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Legal Case-notes June 2021

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".

The Case-book Editor Roger Low can be contacted through the Survey & Spatial NZ 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 seven court decisions covering diverse situations associated with subdivision, development and land use activities from around the country;

- A successful mediated settlement of an appeal against refusal of consent by QLDC for a mixed use activity near Albert Town, Wanaka;
- Successful appeals against refusal by Hamilton City Council for extension of a lapse period for a land use consent (under S125) and variation to conditions of the consent (S127). The consent had included development of bulk retail activity on industrial zoned land;
- Another decision relating to lapsing of consent; This was for a house being constructed at Pauanui, on Coromandel Peninsula. Had it lapsed although the project was not complete?
- Two related decisions on appeals (the first unsuccessful) against a decision of the HC relating to application for consent KPBL to build and operate a marina at Kennedy Point, Waiheke Island. There had been a change of circumstances because at the date the EC originally heard the application for a resource consent, the Ngāti Paoa Trust Board ("Trust Board") was not recognised by Auckland Council ("the council") as representative of the iwi;
- Two further decisions following conviction of Mr A Mawhinney for constructing unlawful structures at Muriwai valley, Auckland.

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https://www.surveyors.org.nz/Article?Action=View&Article_id=23

CASE NOTES JUNE 2021:

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Mt Iron Junction Ltd v Queenstown Lakes District Council _[2021] NZEnvC 53

Keywords: resource consent; mediation

This matter concerned an appeal by Mt Iron Junction Ltd ("MIJ") against the decision of the Queenstown Lakes District Council ("the council") declining an application for resource consent for a mixed-use development at 237 Wānaka Luggate Highway, Wānaka. The decision appealed against declined the application, although following court-assisted mediation and subsequent informal correspondence and meetings, the parties to the appeal reached agreement as to terms of an amended proposal for which consent could be granted by order of the Court. The Court requested confirmation that the experts were agreed that the adverse landscape, visual and character (amenity) effects of the proposal would not be contrary to relevant objectives and policies or be no more than minor. MIJ and the council subsequently filed affidavits and amended draft conditions of consent.

The Court considered (and accepted) the landscape and planning evidence and was satisfied that the making of the order would promote the purpose of the RMA, having followed due process. Therefore, the Court made orders that: the appeal was allowed to the extent that the resource consent was granted subject to: the conditions marked Appendix 1; and the plans

marked Appendix 2; attached to and forming part of this decision. The appeal was otherwise dismissed. There was no order as to costs.

Decision Date 18 May 2021 Your Environment 19 May 2021

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Netherlea Hobsonville Ltd v Hamilton City Council _[2021] NZEnvC 47

Keywords**: **consent lapse; conditions

This decision concerned appeals against: a decision declining an objection in relation to an application for extension of lapse period under s 125 of the RMA for a resource consent authorising development of property at 18 Karewa Place, Hamilton; and a decision to decline an application under s 127 of the RMA for an amendment of conditions of the same resource consent. On 3 August 2020 the parties filed a joint memorandum and two draft consent orders that would resolve the appeals. Following a judicial telephone conference, the Court informed parties that as matters stood, it did not have sufficient information on which to make a decision on the orders sought. It was subsequently agreed that the matter should proceed to be considered on the papers after further evidence and submissions had been filed.

After considering the parties' submissions, and with the consent of the parties, the appeal against the council's decision to decline an objection in relation to the extension of the lapse period for a resource consent under s 125 of the Act was granted. In accordance with this decision, additional conditions were added to the resource consent. The appeal seeking to amend the conditions of resource consent was also granted with the consent of the parties. The conditions of consent were amended as set out in Annexure A and B to this determination.

Decision Date 4 May 2021 Your Environment 5 May 2021

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Turner v Barrett _ [2021] NZEnvC 43

Keywords: declaration; consent lapse; error; council procedures

L Turner ("T") sought a declaration that a dwelling under construction at 92 Pauanui Boulevard, Pauanui, contravened s 9 of the RMA as it contravened a district rule and was not expressly allowed by a resource consent granted by the Thames-Coromandel District Council ("the council") on 28 January 2014, as the consent was not given effect to and therefore lapsed on 28 January 2019. The owner of the property, L Barrett ("B"), and the council opposed the application. The parties agreed that the central question for the Court was whether the resource consent for the dwelling was given effect to by 28 January 2019 in terms of s 125 of the RMA. On 13 December 2018, the council declined B's application for extension of the lapse date of the resource consent. Work on the site, including site clearance and preliminary earthworks, started in January 2019. Construction of the house commenced in 2020 and continued through that year.

