
Legal Case-notes July 2021

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

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

- Two further interim decisions of the Environment Court on appeals relating to protection of "Outstanding Natural Landscapes and Features" in the Queenstown Lakes District;
 - An unsuccessful appeal against a decision of Auckland Council to refuse consent to a proposed mixed-use development on light industrial zoned land at Takanini, Auckland;
 - A further appeal related to other enforcement order proceedings concerning a landslip on two residential properties at Atawhai, near Nelson;
 - An unsuccessful appeal to the Court of Appeal following a high Court decision about the rights of a benefiting party of an easement for rights of way to undertake works within the easement boundaries;
 - Two decisions on costs following appeals relating to the approval of an application to establish a boating marina at Kennedy Point at Waiheke Island;
 - The prosecution of a property owner at Pine Hill, Dunedin for failing to prevent noise from roosters crowing on her life-style property adjacent to residential properties.
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CASE NOTES JULY 2021:

Upper Clutha Environmental Society Inc v Queenstown Lakes D C _ [2021] NZEnvC 60

Keywords: *district plan; landscape protection; rural*

This interim decision followed *Upper Clutha Environmental Soc Inc v Queenstown Lakes District Council* [2019] NZEnvC 205 ("Decision 2.2") in determining several remaining matters concerning proposed Topic 2: Rural Landscapes: Chapters 3 and 6 in the review of the Queenstown Lakes District Plan ("PDP"). Part A of the decision was on Chapter 3. Part B was on Chapter 6.

Concerning Chapter 3, following Decision 2.2, the Court had directed further expert conferencing in response to the findings. Supplementary evidence was received by way of joint witness statements. The Court made determinations on Chapter 3 as specified in the decision. Annexure 1 to this decision set out the provisions of Chapter 3 confirmed or amended by this decision.

Regarding Chapter 6, Queenstown Lakes District Council ("the council") responded to directions in Decision 2.2 in its memorandum of counsel of 11 May 2020. This included a version of Decision 2.2's preliminary provisions marked up with the council's recommended changes. The

Court made determinations on Chapter 6 as specified in the decision. The Court attached a further amended version of Chapter 6 to this decision as Annexure 2.

Directions were made for the council to file a reporting memorandum as to when it would file an updated set of provisions for the purposes of the Court's final decision on this Topic. Costs were reserved.

Decision Date 31 May 2021 Your Environment 1 June 2021

Upper Clutha Environmental Society Inc v Queenstown Lakes District Council _
[2021] NZEnvC 61

Keywords: district plan; landscape protection; rural

This interim decision followed from *Hawthenden Ltd v Queenstown Lakes District Council* [2020] NZEnvC 157 ("Decision 2.4") on Topic 2: Rural Landscapes, in the review of the Queenstown Lakes District Plan ("PDP"). Allenby Farm Ltd ("AFL") appealed aspects of the mapping of the Mt Iron Outstanding Natural Feature ("ONF"). Decision 2.4 directed Queenstown Lakes District Council ("the council") to provide the Court with an updated planning map showing the removal of "Area A". The council had now done so, as shown in Annexure 1 to the decision. The Court was satisfied that the updated map accorded with the findings in *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 ("Decision 2.1") and was fit for purpose. Therefore, directions were made for the PDP to be updated accordingly.

In Decision 2.4 the Court determined that it was appropriate for s 293 directions to be made in relation to the Mt Alpha outstanding natural landscape ("ONL") and the Pisa/Criffel Range ONL but made some drafting refinements to the directions and sought a final version of the plan map, accompanying summary of document and a proof copy of the public notice for both the Mt Alpha ONL and the Pisa/Criffel Range ONL boundary adjustments. The council had now provided this information to the Court. The Court was satisfied with the documentation provided and made the directions as set out in Annexures 2 and 3 to the decision.

In Decision 2.1, the Court found that the Clutha River/Mata-Au corridor was properly classified ONF (rather than a combination of ONL and ONF) and consequently a complete ONF mapping notation for this corridor was required. In Decision 2.4, however, the Court advised that it was not in a position to finally determine whether s 293 directions should be made to address those deficiencies in the operative district plan. The Court had requested that the council provide the Court with its proposed mapping changes and any supporting documentation. The council had responded and the Court found the council's updated proposed s 293 directions appropriate. To ensure clarity on all matters before the council's proposed directions were made, the council was directed to file within 10 working days of the date of this decision: a final version of the "plan change" (ie maps and any related text) in the form intended to be notified; a final version of the updated requested directions; and a proof copy of the related notices. Directions would be made by a further decision once the council had satisfactorily responded to that direction. Costs were reserved.

