a modification of a NOR must not alter the essential nature of the project but could result in significant changes. The Court emphasised that the power to modify in the cases of NORs was different from the power of consent authorities, and the Court, when dealing with resource consents under ss 104A, 104B and 104C of the RMA. None of the latter provisions gave a power to modify a resource consent, other than for something less than what was actually sought. The Court concluded now that the power to modify NORs went beyond merely changing a proposal by restricting it to something less than what was sought. After close consideration of relevant case authority, the Court found there was a broad power to modify a notice of requirement, the scope of which was not limited by the boundaries of the notified proposal but was rather determined by asking whether or not the proposed modification changed a proposal so as to alter its essential nature or character. In the present case, the Court concluded that the Northern Alignment did not alter the proposal's essential nature or character, for the specified reasons. Accordingly, the Court determined that the modification proposed was within jurisdiction.

The Court then considered whether it should make the modification in the present case. This came down to issues of fair process. The Court adopted the key considerations which the NZTA submitted were directly relevant, namely: was it plausible that a person who had not submitted on the NORs would have done so if the modification had been incorporated; would affected landowners be unchanged if the modification had been included; and, to the extent that potential unfairness arose, had this been resolved by BL joining the appeals. Again referring to case authority, the Court concluded that any issues of procedural unfairness had been dealt with and that there were no procedural obstacles pertaining to fairness which would preclude the Court from considering the modified NOR. Accordingly, the matter might proceed to hearing. The Court gave directions as to hearing. Costs were reserved.

Decision date 30 March 2020 Your Environment 31 March 2020

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Edens v Thames-Coromandel District Council _ [2020] NZEnvC 13

Keywords: district plan proposed; subdivision; rule

This decision concerned 11 appeals against the proposed Thames-Coromandel District Plan ("PDP") rules relating to subdivision. Prior to the hearing of the appeals, after negotiation and mediation, three main topics remained to be determined: in relation to Rule 8 (providing for conservation lot subdivision), the appropriate cap for new lots that might be created; in relation to Rule 9 (regarding subdivisions creating one or more additional lots in the Rural zone) whether the appropriate activity status should be restricted discretionary or discretionary; and in relation to certain definitions.

The Court considered the statutory and planning framework and relevant case authority before considering each of the three topics. Regarding a cap on new conservation lots, the Court stated that complexity arose because the activity to be controlled (subdivision and development) was also being used as an incentive mechanism to obtain public benefits (conservation lots) that might offset the adverse effects of the activity sought to be controlled. In the present case, the Court concluded that providing for a lower number of conservation lots was more appropriate, as set out in Rule 8(1)(d) of the revised provisions of the PDP attached to the present decision. Regarding the activity status of rural subdivision in Rule 9, the Court agreed with the Environmental Defence Soc Inc that Rule 9 should remain a discretionary activity because the range of possible circumstances was too broad to ensure discretion could be restricted on a principled basis. The Court further made decisions as to the definitions that should apply. The revised provisions of the PDP, as amended in the present decision, were attached. The decision was an interim one, to the extent that leave was reserved for any party to apply for directions.

Decision date 10 March 2020 Your Environment 11 March 2020
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Burgoyne v Northland Regional Council _ [2020] NZHC 189

Keywords: High Court; resource consent; water take and use; wetland

A Burgoyne ("B"), on behalf of the Te Taumatua o Ngati Kuri Research Unit, appealed from the Environment Court decision of 19 February 2019 by which consent was granted to the Motutangi-Waiharara Water Users Group ("the water group") for water takes from sub-units of the Aupouri Aquifer in the Far North. The water group were individuals who owned properties in the Aquifer area. The Kaimaumau-Motutangi Wetland ("the wetland"), said to be the largest wetland in Northland and the third largest peat bog in New Zealand, was adjacent to the proposed water takes.

