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Legal Case-notes November 2020

Feedback Please! Any Feedback? Drop us a note!

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 seven court decisions covering diverse situations associated with subdivision, development and land use activities from around the country;

- The Environment Court's decision relating to rules for subdivision in the rural areas around Auckland including transfer of any new lots to the Countryside Living zone and on the amalgamation of titles;
- The conclusion of enforcement proceedings associated with a quarry on Otago Peninsula;
- An application for confidentiality orders relating to storage and disposal of smelter waste from the NZAS Smelter at Tiwai Point;
- The decision of the Court of Appeal concluding a sequence of decisions arising from an application for judicial review of a residential development consent by Auckland Council;
- An application for certificate of compliance relating to the activities at Kingston by the owners of the Kingston Flyer Railway;
- A decision on costs in relation to two interlinked proceedings: an appeal by the Flax Trust against the decision of Queenstown Lakes District Council which stemmed from construction of an earth bund of a greater height than that which had been approved;
- A prosecution of a contractor for unlawful earthworks in the Flat Bush area of Auckland;

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CASE NOTES NOVEMBER 2020:

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Cabra Rural Developments Ltd v Auckland Council - [2020] NZEnvC 153

Keywords: regional policy statement; district plan; subdivision

This decision of the Environment Court followed that of the High Court of 6 August 2019 ("the HC decision"). The HC decision allowed the appeal regarding the provisions to be included in the Auckland Unitary Plan ("AUP") applying to subdivision in the rural areas of Auckland. The High Court found that the Environment Court had made errors of law concerning: failures to give effect to specified policies of the New Zealand Coastal Policy Statement ("NZCPS") and of the Auckland Regional Policy Statement ("RPS"); and specified misinterpretations of the RMA and the AUP. The matter was remitted to the Environment Court for reconsideration.

The Court stated that, following a prehearing conference, a Court minute was issued confirming that the parties were agreed that it was only necessary to revisit the original decision to the extent that it affected the wording of the relevant plan provisions. By the time of the hearing, the council supported provisions which met some of the concerns of the appellants, as annexed to the present decision marked B. The Court proceeded by addressing the legal issues remitted by the High Court and the relevant provisions of the AUP to the extent they were still in issue,

making findings on issues including: the coastal environment; subdivision provisions the subject of the appeals; hierarchy within the NZCPS; biodiversity within the Auckland rural areas; activity status and effects; transferring of subdivision rights to the countryside living area; staging of transferable rural site subdivision developments; in-situ developments; and particular wording changes, as attached in Annexure C.

Overall, the Court concluded that the most appropriate wording for the RPS was the Independent Hearing Panel provisions with amendments made by the Court. This made the subdivision policies focus on transfer of any new lots to the Countryside Living zone and on the amalgamation of titles. The Court concluded that the wording now adopted was the most appropriate to achieve specified policies and pt 2 of the RMA. The changes to the relevant district plan rural subdivision provisions would encourage the potential and enhancement of indigenous vegetation and wetlands and encourage the costs of subdivision potential to be moved to Country Living zones.

The Court adopted the provisions of the AUP as summarised and annexed in C to the present decision. Other provisions were already agreed and the final wording was to be approved by the Court. The council was directed to provide an integrated redraft of the revised provisions and circulate it to the parties, before submitting it to the Court for final approval. Costs were not considered appropriate, but were reserved.

Decision Date 8 October 2020 Your Environment 9 October 2020

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Caradoc-Davies v Clearwater - [2020] NZEnvC 131

Keywords: enforcement order; quarry; resource consent

This was the second application by S Clearwater ("C") seeking temporary uplifting of enforcement orders relating to C's quarry on Otago Peninsula which restricted excavation of blasting south of the specified contour. The first application was refused by the Court's decision of 25 February 2020, in which the Court discussed shortcomings with the resource consent which was then relied on for the application for suspension. The order now sought would require remediation work to be completed as shown on approved plans.