Decision Date 1 June 2021 Your Environment 2 June 2021

(Note: The issues relating to protection of "Outstanding Natural Landscapes and Features" in the Queenstown Lakes District plans have been subject of many appeals in recent years.

The previous decision Hawthenden Ltd v Queenstown Lakes District Council [2019]NZEnvC160 was reported in Newslink Feb 2020.

Also see Newslink case-notes October 2020 and April 2021 – RHL.)

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**Kombi Properties Ltd v Auckland Council** \_ [2021] NZEnvC 62

**Keywords: resource consent; reverse sensitivity; amenity values; precedent; activity non-complying; objectives and policies; industrial**

This decision concerned an appeal by Kombi Properties Ltd ("KPL") against a decision of Auckland Council ("the council") to decline consent to an application to establish 17 two-storey units to be used for a mix of industrial, residential and ancillary office activities on land located on a coastal site in Takanini which was zoned for light industrial use. At the heart of the appeal was a dispute as to the potential for reverse sensitivity effects to occur due to the introduction of residential activity into a zone intended (primarily) for light industrial activity. The subject site was within the Business: Light Industrial zoned land ("LIZ") under the Auckland Unitary Plan ("AUP"). The proposal required consent as several AUP rules were not complied with.

The council strongly opposed a grant of consent. Aside from reverse sensitivity concerns, the council also contended that the level of amenity afforded to the residents would not be acceptable. This was because of the adverse effects emanating from industrial activity taking place within the zone (odour, dust, noise and traffic) and due to the poor pedestrian environment in and surrounding the site. The council argued the grant of consent would set an undesirable precedent and risk undermining the integrity of the LIZ provisions.

The Court found the reverse sensitivity effects were of significance as opposed to being "relatively small or unimportant" when considering the LIZ objectives. The Court concluded that as the reverse sensitivity effects would be more than minor, the first s 104D(1) "effects" gateway was not able to be surmounted. As to the second s 104D(1) gateway, given the Court's finding that reverse sensitivity might lead to constraints on industrial activities within the zone, a finding that KPL's proposal was contrary to key objectives and policies followed. The Court found that the proposal amounted to a direct challenge to the strategic objectives for the LIZ. The activity was also contrary to the policies that implemented those objectives. The Court thus concluded that there was no jurisdiction to consider the merits of the proposal in terms of ss 104 and 104B.

The Court rejected KPL's contention that the site had distinguishing features that made it sufficiently unusual to avoid a precedent being set by a grant of consent. The Court accepted the council's concern that this proposal would, if consented, have implications for the ongoing administration of the AUP. Accordingly, the Court concluded that as the AUP was "newly minted", the precedent effect of a grant of consent would have been a factor counting against a grant of consent to the proposal, even if there had been jurisdiction to grant consent in terms of the discretion retained under s 104. The appeal was declined. Costs were reserved.

Decision Date 3 June 2021 Your Environment 4 June 2021

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**Smith v Nelson City Council \_ [2021] NZEnvC 56**

***Keywords: resource consent; conditions; enforcement order***

This proceeding concerned an appeal against an application for a replacement condition 31 of resource consent RC175059 (Variation 2). The appeal was related to other enforcement order proceedings concerning a landslip on two residential properties at Atawhai, near Nelson. This decision concluded matters in relation to the resource consent appeal.

The applicant sought a third variation of RC175059 because a resource consent was required for the remedial works as set out in the enforcement order. That variation was approved in November 2020. The parties were directed to file a consent memorandum to resolve the appeal proceedings, encapsulating the terms of the enforcement order and third variation of consent into one agreement. The parties had subsequently agreed to a joint consent memorandum to resolve the appeal.