The Court stated there were three limbs to the EC's decision: avoidance of adverse environmental effects; avoidance of cultural effects; and the land issue. Regarding the present appeal, the Court admitted to difficulty in following B's arguments. However, B, who was self-represented, now raised two points. The first concerned land ownership. B submitted that certain parcels of land held by members of the water group must be returned to Māori ownership and further that some of the water group members were acting in breach of the Overseas Investment Act 2002 ("OIA") by failing to disclose their New Zealand investments. The second point appeared to relate to the grant of the consent and damage to archaeological sites and the wetland. Regarding the first point, the Court agreed with the Environment Court that a challenge to a resource consent was not an appropriate legal process to challenge land ownership and such matters were more appropriately dealt with in the Māori Land Court. Further, the OIA had no bearing on the grant of consents under the RMA. Regarding the second point, the water group said that the claims by B, that the water group had failed to respond to a request by Heritage New Zealand to undertake an archaeological survey, were baseless. Regarding B's contention that the aquifer's recharge was inadequate, the Court noted that the EC decision had introduced a conservative water trigger level for the wetland in the monitoring process. B had not demonstrated any error in the EC decision. The appeal was dismissed.

Decision date 3 March 2020 Your Environment 04 March 2020

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Maypole Environmental Ltd v Kapiti Coast District Council _[2020] NZEnvC 9

Keywords: district plan proposed; consent order; jurisdiction

The Environment Court considered a joint submission by the parties to the appeal, Maypole Environmental Ltd and Kapiti Coast District Council ("the council") that it exercise its powers under s 293 of the RMA to resolve certain issues as to jurisdiction. The matter concerned the proposed Kapiti District Plan 2012 ("the PDP") and the agreed settlement by the parties of unresolved issues ("the settlement"). The Court stated that, since the decision in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93, it was accepted that vires issues might arise with outline plan consents, such as those proposed in the present case under a two-step process set out in the settlement. The parties had agreed that certain of the amended provisions of the PDP in the settlement were now outside the scope of the original notice of appeal and so requested the present hearing.

The Court considered the relevant provisions and proposed amendments and confirmed the final set of amended provisions submitted on 3 February 2020. The Court accordingly directed the council to amend its PDP as set out in Appendix A to the present decision.

Decision date 4 March 2020 Your Environment 05 March 2020

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CEP Services Matauwhi Ltd v Northland Regional Council _ [2020] NZEnvC 7

Keywords: procedural; waiver; time limit; public interest

Mangawhai Harbour Restoration Society Inc ("the Society") applied for waiver of time limit to join appeals by CEP Services Matauwhi Ltd and Royal Forest and Bird Protection Soc of New Zealand Inc relating to provisions in the proposed Northland Regional Plan which concerned mangrove removal, originally part of coastal activities provisions but now created as a separate topic.
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The Court considered the question of waiver and inclusion of a party in a plan appeal which was well underway. In the present case, although not a party, the Society had been involved in various discussions regarding removal of mangroves. The mapping provisions would have a significant impact on the level of intervention might be achieved. The Society sought liberalised provisions allowing removal of mangroves; the appellants sought more stringent provisions. The issue involved a large area of coastal land, accessible to the public. The removal of mangroves was a contentious issue, as demonstrated by previous decisions of the Court. The Court concluded that the scheme of the RMA encouraged public participation and that the public interest issue meant that the waiver should be granted. The waiver was granted, subject to specified conditions. Costs were reserved.

Decision date 24/2/2020 Your Environment **2502**

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Speargrass Holdings Ltd v van Brandenburg _ [2019] NZCA 684

Keywords: Court of Appeal; stay; Supreme Court; leave to appeal; procedural; jurisdiction

This decision of the Court of Appeal followed that of 18 November 2019 by which the appeal, by Speargrass Holdings Ltd and Mr and Mrs Meehan (together "the appellants"), against a decision of Dunningham J ("the HC decision") was dismissed. The appellants now sought a stay and/or interim relief pending an application for leave to appeal to the Supreme Court. The stay was opposed by the first respondents Mr and Mrs van Brandenburg ("B").