The consented activity was for a "new dwelling that does not comply with the Airfield Height Control Rule of the District Plan". Consent was also required for the same activity under the proposed Airfield Amenity Yard rule. The Court concluded that no works for a new dwelling that did not comply with the Airfield Control Rule and the Airfield Amenity Yard Rule had been given effect to by 28 January 2019. In the Court's judgment, it was clear that B had not given effect to her resource consent before its lapse date.

However, the Court found further issues bearing on the application for a declaration relating to the approach taken by the council to assessing B's application an extension of the lapse date. There were two aspects of treatment of the application that appeared to have prejudiced B's position and so had to be taken into account in determining the matter.

First, the Court found that the council misapplied s 125 of the RMA to B's application. The council treated the matters in s 125(1A)(b) as tests which had to be passed before an extension could be granted (as they were between 1991 and 2003) rather than as factors to be taken into account (as they had been since the commencement of the 2003 Amendment Act). In particular, the council appeared to have disregarded the basis on which the consent had originally been granted, including as both a non-notified application and, at least inferentially, as a consent under the proposed plan. The council also treated a notionally adverse effect on the proposed plan as determinative, notwithstanding that the proposed provision relating to the airfield amenity yard had been relevant and ought to have been considered at the time that the resource consent was granted. As well, the references in the officer's assessment to effects

appeared to relate to substantive matters associated with the building rather than being confined to the effects of the granting of an extension in terms of s 125(1A)(b)(iii). This meant that the council's conclusions that the original application for consent "would not withstand the scrutiny of an assessment under [today's] PDP provisions" and that the application for an extension of time did "not meet the second test of section 125" were at least questionable and possibly wrong.

The second aspect of concern was the unequivocal assurance of the council's Development Planning Manager on 13 December 2018 that B's consent had been given effect to. The Court noted it was generally held that there can be no estoppel in public law of the requirements of legislation such as the RMA and more broadly in public law. However, an assurance of this kind in these circumstances was a relevant consideration in the exercise of the discretion whether to make a declaration and, if so, the terms in which one should be made.

In light of those matters, while the Court concluded that B's resource consent had lapsed, it would not make the declaration sought by T as it included conclusory elements which could be read as preventing the further steps which might be taken to address the lapsing and, potentially, correct the errors which may have occurred in relation to the application for an extension of the lapse date. The Court found the declaration that ought to be made should be worded more closely in terms of the central question identified by the parties and only state that the resource consent was not given effect to by 28 January 2019. Taking all matters into account, the Court made a declaration that the resource consent granted by the council on 28 January 2014 was not given effect to by 28 January 2019 in terms of s 125(1A)(a) of the RMA. There was no order as to costs.

Decision Date 30 April 2021 Your Environment 3 May 2021

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SKP Inc v Auckland Council _ [2021] NZSC 35

Keywords: appeal procedure

SKP Inc ("SKP") sought leave to appeal out of time directly to the Supreme Court from the decision of the High Court ("HC") in *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879. The HC had dismissed an appeal by SKP from a decision of the Environment Court ("EC"). In the HC, SKP claimed a change in circumstances concerning the representative body of Ngāti Paoa for the purposes of resource consent applications. SKP said there had been a change in circumstances because when the EC originally heard the application for a resource consent, the Ngāti Paoa Trust Board ("Trust Board") was not recognised by Auckland Council ("the council") as representative of Ngāti Paoa. At the time, the council had decided to treat the Ngāti Paoa Iwi Trust ("Iwi Trust") as the representative entity. Subsequently, since 2018, the council had agreed to recognise both the Trust Board and the Iwi Trust as representatives, albeit on an interim basis.

SKP wished to argue that the following questions of law, some of which SKP said reflected questions of general or public importance, arising from the decision of the HC: did the HC err in failing to apply the proper test in determining what constitutes a change in circumstances under s 294 of the RMA; when considering whether the change of circumstances might have affected the decision, did the HC err in failing to: (i) apply the counterfactual as required, that is, to ask whether there had been a change in circumstances that might, if it had (in the counterfactual) occurred at or prior to the time of the hearing (or decision), have affected that decision; and/or (ii) have regard to the legal and factual consequences that would have arisen from the council's recognition of the Trust Board as the representative entity, had that recognition occurred at the time of the consent application. SKP also submitted a substantial miscarriage of justice had occurred.