The Court was content that the consent order sought accurately reflected enforcement orders and the third variation of consent. All parties to the proceedings had confirmed their agreement with the memorandum requesting the orders. The Court was satisfied that all matters proposed for its endorsement fell within its jurisdiction, and conformed to the relevant requirements and objectives of the RMA. The Court, by consent, ordered that the appeal was allowed to the extent that the resource consent was granted subject to the conditions marked Appendix 1, attached to the decision. The appeal was otherwise dismissed. Costs would be addressed in a further decision.

Decision Date 25 May 2021 Your Environment 26 May 2021

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**Cornes v Village Residential Ltd \_ [2021] NZCA 216**

***Key words: Civil procedure; Appeals; Grounds; Real Property; Easements; Rights of way; Implied covenants; Ancillary rights***

The appellants challenge a High Court decision confirming the respondents' entitlement to carry out an upgrade of the appellants' rundown driveway for the purposes of a consented subdivision. The respondents have a right of way over that land. The appellants say that the proposed works do not fall within the scope of the easement's terms, nor the implied covenants under schedule 5 of the Property Law Act 2007. They also say that the High Court erred in effectively recognising "drainage rights" which is a different class of easement altogether. Held:

Appeal dismissed. (1) The upgrades to the driveway, as required for the purposes of the consented subdivision, were permitted. The respondents have a right of way (including vehicular access) for any lawful purpose for which the respondents' land can be used. Nothing in the terms of the easement, nor the provisions of schedule 5 of the Act, preclude the respondents from carrying out the work. In addition, the common law confers ancillary rights to the easement holder that are reasonably necessary for the effective and reasonable exercise and enjoyment of the rights expressly granted. (2) The proposed works do not constitute the grant of a drainage easement, which permit water to be drained from one property over another property. The works in this case are merely for the purposes of water management within a property.

Decision Date 11 June 2021 Alert24 Land 14 June 2021

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SKP Inc v Auckland Council _ [2021] NZEnvC 64

Keywords: costs

This decision concerned an application for costs filed in relation to an application for rehearing of *SKP Inc v Auckland Council* [2018] NZEnvC 81 and a number of interlocutory applications filed by SKP Inc ("SKP"). Kennedy Point Boatharbour Ltd ("KPBL") and Auckland Council ("the council") sought costs against SKP. The council's position was that the costs it incurred in responding to all five of SKP's applications should not fall on the ratepayer. SKP argued costs should lie where they fell.

The Court agreed with the council and KPBL that an award of costs was warranted in relation to the application for rehearing. The matters raised in the original and the further amended notice of motion for rehearing were not new and important information and did not represent changes in circumstances that would have affected the outcome of the case. Further, an award of costs was warranted in relation to SKP's application for discovery. Regarding SKP's three applications for recusal, adjournment and appointment of a Māori Land Court Judge, the Court found an award of costs was appropriate. The application for recusal was "an extremely long bow" and the applications for adjournment and appointment of a Māori Land Court Judge were ill timed and caused unnecessary delay and cost.

The Court acknowledged that SKP's appeal raised matters of public interest; however, bringing an appeal in the public interest did not exempt a party from a costs award. The Court stated that SKP's approach in bringing the interlocutory applications was poorly conducted. In general, the applications were misconceived and caused unnecessary cost. SKP's case in bringing those applications was unmeritorious, was without substance, and amounted to an abuse of the Court's process. The Court found that the costs award made should not be within the Court's "comfort zone" and that a higher award of costs should be made of 50 per cent of the costs incurred by KPBL and the council. Costs of \$42,597 were awarded against SKP in favour of KPBL. Costs of \$26,424 were awarded against SKP in favour of the council.

Decision Date 4 June 2021 Your Environment 8 June 2021

SKP Inc v Auckland Council _ [2021] NZEnvC 63

Keywords: costs

This decision concerned applications for costs filed by Kennedy Point Boatharbour Ltd ("KPBL") and Auckland Council ("the council") following *SKP Inc v Auckland Council* [2018] NZEnvC 81. That decision granted the resource consent sought by KPBL subject to modified conditions of consent. The council sought an award of costs totalling \$71,176, representing approximately 25 per cent of the council's actual costs. KPBL sought an award of costs totalling \$136,494, representing approximately 33 per cent of KPBL's actual costs. The council and KPBL submitted that the way SKP Inc ("SKP") conducted its case supported an award of costs in accordance with the *Bielby* factors. SKP sought that costs lie where they fell.