The Court reviewed the litigation and noted that the underlying dispute concerned the construction on B's land of an earth mound which was higher and larger than that for which consent had been granted by Queenstown Lakes District Council ("the council"). Judge Jackson in the Environment Court decision of 17 October 2016 ("the EC decision") granted a variation of consent for the mound. The appellants, whose property was adjacent to that of B, appealed to the HC and applied for judicial review of the council's decision not to notify a resource consent application for the mound, in addition to seeking an order under the Property Law Act 2007 ("PLA") requiring the mound's removal. The Court in the HC decision decided that the EC erred in several material ways and allowed the appeal, setting aside the EC decision. The HC decision also found that the council erred in making the non-notification decision but declined relief regarding that application and the PLA application. The appellants appealed against the HC decision in respect of the judicial review and PLA proceedings.

The Court noted that the appellants now argued that their appeal to the Supreme Court would be rendered nugatory if the orders presently sought were not made. However, B argued that the Court of Appeal had no jurisdiction regarding the EC decision, as the HC decision setting aside the EC decision was not before the Court of Appeal. Further, B submitted that the stay application was designed to delay proceedings until Judge Jackson retired from the EC in March 2020. The Court now considered the provisions of r 30(2) of the Supreme Court Rules and said it was unclear how it could have jurisdiction to order the stay now sought. The HC decision setting aside the EC decision was not the subject of an appeal to the Court of Appeal. It was not the Court of Appeal's decision which was being executed but that of the High Court and the Court of Appeal had no jurisdiction. Further, any further proceedings before the Supreme Court would not be rendered nugatory. The EC was lawfully entitled to embark on hearing of the unresolved appeal. If the appellant wished to prevent that occurring, the appropriate course would be to apply for an adjournment to that Court. Another alternative would be to apply for a stay to the HC which was once seized of the proceeding. The applications for stay of execution and other orders were declined.

Decision date 27 February 2020 Your Environment 28 February 2020

For the previous decision refer to the summary printed in Newslink August 2018

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

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decisions that may be of interest to members. Please consult the complete decisions for a full understanding of the subject matter.

Should you wish to obtain a copy of the decision please phone Thomson Reuters Customer Care on 0800 10 60 60 or by email to judgments@thomsonreuters.co.nz.

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This month's cases were selected by Roger Low, rlow@lowcom.co.nz, and Hazim Ali, hazim.ali@aucklandcouncil.govt.nz.

Other News Items for May 2020

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Shopping mall on Ravensdown site in New Plymouth given go ahead

Taranaki Daily News reports that developer Bluehaven Management has been given approval by an independent commissioner for a commercial retail complex at the old Ravensdown fertiliser site, subject to conditions. The multimillion-dollar project will be constructed in three stages, over a period of three years. Read the full story here.

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Christchurch Stadium planning work continues amid lockdown

Stuff reports that planning work on the new Christchurch Stadium continues despite coronavirus restrictions, with no delays predicted at this stage. Council citizens and community general manager Mary Richardson said the council was "proceeding at pace" with planning, but even if it was delayed due to Covid-19, it would not necessarily affect the main work timeline. Read the full story here.

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Hole opens in ozone layer above the Arctic

The Guardian reports that a hole has opened up in the ozone layer above the Arctic which scientists say is the result of unusually low temperatures in the atmosphere above the north pole. The hole has reached record dimensions, but is not expected to pose any danger to humans unless it moves further south. Read the full story here.

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Biosolids shipped to landfill in Taranaki

Taranaki Daily News reports that New Plymouth District Council has been forced to truck biosolids from its Wastewater Treatment Plant to a landfill 190 km north of the city after the practice of spreading the sludge on fields was jettisoned because of odour complaints. The issue arose after planned and approved repairs and upgrades, costing $4.3 million, to the failing Treatment Plant thermal dryer were thwarted by the Covid-10 shutdown. Read the full story here.

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Oil and gas ban ineffective and done without due consultation - report

Radio New Zealand reports that a report by the Parliamentary Commissioner for the Environment, Simon Upton, says that the government ban on new oil and gas exploration permits was introduced after "limited analysis" and without proper consultation with stakeholders. Furthermore, the report finds that the ban will be costly and do little to benefit the environment. Read the full story here.