The Court stated that Dunedin City Council ("the council") now expressed regret for the errors in the first consent and submitted that it now considered that all relevant adverse effects were now recognised in the varied consent now issued. The council now supported C's application. The Court considered the complaints which the applicants for the enforcement orders continued to raise, but determined that orders could be made temporarily suspending the enforcement orders. This would allow the consent holders to use the varied resource consent and to undertake the specified remediation works, to be completed within six months. Costs were reserved.

Decision Date 15 September 2020 Your Environment 16 September 2020

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Environmental Defence Society Inc v New Zealand Aluminium Smelters Ltd - [2020]NZEnvC 132

Keywords: procedural; declaration

The Court considered an application by New Zealand Aluminium Smelters Ltd ("NZAS") for confidentiality orders. The matter concerned declarations sought by Environmental Defence Soc Inc ("EDS") regarding the movement and storage of aluminium dross by-products from the Tiwai smelter in Bluff to several sites in Mataura. NZAS opposed the declarations. The proceedings were joined by Gore District Council, Southland Regional Council and the Minister for the Environment as parties under s 274 of the RMA. NZAS sought the confidentiality orders in relation to the Taha Agreement, which was an agreement between NZAS and Taha International. It was a large document, which NZAS considered to be commercially sensitive, containing references to NZAS/Rio Tinto documents and processes which were confidential.

The Court stated that, having consulted with the other parties, NZAS agreed to release the Taha Agreement, without the pricing details contained in Schedule C, on specified terms. NZAS asked the Court to make confidentiality orders by which the Taha Agreement would be released to the Court and to specified persons in Annexure 1, and requiring that it kept confidential and used only for specified purposes.

The Court considered the provisions of ss 279(3)(c), 277 and 278 of the RMA. The Court accepted NZAS's advice that the information in the Taha Agreement contained commercially sensitive information and that its disclosure would cause prejudice to NZAS, which would outweigh the public interest in publication of the document. The Court noted that the district and regional councils consented to the terms of the order sought.

Decision Date 16 September 2020 Your Environment 17 September 2020

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Hunter v Auckland Council - [2020] NZHC 2245

Keywords: High Court; stay; Court of Appeal

K Hunter ("H") applied for a stay of the execution of the High Court's judgment of 16 July 2020, by which judicial review was declined, pending resolution of his appeal to the Court of Appeal. H challenged the decision of Commissioners of Auckland Council to grant resource consent to the development of his neighbour's house. The neighbour opposed the stay.

The Court noted that H's grounds of appeal to the Court of Appeal were that the HC decision displayed errors of fact and omissions which indicated predetermination and bias, and failures to address significant issues. The Court reviewed r 12 of the Court of Appeal (Civil) Rules 2005 which provided the jurisdiction for a stay of proceeding and execution and the principles set out in *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17. Applying these to the present case, the Court accepted that, if a stay were declined, H's right of appeal might be rendered nugatory. While H's bona fides was accepted by the Court, he was self-represented and the Court considered that he would benefit from planning and/or legal advice as to the merits of the issues he raised. The Court noted that the neighbour had planned to redevelop his property four years ago and his health, compromised by cancer treatment, was seriously compromised by H's ongoing proceedings, and there was an enormous toll placed on his family. Further, the building consent for the redevelopment would expire this year if the work was not able to start. The Court noted there was no effect on third parties.

On the balance of convenience, the Court considered the emotional and financial burden placed on the neighbour through the continuing delays, against the effect of the redevelopment on H's property, and found the balance of convenience favoured the neighbour. The neighbour had a judgment in his favour and H had not offered any undertaking as to damages in the event he was unsuccessful in the Court of Appeal. The Court noted H had applied for legal aid. The Court stated that the most telling factor against a stay was the lack of any real prospect of success in the Court of Appeal. The appeal was simply a repeat of H's failed application for judicial review. Accordingly, the application for stay of execution of the High Court decision was dismissed.