The Court generally agreed with the submissions of KPBL and the council that there were *Bielby* factors present in the case that warranted an award of costs. Namely that the conduct of SKP in preparing for hearing put the other parties to unnecessary cost. SKP engaged in poor pleading and preparation of its case in continuing to advance its extensive list of issues, broad evidence and its belief that KPBL's settlement offer was not genuine. The

Court accepted submissions that SKP ran a similar case to that of its predecessor before the council.

The Court considered it appropriate for KPBL to be compensated for a reasonable proportion of its costs and in the case of the council, that it was inappropriate the full cost of its case be borne by Auckland's ratepayers. Having considered the circumstances of this case the Court found that an award of 25 per cent of the costs incurred by KPBL and the council was appropriate. This percentage was in the lower range of costs regularly awarded by the Court, reflecting that the appeal did address some issues of public interest, but also the unnecessary costs SKP caused KPBL and the council. SKP was ordered to pay \$71,176 to the council and \$102,420 to KPBL.

Decision Date 4 June 2021 Your Environment 8 June 2021

(See previous reports in Newslink February 2021 and June 2021 editions – RHL)

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**Dunedin City Council v Heke \_ [2021] NZDC 9450**

**Keywords: prosecution; abatement notice; noise**

L Heke (“H”) pleaded not guilty to one charge brought against her by Dunedin City Council (“the council”) that between on or about 28 February 2020 and 29 May 2020 at Dunedin she contravened or permitted the contravention of an abatement notice which had been issued to her on or about 4 February 2020 under s 322(1)(c) of the RMA requiring her to adopt the best practicable option of ensuring the emission of noise from her land, namely rooster crows, did not exceed a reasonable level. The charge arose out of free range poultry farming activities undertaken by H on a five-acre Rural zoned property which she owned at 13 Abbeyhill Rd, Pine Hill, Dunedin.

The Court stated the issues before the Court in these proceedings were the following: was a valid abatement notice issued by the council; and had H complied with the notice or did she contravene it between 28 February and 29 May 2020 as alleged by the council?

Regarding the first issue, the Court accepted a council environmental health officer’s assessment that rooster noise from the property exceeded a reasonable level. Accordingly, in terms of s 322(4), the officer had reasonable grounds for believing that the circumstances set out in s 322(1)(c) existed, entitling her to issue an abatement notice. As to the second issue as to whether or not H complied with the abatement notice, the Court stated that on her own admission H had not because she failed to move and house the roosters on the southeast boundary of the property as required by paragraph 1.1 of the abatement notice. The Court found that H had contravened the abatement notice and so the charge was proven and the Court found her guilty accordingly. H was remanded for sentence.

Decision Date 11/6/2021 YE 14 June 2021

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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](#).

Contact Energy secures large wind farm site in the lower South Island

Stuff reports that Contact Energy has secured the site for what may be a large wind farm in the lower South Island. The company aims to begin developing wind farms for the first time, and is planning a pipeline of "large-scale" developments over the next six years. Read the full story [here](#).

\$344 m to redevelop Scott Base

The New Zealand Herald reports that the Government has allocated \$344 m in Budget 2021 for the redevelopment of Scott Base. Antarctica New Zealand will replace the existing base and redevelop the Ross Island Wind Farm. Read the full story [here](#).

Billion-dollar Sleepyhead development gets the go ahead

Stuff reports that independent commissioners have approved Comfort Group's proposed "Sleepyhead" development on the company's 178-hectare rural site in Ōhinewai. The proposal involves the building of a large manufacturing and housing community, contained within industrial, commercial, and residential zones. Read the full story [here](#).

\$236 m Manukau Health Park redevelopment

Stuff reports that preliminary designs have been signed off for the \$236 million redevelopment of the Manukau Health Park, and construction is expected to start before the end of the year. The new super-clinic will include an expanded renal dialysis service, four new operating theatres, a new radiology hub and an integrated breast care service. Read the full story [here](#).

Up to \$185 b investment in water infrastructure needed over 30 years

Radio New Zealand reports that new studies estimate between \$120 b to \$185 b investment will be needed in water infrastructure over the next 30 years. The studies also saw benefits of about \$14 b to \$23 b in GDP through water-related jobs and infrastructure spending. Read the full story [here](#).