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Auckland Mayor looks to transport infrastructure projects to revive local economy after crisis

Radio New Zealand reports that Phil Goff has asked infrastructure leaders to be ready with projects to alleviate the recession once the Covid-19 crisis is ended. Options mentioned by the
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mayor included electric buses, more cycleways, a rapid transit system and new roads. Read the full story here.

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Historic building damaged by vandals

The *Otago Daily Times* reports that the Historic Places category 1 building, St Dominic's Priory in Dunedin, was damaged by intruders who broke in and vandalised "irreplaceable" property. Read the full story here.

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Staged closure of Tiwai Point smelter line

The *Otago Daily Times* reports that Stewart Hamilton, chief executive of New Zealand Aluminium Smelters, had said the the Tiwai Point smelter will undertake a staged shut down of one of its lines this week, in response to the Covid-19 situation and in anticipation of a reduced load. Read the full story here.

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Wellington bird sanctuary threatened by proposed landfill expansion

The Dominion Post reports that concerns have been expressed that Wellington City Council's plans to extend the Southern Landfill will have adverse impacts on the nearby Zealandia eco-sanctuary, recently named by *Time* magazine as one of the "world's greatest places". Read the full story here.

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Mystery golf course appears in Auckland reserve

Stuff reports that a three-hole golf course has mysteriously appeared at an Auckland reserve during the nationwide lockdown, equipped with greens, flags and fairways. Auckland Council have ordered its removal and advised against using it. Read the full story here.

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Bay of Plenty township declared unsafe for residents

Stuff reports that commissioners of Whakatane District Council have determined that that all residents in the Awatarariki catchment at Matata in the Bay of Plenty must leave their homes by March 31, 2021, after which date their continued occupation will be unlawful. Following a debris flow event in 2005, the council concluded the township was too dangerous to live in and, by plan changes, removed any existing use rights. Read the full story here.

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Wind turbine blades arrive but cannot be used

The *Manawatu Standard* reports that the 99 wind turbine blades for Mercury's $450 million Turitea wind farm project will be transported from Port Taranaki and stored until after the present lockdown. Construction of the windfarm has been suspended as it is not deemed to be essential work. Read the full story here.

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Transport Agency was failing to complete road projects before shutdown

Radio New Zealand reports that roading projects being undertaken by the Transport Agency were behind schedule before the shutdown began and only half of what was expected from the Agency had been delivered, with the result that much of the funding allocated had not been used. Read the full story here.

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Consultation suspended for Bay of Plenty Regional Plan

Radio New Zealand reports that Bay of Plenty Regional Council has suspended public consultation on its annual plan and on proposed changes to the Resource Management Act for the period of the coronavirus shutdown. However, the council will continue with the public consultation process regarding flood protection and drainage by-laws. Regional Council chairman and Eastern Bay of Plenty councillor Doug Leeder emphasised that the by-laws were

a core function on which the council would continue to focus during the crisis. Read the full story here.

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Construction worker walks off building site because of alleged unsafe virus procedures.

The Star reports that the Christchurch Hospital building site has been called a "dangerous little virus hub" by a worker who walked off the site because the Australian company CPB, which is undertaking the $500 million construction project, is alleged not to be following coronavirus safety guidelines at the site. The Ministry of Health confirmed there had been instances when contractors had not followed coronavirus safety guidelines on site, and has ordered CPB to be more vigilant about enforcing its safety management plan. Read the full story here.

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Australia: coalmining extension under Sydney's Woronora reservoir leads to fears for water quality

The Guardian reports that the New South Wales government has approved the extension of coalmining under Woronora reservoir, one of Greater Sydney's reservoirs. Environment groups say this could affect the quality of water in the drinking catchment. Read the full story here.

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Temporary museum building opening delayed in Invercargill

The Southland Times reports that the opening of the interim museum in Invercargill, which has being prepared to replace the "pyramid" Southland Museum and Art Gallery building, closed for two years because of earthquake safety concerns, will itself now be delayed due to the Covid-19 lockdown. The pyramid building is planned to be retained and redeveloped at a cost of $66 million. Read the full story here.