Decision Date 18 September 2020 Your Environment 21 September 2020

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Kingston Lifestyle Properties Ltd v Queenstown Lakes District Council _ [2020] NZEnvC 150

Keywords: declaration; zoning; procedural

Kingston Lifestyle Properties Ltd ("KPL") owned the Kingston Flyer Railway in the Queenstown Lakes District at Kingston and applied for a declaration as to the activity status of running the Kingston Flyer for restoration and maintenance activities. The Kinston Flyer land was subject to both the Queenstown Lakes District Operative Plan ("ODP") and the proposed plan review ("PDP") zonings. KPL considered that its activities were permitted under the PDP, any previous rules under the OPD were inoperative and its activities were not commercial. In April 2020, KPL had applied to Queenstown Lakes District Council ("the council") for a certificate of compliance ("CoC") for the use of the railway but the council had not issued a CoC or given any commitment to do so. KPL now applied for a declaration as it needed certainty regarding its operation under PDP.

The Court stated that the council and KPL had been in discussions and had filed a joint expert planners' witness statement to support the modified declaration now sought by KPL. The Court reviewed the planners' joint witness statement, noting that the Kingston Flyer was subject to multiple different zonings under the ODP and PDP and that in the planners' opinion the activities were permitted in the PDP.

The Court considered it jurisdiction under ss 310 and 313 of the RMA to make declarations. The Court found the planners' evidence to be reliable and was satisfied, subject to one alteration, that the declaration as sought was appropriate. The running of the Kingston Flyer for restoration and maintenance activities was a permitted use under the relevant provisions of the PDP and the activities would not trigger any consent requirements under the OPD or PDP. The parties were directed to notify the Court as soon as practicable when the decisions on the provisions had been made, and the parties were directed to confirm the final wording of the declaration. Costs were to lie where they fell.

Decision Date 6 October 2020 Your Environment 7 October 2020

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Flax Trust v Queenstown Lakes District Council - [2020] NZEnvC 139

Keywords: costs; enforcement order

In this decision the Court considered applications for costs in relation to two interlinked proceedings: an appeal by the Flax Trust against the decision of Queenstown Lakes District Council ("the council") declining to retrospectively vary the dimensions of an earth mound; and an application for enforcement orders by F van Brandenburg ("B"), trustee of the Flax Trust, against Speargrass Holdings Ltd ("SHL"). Flax Trust now applied for costs against SHL and the council, in relation to the appeal proceedings and B applied for costs against SHL in the enforcement proceedings.

After summarising the background to the litigation, which culminated in the Environment Court's decision of 19 June 2020, now under appeal to the High Court, the Court noted that the following costs awards were sought: the 2016 application, which sought that the council and SHL should pay Flax Trust's total legal fees being $58,459; the 2020 application, which sought full indemnity costs against the council and SHL, being $84,606; and the application by B, who sought an award of $10,581 against SHL, for legal fees in the enforcement proceeding.

The Court considered the principles and relevant case authority concerning its discretion to award costs under s 285 of the RMA. First, regarding the enforcement proceedings, the Court considered an award of costs was inappropriate and determined that costs should lie where they fell. Regarding the 2016 decision, the Court similarly determined that an award of costs was inappropriate.

Regarding the 2020 proceedings, the Court, by a fine line, concluded that a costs award against the council was not appropriate. However, the Court found that SHL should pay costs for the 2020 hearing and made an order that it pay about 33 per cent of the costs of the Flax Trust, being $28,000. The costs order was stayed, pending resolution of the appeal to the High Court.

Decision Date 1 October 2020 Your Environment 2 October 2020

(See previous references in Newslink: September 2004 and July 2005, February 2017 and February and September 2020. RHL.)

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Auckland Council v Brett Wallen Contracting Ltd - [2020] NZDC 13655

Keywords: prosecution; earthworks; river; erosion; enforcement order

Brett Wallen Contracting Ltd ("BWC") was sentenced in the District Court having pleaded guilty to three charges laid by Auckland Council ("the council"). Two charges under s 9 of the RMA related to unlawful earthworks and placing of fill. The other charge, laid under s 13, related to the placing of a structure in the bed of a river. The council sought an enforcement order, in addition to a fine.