The Court stated that SKP wished to argue that the courts below departed from the usual approach to what constitutes a change in circumstances for the purposes of s 294. This argument related to the conclusion of the HC that the change must be more than the council's recognition of the status of a potential submitter and the Court's approach to the counterfactual analysis. The HC considered that while that status may ensure notification, it was not an end in itself. Rather, what was important under the RMA was the input by a submitter as to effects. Further, the HC saw it as relevant that the council's recognition of the Trust Board was "inherently prospective". The Court found to give that recognition retrospective effect, which would be the outcome on SKP's approach, would effectively decide mandate issues which were outside the scope of the appeal.
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The Court noted SKP had made similar submissions in its application for leave to appeal to the Court of Appeal ("CA"). The CA considered the proposed questions did "not have implications beyond the particular factual matrix". The Court agreed with the CA that the proposed grounds of appeal were very much linked to the particular circumstances and the surrounding facts. No questions of general or public importance arose. Further, the Court did not consider the assessment of the courts below gave rise to a miscarriage of justice.

The application for an extension of time to apply for leave to appeal was granted but the application for leave to appeal was dismissed. Leave for SKP to file reply submissions was formally declined. SKP was ordered to pay costs of $1,750 to each of the respondents.

Decision Date 6 May 2021 Your Environment 7 May 2021

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SKP Inc v Auckland Council _ [2021] NZSC 37

Keywords: supreme court; appeal procedure; procedural; error

This decision followed *SKP Inc v Auckland Council* [2021] NZSC 35, where the Supreme Court dismissed an application for leave to appeal by SKP Inc ("SKP"). SKP applied for a recall of the Court's judgment, arguing that the Court erred in its judgment in adopting the observation of the Court of Appeal that SKP had not called evidence as to claimed harmful cultural effects of the proposed marina. SKP described this as an error in its initial application and in its submissions for leave to appeal. SKP stated that there was a real possibility the Court may have reached a different decision on the application for leave if this error had not been made.

The Court accepted, as the Environment Court recorded in its initial decision, that SKP called evidence from witnesses "from and on behalf of the Piritahi Marae" on, amongst other matters, harmful cultural effects. The judgment was to be recalled to make that clear. Apart from this correction, the Court found that there was nothing that required amendment of the judgment. The judgment of the Court was recalled and reissued to make an addition to [15] of the judgment.

Decision Date 13 May 2021 Your Environment 14 May 2021

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Poutama Kaitiaki Charitable Trust v Taranaki Regional Council _ 2021] NZHC 871

Keywords: high court; costs

This was a decision on costs following *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, (2020) 22 ELRNZ 202. Waka Kotahi New Zealand Transport Agency ("Waka Kotahi") sought costs of $30,592 on a category 2 basis with 70 per cent to be recoverable from Poutama Kaitiaki Charitable Trust ("Poutama") and 30 per cent from D & T Pascoe ("the Pascoes"). Poutama and the Pascoes opposed a costs award.

The Court did not consider hardship or charitable status was a reason to decline or reduce costs against Poutama. Further, the Court did not consider the public interest exception applied. Regarding the Pascoes, the Court found "financial hardship" was not made out and nor was it a relevant factor in this case. The Court accepted complicated RMA procedures, the extensive planning and changes made even during the hearing and after the hearing, and the fact that it was an interim decision were important matters for the Pascoes and Poutama. However, unless the matter was one of public interest, there could be no impact on the award of costs. Accordingly, the Court was not satisfied that there was reason to depart from the usual principle that costs follow the event.

The Court did not consider this was an appropriate case to apportion the costs and the Court saw no reason other than to award the costs jointly and severally. The claim by Waka Kotahi for second counsel was appropriate and was allowed. Poutama and the Pascoes were ordered to pay costs on a 2B basis, in terms of the schedule provided in Waka Kotahi's submissions dated 8 December 2020, totalling $30,592 together with reasonable disbursements.