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Australia: worst environmental conditions across the country since at least 2000

The Guardian reports that the annual Australia's Environment report has found that 2019's heat and drought brought the worst environmental conditions across the country since at least 2000. The report found river flows, tree cover and wildlife being hit on an "unprecedented scale". Read the full story here.

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New Plymouth DC seeks to remove freedom campers from the roads during crisis

Radio New Zealand reports that all freedom campers in the New Plymouth area have been told they must head to a holiday park for the duration of the Covid-19 shutdown. New Plymouth District Council has closed 14 car parks at reserves, parks and beaches, including those which provide options for freedom campers. Read the full story here.

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New figures show air pollution in Europe lowered during shutdown

Radio New Zealand reports that satellite data shows an improvement in air quality over Europe - this being a byproduct of the coronavirus crisis. Lockdown polices and the resulting reductions in economic activity have seen emissions take a steep dive. Read the full story here.

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Call to Government to support construction companies.

Stuff reports that Rick Herd, chief executive of construction company Naylor Love says the Government needs to save thousands of small and medium-sized construction companies from going broke during the coronavirus lockdown. Mr Herd said the Government needs to underwrite current construction projects of commercial buildings, high-rise apartments, hotels, malls and office blocks. Read the full story here.

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Great Barrier Reef coral bleaching confirmed.

The Guardian reports that the Great Barrier Reef Marine Park Authority has confirmed the natural landmark has suffered a third mass coral bleaching episode in five years, describing the damage as "very widespread". Read the full story here.

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West Coast hospital to be built _

Radio New Zealand reports that the Te Nikau Grey Hospital and Health Centre in Greymouth will now be built as Fletcher Building and the Ministry of Health have resolved their differences over the construction contract. Construction of Te Nikau Hospital and the Canterbury DHB's Hagley facility have been granted exemptions under the emergency regulations as essential services during the lockdown. Read the full story here.

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Extension of Marlborough environment plan appeals _

Stuff reports that Marlborough's new environment plan has seen its appeal date extended because of the Government's four-week coronavirus lockdown. Environment Court Judge John Hassan said the court would allow submitters until May 8 to contest the Proposed Marlborough Environment Plan.

Read the full story here.

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Tiny-home owners and councils call for simplified resource consent rules.

Stuff reports that tiny-home owners and councils are calling for simplified resource consent rules as owners suffer confusion over what rules should apply. Building and Construction Minister Jenny Salesa acknowledged "some inconsistency" about how councils have been interpreting s 8 of the Building Act, which specifically includes immobile vehicles intended for permanent habitation. Read the full story here.

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Derelict neighbouring buildings make renovations uneconomic.

Stuff reports that Aaron Hegarty has discontinued the renovation of his office building in central Christchurch because of the derelict state of four nearby buildings. The council, having deemed the four buildings "barrier sites", says it has no power to force demolition merely because the buildings look unsightly. Read the full story here.

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New Zealand King Salmon application to extend farm in the Marlborough Sounds declined.

Stuff reports that New Zealand King Salmon has had its application to extend a farm in the Marlborough Sounds turned down due to environmental and navigational concerns. The company had applied to add four net pens, along with anchors and surface floats, to the Waitata Reach salmon farm in the outer Pelorus Sound/Te Hoiere. Read the full story here.

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Scientists researching seaweed to be used in cattle feed to reduce greenhouse gases.

Stuff reports that the Cawthron Institute has started research on seaweed which could potentially be farmed and harvested to reduce greenhouse gas emissions from cattle. Group manager aquaculture Dr Serean Adams says a native red seaweed, *Asparagopsis armata*, has been found to be particularly effective in terms of methane reduction. Read the full story here.

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Home builders want to keep construction going during crisis.

Stuff reports that New Zealand Certified Builders chief executive Grant Florence is urging the Government to include construction, especially smaller residential building projects, in the list of essential services during the Covid19 lockdown period. Read the full story here.

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