\$43 million research and innovation hub for Queenstown

The *Otago Daily Times* reports that a \$43 million research and innovation hub is to be built in Queenstown. Half of the money for the project will be sourced from a government loan. Read the full story [here](#).

Apartments planned for Nelson's Trinity Church site

Stuff reports that a developer plans to build 40 affordable rental apartments at the site of the Trinity Presbyterian Church in Nile St, Nelson. The resource consent application outlines plans to retain the 130-year-old church but to demolish other buildings on the site. Read the full story [here](#).

Marine environment affected by Canterbury floods

The *Otago Daily Times* reports that biodiversity in a refuge for Hector's dolphins could take up to a decade to recover from the Canterbury floods after large amounts of sediment covered the coastal marine environment. Heavy rains caused rivers from South Canterbury to Waimakariri to send massive amounts of turbid water, including forestry waste and refuse from dairy operations, into the marine environment. Read the full story [here](#).

\$685 million cycling and walking bridge for Auckland

Stuff reports that a new \$685 million bridge is to be built for walkers and cyclists crossing Auckland's Waitematā Harbour. The new structure is expected to take five years to complete. Read the full story [here](#).

Crown to acquire and demolish harbourfront homes to build a bridge

Stuff reports that the Crown is set to buy a series of Northcote harbourfront properties, via compulsory acquisition, in order to demolish the homes to facilitate the erection of a freestanding cycle and pedestrian bridge. The \$685 million bridge will connect Westhaven and Akoranga and those multi-million dollar properties are needed to make way for the project's (collectively they are worth approximately \$23 million). The Public Works Act 1981 gives the Crown power to acquire land needed for road works. In the first instance, landowners are asked to negotiate their terms, but if an agreement can't be made, the Minister for Land Information, Damien O'Connor, may acquire the land by law. Read the full story [here](#).

Redevelopment plans for historic Palmerston North building

Stuff reports that civil engineering firm Terra Civil has bought the 115-year-old Grand Hotel building in Palmerston North and plans to keep retail spaces on the ground floor, while replacing upstairs offices with luxury apartments. Read the full story [here](#).

New high-end apartments in Hamilton CBD

Stuff reports that Waikato-based Downey Construction has released plans to transform the former Opus House building on Harwood St, Hamilton, into 22 high-end apartments. The redevelopment is expected to be completed in late 2022. Read the full story [here](#).

Climate Change Commission releases final report

Radio New Zealand reports that the Climate Change Commission has released its final report setting out the roadmap for New Zealand to cut emissions and become carbon neutral by 2050. Recommendations include that nearly all cars imported by 2035 must be electric vehicles. Read the full story [here](#).

New \$178 million University of Otago building in Christchurch

The New Zealand Herald reports that the University of Otago Council has approved full funding for a \$178 million building on its Christchurch campus. Resource consent for the project was approved by the Christchurch City Council. Read the full story [here](#).

Land at Waiouru contaminated with heavy metals

Radio New Zealand reports that Defence Force land at Waiouru has been contaminated with heavy metals from ammunition. The Defence Force is changing how it handles ammunition to cut down the impacts, which included a civilian staffer getting lead blood poisoning. Read the full story [here](#).

New Zealand's use of coal for electricity generation increases

Radio New Zealand reports that New Zealand has significantly increased its use of coal to generate electricity in recent years. In the first three months of 2021, the same amount of coal was used to generate electricity as in all of 2016 and 2017 combined. Read the full story [here](#).

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**\$305 m hotel and office redevelopment on Auckland waterfront to commence**

*Stuff* reports leading inner city developer Precinct Properties will soon start building The One Queen St 21-level hotel and office building at the foot of Queen Street, as part of the Commercial Bay office and retail development completed in 2020. Construction is by LT McGuinness on a fixed price contract with completion due in late 2023. Read the full story [here](#).

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Development planned for Broad Bay

The *Otago Daily Times* reports that a 72-lot development is planned in Portobello Rd, Broad Bay, near Dunedin. A mix of high-end and more affordable housing is envisaged. Read the full story [here](#).

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**Plan to restore Lake Horowhenua**

*Radio New Zealand* reports that the Government will buy a dairy farm next to Lake Horowhenua to construct a wetland and help restore the lake. The wetland is expected to significantly reduce the nitrogen levels in the lake. Read the full story [here](#).