Decision Date 13 May 2021 Your Environment 14 May 2021

(See previous report Newslink March 2021 - RHL)

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R v Mawhinney _ [2021] NZDC 4969

Keywords: prosecution; building; district plan; regional plan

This was the sentencing of A Mawhinney ("M") who, following a three-day jury trial, had been found guilty on three charges under ss 9(3) and 338(1) of the RMA. The charges related to structures unlawfully erected by M. The offending occurred at 95-115 Anzac Valley Rd, Muriwai Valley, Auckland. The particular contravention of the Auckland Unitary Plan was in relation to chapter H20 in relation to the Rural – Waitākere Foothills Zone and the rule in activity table H20.4.1(A1), which stated that activities not provided for in the rest of the table were non-complying activities. M applied for a discharge without conviction under s 106 of the Sentencing Act 2002 ("SA"). The Crown sought convictions against M on all three charges together with a total fine of $20,000 or, given M's circumstances, a lesser fine and a short term of community work.

M argued the consequences of a damaged reputation and hindrance to future plans to open a school would be out of all proportion to the gravity of the offence. The Court found no acute repercussions personal to M that would make a conviction wholly disproportionate to the seriousness of the offences he had been found to have committed. The threshold of s 107 of the SA was not met in this case and the Court refused the application for a discharge without conviction.

The Court concluded that community work would not be appropriate in this case as it would hinder M in the care of the person living on the site and in his desire to establish his proposed school. The Court found that a fine of $3,000 was appropriate in respect of each charge. Standing back and looking at the three charges together as a connected series of offences in accordance with the totality principle, a total fine of $7,500 was appropriate. M was convicted and fined $7,500 in total (apportioned as $2,500 to each charge), together with a solicitor's fee of $113 on each charge and court costs of $130 on each charge.

Decision Date 23 April 2021 Your Environment 27 April 2021

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R v Mawhinney _ [2021] NZDC 6515

Keywords: prosecution; error

This decision followed *R v Mawhinney* [2021] NZDC 4969, where the Court convicted A Mawhinney ("M") on three charges of which he had been found guilty and sentenced him. The Court had neglected to make the order required by s 342 of the RMA which required, where a person is convicted of an offence under s 338 of the RMA and the court imposes a fine and the proceedings in relation to the offence were commenced by or on behalf of a local authority, the court to make an order that the fine be paid to that local authority less a deduction from every amount payable a sum equal to 10 per cent which is to be credited to a Crown bank account. The Court accordingly ordered that the fines payable by M, less a 10 per cent deduction payable to the Crown, were to be paid to Auckland Council.

Decision Date 10 May 2021 Your Environment 11 May 2021

(Reports of the many court cases involving Mr Mawhinney and Auckland Council on subdivision-related matters, have been documented in previous issues of Newslink – RHL)

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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 June 2021

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Judgment for the decade' in landmark foreshore and seabed case

A major High Court decision on applying the law which followed the Foreshore and Seabed Act could set a precedent for hundreds of applications for iwi and their say over marine and coastal areas.

After decades of legal battles, iwi in the eastern Bay of Plenty have been granted customary rights to parts of the marine and coastal area.

The High Court ruling is only the second under the Marine and Coastal Area (Takutai Moana) Act, the legislation that replaced the controversial Foreshore and Seabed Act in 2011.

https://www.newsroom.co.nz/judgment-for-the-decade-in-landmark-foreshore-and-seabed-case

See also

Another report: Whakatōhea hapū win customary marine title case

https://www.stuff.co.nz/pou-tiaki/300303942/whakathea-hap-win-customary-marine-title-case

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Twenty million trees to be planted in Kaipara Harbour restoration project

Radio New Zealand reports that more than 20 million native trees and other plants will be planted as a part of the $200 million Kaipara Moana Remediation project. The project aims to boost the Kaipara Harbour's health through slashing sediment running into its waters, reducing nitrogen levels and boosting swimmability and shellfish health. Read the full story here.

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Court challenge to Shelly Bay development fails

Radio New Zealand reports that the High Court has dismissed an application for judicial review of the decision to grant a resource consent to a development at Shelly Bay on the Miramar Peninsula in Wellington. A group of local businesses made the application arguing that the decision was unreasonable. Read the full story here.

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Council purchases Bunnings Warehouse store to convert into district museum

Stuff reports that the former Bunnings Warehouse in Te Awamutu has been purchased by the Waipā District Council. The council intends to use it to house its planned Te Ara Wai Museum. Read the full story here.

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Space mission snaps Southern Alps and lakes

https://www.stuff.co.nz/science/125080381/space-mission-snaps-southern-alps-and-lakes

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Council to spend $68.5 million removing wastewater from rivers

Stuff reports that Central Hawke's Bay District Council will spend $68.5 million on removing wastewater from rivers over the next 15 years. The council will build a "mega-plant" at Waipawa, with wastewater being piped there from Ōtāne and Waipukurau, and the treated wastewater will be discharged to land. Read the full story here.