The Court reviewed the relevant provisions of the Auckland Unitary Plan ("AUP") relating to earthworks and placing pipes in a stream bed. The facts were that BWC's shareholders were Mr and Mrs Wallen and B Wallen ("W") was a director and sole employee of the company. The works took place on a property at 479 Ormiston Rd, Flatbush ("the site") owned by D Fitton ("F"). F engaged BWC to carry out the works. The site was in the Rural-Countryside zone and an intermittent stream ran through it. In February 2019, two pipes of 700 mm diameter were placed in the stream bed, the materials extracted from the stream were placed on the slope and metal and concrete were placed over the pipes. Over the following six months, fill, consisting of aggregate, concrete, rubble and other debris, was placed over the pipes and across the site generally. There were no sediment or erosion controls put in place. The council issued an

abatement notice to F, requiring the immediate cessation of further activity. Following receipt of complaints, the council sent officers to visit the site and further abatement notices were issued both to F and to W. The council incurred a total of $10,913 investigations costs.

The Court considered the sentencing principles as established by the Sentencing Act 2002 ("SA") and case authority. The environmental effects of the offending were to the stream and the potential of discharge to the surrounding area. The works resulted in bare soil and clay being exposed to rainfall and stormwater runoff. The Court concluded there was a high likelihood of adverse effects. Regarding culpability, the Court found that BWC was highly careless in its approach to the works. After close consideration of relevant decisions, the Court set a total starting point for all three charges at $45,000. A five per cent deduction was made for lack of previous convictions. Regarding the enforcement order sought by the council, the Court considered the proposed orders submitted by the council and by BWC. The Court had regard to BWC's ability to comply with any order made. W had indicated that BWC could undertake some of the remedial works. The Court determined to impose enforcement orders along the lines proposed by BWC, which focused on the unauthorised works which gave rise to the charges and not, as the council's proposed orders did, on a wider scope of remediation. The order was made subject to F's consent to BWC entering the site to complete the works. The Court made the decision on an interim basis, to allow the parties to clarify the exact area to be remediated on the site. The Court made a five per cent discount from the fine to allow for BWC's willingness to undertake the remediation, and a further 25 per cent for early plea. A figure of $30,375 was thus arrived at. After considering submissions as to BWC's ability to pay, under s 40 of the SA, the Court determined that in the circumstances it was appropriate to reduce the fine to $20,000. This was a compassionate response to the position in which BWC found itself following the Covid-19 lockdown.

The Court concluded that if enforcement orders were made and the decision was final, BWC would be convicted and fined $20,000, and allowed to enter an instalment plan for payment over 12 months. Ninety per cent of the fine was to be paid to the council. The final form of the order was to be determined.

Decision Date 21 August 2020 Your Environment 24 August 2020

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

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Other News Items for November 2020

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Eco-friendly freight depot opened

NZ Herald reports that Mainfreight's new freight facility has been officially opened with a powhiri and haka performed, to honour the iwi on whose land the facility is built, Mangatawa. The depot has been designed to be as eco-friendly as possible, with solar panels that lined the roof, a truck wash station that recycles 80 per cent of its water, and electric vehicle car parking stations. The building, the largest of Mainfreight's depots, runs alongside Tauranga's Eastern Link.

Read the full story here.

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Ambitious cycle trail one pedal closer
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Otago Daily Times reports that plans for two new bridges and an underpass, as part of a proposed cycle route connecting Queenstown and Cromwell, are one step closer to realisation with Central Otago Queenstown Trail Network Trust having produced something close to a final draft. The Trust has filed a resource consent application with the Queenstown Lakes District Council for the section between Nevis Bluff and the Citroen Rapids, along the Kawarau Gorge. Council approval would be subject to a condition that the Department of Conservation allows cycling on the Crown-owned land, as per a partial review of the current conservation management strategy.

Read the full story here.

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Cull proposed as best option for community housing

Otago Daily Times reports that a recommendation has been put before the Southland District Council, by the manager of their Property Services, to shut down the council's community housing scheme. The council currently had 69 units across ten towns, predominantly tenanted by pensioners. Issues such as appropriate rental rates, suitability of condition and location and the lack of clarity around the need for the housing were at the heart of the recommendation.

Read the full story here.

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First section of Transmission Gully will open to cars in November

Stuff reports that a 1.3 km portion of Transmission Gully at Paekākāriki will open to cars in November. The road was first proposed in 1919.

Read the full story here.

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Concern that mega-development would destroy Wellington's largest flax swamp _

Stuff reports that Friends of Taupō Swamp and Catchment claim that if the 2000-home Plimmerton Farm development is allowed, there will be a deluge of sediment and building waste that will overrun the swamp.

Read the full story here.

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Safety buffer zones may be imposed on petrochemical installations after Environment Court ruling

Radio New Zealand reports that the Environment Court has ruled that setbacks of 250 metres for well heads and 650 metres for production stations must be included in the South Taranaki District Plan to minimise the risk of injury or death to members of the public in a fire or explosion.

Read the full story here.

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Proposed new Wellington CC building height rules raise residents' opposition

The Dominion Post reports that residents are protesting against a proposal to permit six-storey buildings near railway lines and commercial centres within the northern and western suburbs of Wellington. Tony Randle, vice-president of the Johnsonville Community Association, says the increase in housing density is not being fairly spread across the city.

Read the full story here.

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Concerns that subdivision road may be used to create hazardous traffic link

Stuff reports that the small Christchurch subdivision of Cameo Grove may be connected by developer CDL Land to the neighbouring proposed large Prestons Park subdivision, planned to have 1150 residential lots, which Cameo Grove residents fear will cause increased traffic density and hazards and spoil the amenity of Cameo Grove.

Read the full story here.

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DoC funding for removal of predators from Stewart Island

The *Otago Daily Time*s reports that Predator Free Rakiura chairman Paul Norris has welcomed the immediate allocation of $1 million, with the promise of more to follow, by the Department of Conservation for the eradication of predators from Stewart Island, which is home to 20 threatened species.

Read the full story here.

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Invercargill Airport company resists proposed subdivision

Stuff reports that a proposal to build a 31-lot subdivision at Otatara, near Invercargill, has met resistance from the Invercargill Airport company, with its primary concern being that the proposed subdivision is located within the airport's noise boundary.

Read the full story here.

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Definition of wetlands in NPS criticised

Radio New Zealand reports that the Ministry for the Environment accepts that the definition of "wetland" in the National Policy Statement for Freshwater Management was changed at a late stage. Parties as varied as the Forest and Bird Protection Society and the Quarry Association are complaining that the definition is too uncertain and confusing.

Read the full story here.

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Offshore marine farm environmental impacts explored by team of scientists

Radio New Zealand reports that funding of $2.7 million has been awarded to the development of possible rules to assess the effects of relocating aquaculture infrastructure into offshore waters. Auckland University of Technology's Kay Vopel says the assumption is that such a relocation into deeper waters would increase the dispersion of organic waste, and lessen the environmental impacts of marine farms.

Read the full story here.

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$130 million harbourside path linking Hutt Valley to the capital

Stuff reports that construction of a $130 million harbourside path linking Hutt Valley to the capital could begin next year. The plan involves a cycleway and walking path, complete with new beaches for swimming and fishing in Wellington harbour.

Read the full story here.

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New sand quarry proposed near Cambridge

Stuff reports that plans for a new sand quarry are being considered by Waipā District Council. Shaw's Property Holdings has applied for a resource consent to extract sand from a 49.9 hectare rural property it owns on Kaipaki Road, between Cambridge and Mystery Creek.

Read the full story here.

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Council to pick preferred contractor for new Christchurch stadium

Stuff reports that Christchurch City Council has released documents outlining the $473 m Christchurch stadium project for companies interested in designing and building it. The council will pick a preferred contractor in December.

Read the full story here.

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Auckland Council admits fault in not telling residents about Harbour Bridge traffic contamination

Radio New Zealand reports that Auckland Council has said it was wrong not to inform residents of the discovery by NZTA 10 years ago of heavy metal and hydrocarbon contamination associated with maintenance work and traffic on the Harbour Bridge.