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Waipā District Council plans $87m capital works programme

Stuff reports that Waipā District Council is planning its biggest capital works programme to date, worth $84.7m, to keep up with predicted population growth. The council expects 18,900 more people to live in Waipā by 2050. Read the full story here.
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Developers lodge plan change bid to enable 750 homes near central Nelson

Stuff reports that developers are to lodge a private plan change request to Nelson City Council to allow a proposed development of a 287 ha site about 3 km from the Nelson CBD. The proposed development of about 750 homes would include at least 100 targeted at first home buyers. Read the full story here.

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Project Onslow "only way" to net zero

The *Otago Daily Times* reports Environment Minister David Parker says the only way for New Zealand to reach its net-zero 2050 emissions target is with a proposed $4 billion-plus hydro-electric storage lake above Roxburgh, known as Project Onslow. Mr Parker said without Project Onslow, the country would not be able to break away from its use of fossil fuels. Read the full story here.

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Palmerston North "prime candidate" for hydrogen production facilities

Stuff reports that Firstgas, New Zealand's largest gas network operator, has identified Palmerston North as a prime candidate for one or more of the 15 new North Island hydrogen production facilities required for its plan to replace natural gas with hydrogen as a greener alternative by 2050. Hiringa Energy has also committed to build a hydrogen refuelling station and production facility in the city over the next decade. Read the full story here.

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New Zealand's glaciers melting faster

Radio New Zealand reports that new research published in the science journal *Nature* shows New Zealand's glaciers are melting at a much faster rate than they were 20 years ago. New Zealand had a record glacier thinning rate of 1.5 m a year between 2015 and 2019, a nearly sevenfold increase compared to 2000-2004. Read the full story here.

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Work begins on new Timaru-Pleasant Point cycle trail

Stuff reports that work has begun on the first leg of a Timaru-Tekapo cycle trail. Waka Kotahi NZ Transport Agency has provided $500,000 to build the 14 km first stage, a shared use path between Washdyke and Pleasant Point. Read the full story here.

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$10 million upgrade of historic Bluff Town Wharf

Stuff reports that Bluff Town Wharf, which dates to the mid-1800s, is about to undergo an upgrade worth more than $10 million. Work will begin in June and be completed by the end of March 2022. Read the full story here.

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Panic for first home buyers as a development placed in receivership

NZ Herald reports that South Auckland property development, Ormiston Rise, has gone into receivership leaving people who had signed contracts for hundreds of new homes "in the lurch" and panicking about their future. However, receivers are assuring buyers that their cash - including those with homes purchased under the KiwiBuild scheme - is safe and they are working with the intention of completing the development. The development was set to be delivered in stages and is a combination of KiwiBuild and private sales.

Read the full story here.

See pictures below:
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Promotional image – (only construction earthworks and drainage works are evident on site May 2021)

Locality plan from Auckland GIS (Image dated 2017).

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Coastal erosion threatens Tiwai Point monitoring bores

Radio New Zealand reports that sea level rise near Tiwai Pt aluminium smelter is destroying monitoring bores within scores of metres of where 100,000 tonnes of hazardous waste is stored. Coastal erosion has already shut down one bore used to monitor groundwater for pollution. Read the full story here.

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Sea level rises and the risk to thousands of kiwi homes

Newshub reports that the Government has laid out its intentions for what will come from the ruins of the soon to be defunct Resource Management Act. New laws are about to transform how New Zealand deals with the risks posed by climate change - and decide who foots the bill for our retreat from the coast. Tens of thousands of coastal Kiwi homes could be deemed uninsurable over the next few decades thanks to a rapid increase in erosion fuelled by sea level rises, and a 'managed retreat' has been posited as a way to fix this very expensive looming crisis. Read the full story here.

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Te Waiariki win bid to buy back ancestral land

One News reports that there were celebrations for supporters of a land occupation at Pātaua in Northland today with mana whenua iwi Te Waiariki winning a bid to buy back a large block of their ancestral land. The land, near Whangārei, was expected to sell to developers - with initial purchase efforts by iwi rejected. The block of nearly 60 hectares is prime coastal land. It borders another block of Māori owned land - a DOC campground and a tidal estuary. Read the full story here.

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