Read the full story here.

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Stricter freedom camping rules considered by Grey DC

Radio New Zealand reports that a draft bylaw which would limit freedom camping within the Grey District will be put to public consultation. Local residents have complained about the freedom campers blocking access and leaving a mess.

Read the full story here.

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Wellington needs to find billions of dollars to fix and repair city's pipes

Stuff reports that Wellington Water and Wellington City Council estimate that the city's piping infrastructure will need between $2.2 billion and $4.5 billion to fix and replace old and defective pipes over the next three decades.

Read the full story here.

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Environment Court making progress towards removal of ouvea premix waste from Mataura

Radio New Zealand reports that progress is being made in the judicial settlement conference process being undertaken by the Environment Court towards a resolution of the issue of toxic aluminium waste presently stored in locations in Mataura, against the wishes of local residents.

Read the full story here.

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Number of building consents shows monthly increase

Radio New Zealand reports that Statistics NZ says that the number of building consents issued in August increased, with industrial building leading the surge. Infometrics reports that the growth was centred in Auckland, and comprised proposed new factory buildings and warehouses.

Read the full story here.

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Wellington CC takes legal action against owners of derelict hotel

The Dominion Post reports that owners of the Adelaide Hotel in Newtown, Wellington, who want to demolish the derelict, earthquake-prone building, may be prevented from doing so by legal action taken by Wellington City Council. The council has applied for permission to complete the strengthening works itself, and then to recover the costs of the work from the hotel's owners.

Read the full story here.

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Forest & Bird says councils failing to prevent unlawful harm to native habitat

Radio New Zealand reports that a report by Forest and Bird shows that regional and district councils throughout New Zealand are failing to take action to prevent native forest and habitat destruction and, further, about one third of local authorities fail even to keep records of unauthorised clearances.

Read the full story here.

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Federated Farmers point to wilding vegetation on DOC land for exacerbating high country fires

Radio New Zealand reports that Federated Farmers High Country Committee chairman Rob Stokes says he has warned the Government about the fire risk posed by wilding vegetation on
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DOC lands. A fire at Lake Ōhau destroyed at least 20 homes and forced around 90 people to evacuate.

Read the full story here.

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Plans for electric-powered planes on regional routes

Radio New Zealand reports that Sounds Air plans to offer zero-emission flights on regional routes within New Zealand, after completing the purchase of electric aircraft from Heart Aerospace, a Swedish company.

Read the full story here.

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New bridge across Mataura River opposed by Hokonui Rūnanga

The *Otago Daily Times* reports that the Hokonui Rūnanga is against the new cable-stay bridge under construction across the Mataura River. Their opposition is based on the alleged lack of consultation about the impact of the bridge on nearby archaeological site and on the flight path of bird taonga species.

Read the full story here.

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$250 million redevelopment of Scott Base to take account of sea level rise

Stuff reports that Antarctica NZ is in the planning stages of a $250 million redevelopment of Scott Base. Planning will take into account a projected sea level rise of as much as 1.64 metres over the next 100 years, as well as tsunami risk.

Read the full story here.

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Residents not informed of historic Auckland Harbour Bridge contamination

Radio New Zealand reports that Auckland Harbour Bridge maintenance work and operations have contaminated land next to houses with heavy metals above permitted levels. Soil tests in 2010 found high levels of lead, zinc and copper in topsoil at Te Onewa/Stokes Point, caused by sandblasting and traffic, but local residents were not informed of this.

Read the full story here.

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Maniototo school rebuild begins

The *Otago Daily Times* reports that an $11 million rebuild operation has started at Maniototo Area School, in Otago. The first stage to be built is a new technology block, which school principal Joe Ferdinands hopes will be completed by February or March 2021.

Read the full story here.

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Erionite presence in Auckland soils investigated

Radio New Zealand reports that the Endeavour Fund has granted researchers in Auckland University $7.7 million to investigate if and where the toxic and cancer-causing mineral erionite is deposited in Auckland soils. If deposits are discovered, this could have serious impacts on construction sites. Read the full story here.

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