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Legal Case-notes September 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 as not all cases may have 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;

- A judicial review of a decision of Queenstown Lakes District Council to approve a non-complying house at Wanaka ulitising incorrect assessment criteria and inappropriately cancel a consent notice;
- A decision on costs following a prosecution of a Wellington developer for illegal earthworks;
- Another prosecution for works within the "bed" of a river: this appeal relates to the Waiau River in North Canterbury;
- An appeal against unreasonable charges by Far North District Council for processing a resource consent application;
- An appeal to the High Court against a decision of the Environment Court relating to the realignment of a high-tension power line across land and part of Tauranga Harbour;
- An appeal against a decision of hearing commissioners, seeking to summons witnesses who gave evidence on a proposed plan change, to also provide evidence on a non-complying activity application in Epsom, Auckland;
- An application for an enforcement order against owners of a residential property in Mount Eden, Auckland for keeping a large number of rabbits.

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CASE NOTES SEPTEMBER 2021:

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Frost v Queenstown Lakes District Council _ [2021] NZHC 1474

Keywords: High Court; judicial review; resource consent; public notification; effect adverse

This matter concerned resource consents sought by D and P Clarke and PKF Goldsmith Fox Trustees # 3 Ltd ("the Clarkes") to develop a home at Lot 60, Penrith Park, Wanaka. M Frost, W Brown and J Munns ("the applicants") sought judicial review of Queenstown Lakes District Council's ("the council") decision to process the application on a non-notified basis, and to grant the requisite consents. The applicants all owned properties in Penrith Park. None were directly adjacent to the Clarkes' property, but all had views of the house which was now under construction. They considered the council erred in making the notification decision and the substantive decision and the consents should be set aside and reconsidered following (at least) limited notification. The applicants submitted the council erred in assessing the application for public notification under s 95A of the RMA and for limited notification under s 95B.

The applicants first submitted both the Assessment of Environmental Effects ("AEE"), and the subsequent decision of the council, failed to consider effects on properties to the north and west of the subject site, including the applicants' properties. The Court did not consider the council failed to consider public and private views from the west and north as alleged and this ground of review was not made out.

The applicants next raised several issues in respect of the council's assessment of the effects of vegetation removal. They argued the council did not have the information required to reach its conclusion that effects relating to vegetation removal would be temporary in nature, and would be mitigated by conditions of consent. Further, the applicants submitted that the assessment of effects on persons of vegetation removal for the purpose of limited notification used the wrong statutory test. The council concluded that the effects of vegetation removal were "not considered to be more than minor", when the test for affected persons under s 95E(1) of the RMA required any effects on them to be "less than minor". The council acknowledged that the language used in its limited notification assessment was not the language used by s 95E, but said it was important to read the decision as a whole. It stated that although the limited notification section of the decision wrongly referred to the test for public notification, it was clear from the decision, when considered as a whole, that the council considered the effects of removal of vegetation were less than minor and, so concluded there were no affected persons. The Court did not agree the decision's wording could be overcome by saying the council also expressly adopted and relied on the AEE supplied by the applicants. It did so, but with the proviso that it made "additional comments" and it was in these comments that its conclusion on the effects of vegetation removal were reached. The Court found that the decision maker intended to reach her own conclusion on the effects of vegetation removal, which was that they were "no more than minor", and simply did not explain why no owners or occupiers of neighbouring properties were therefore considered to be unaffected by the proposal. Accordingly, this ground of review was upheld.

The applicants alleged incorrect use of a building height rule. While it was common ground that the council understood there was no permitted baseline in this case relating to buildings, the applicants criticised it for allegedly treating site standards such as the height limitation as a baseline for assessing the effects of the proposed dwelling. The Court did not consider the council treated the site standard as a permitted baseline and ignored its effects. This ground was not upheld.

The applicants next criticised the council for assessing the proposed activity with reference to the assessment criteria for controlled activities in r 12.7.6(i) of the operative district plan ("ODP"), and for discretionary activities in r 12.7.6(ii), when the proposed activity was non-complying. In short, they argued it was an error of law to evaluate a non-complying activity by applying assessment criteria that guided decisions on controlled or discretionary activities. The Court stated it was clearly both lawful and appropriate to consider the assessment matters in rr 12.7.6(i) and (ii). However, the council did not limit its consideration to these matters. This ground was not upheld.

Finally, the applicants argued the council erred when it allowed the removal of the consent notice on the title to Lot 60, relying on a conclusion that r 12.7.5.1(ii) of the ODP was sufficient to ensure effects on the environment would be equivalent to condition 2 of the consent notice, when condition 2 required complete invisibility from the Lake Wanaka shoreline of any structure on the property, while r 12.7.5.1(ii) was simply a site standard, and could be departed from. The Court concluded that the council's failure to appreciate the distinction between the mandatory nature of a consent notice, and the discretion to depart from a site standard such as found in r 12.7.5.1(ii)(d) or (e), meant the council made its decision as to notification on an incorrect factual and legal basis. Accordingly, its conclusion that no persons were considered affected by the proposal to remove the consent notice was reached in error and this ground of review was also upheld.

The Court considered its discretion to grant relief. The Court noted that the Clarkes were well advanced in constructing the building, having now spent $1,500,000 on it, and there would be considerable detriment to them, both in cost and delay, if the Court were to grant the relief sought by the applicants and require the consent to be reconsidered. In the Court's view, in the particular circumstances of this case, most of the applicants' concerns could be addressed if it limited relief to setting aside the decision cancelling the consent notice. That could then be reconsidered, on the correct basis, which was that it was not the equivalent of site standard r 12.7.5.1(ii)(d).

The Court ruled that the limited notification decision on the application for land use consent was made on the wrong legal basis, being that effects of vegetation removal were minor, when the requisite statutory test was that the effects were less than minor. However, in the special circumstances of the case, the Court declined to grant relief as sought. The notification and substantive decisions on the application to cancel the consent notice were quashed. Costs were reserved.

Decision Date 8 July 2021 - Your Environment 12 July 2021

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Wellington City Council v Zhou _ [2021] NZEnvC 76

Keywords: costs; earthworks

Z Zhou and L James ("the respondents") sought costs against R Higgs as Trustee of the RLH Trust and K and J Higgs ("the Higgs"). In July 2018, Wellington City Council ("the council") made an application for enforcement orders against the respondents in respect of a property situated at 120A Nicholson Road, Khandallah, Wellington. The proceedings arose as a result of illegal earthworks undertaken by the respondents between April and September 2017 in the course of a development. They were prosecuted for the illegal earthworks as well as being subject to the simultaneous enforcement proceedings. The Higgs had joined the enforcement proceedings under s 274 of the RMA. After a judicial conference on 17 March 2021, the Court determined to make orders as agreed by the respondents and the council which represented an approved and consented engineering remedy with a time frame for compliance. Orders in final form were made on 26 March 2021.

The respondents argued that the Court's decision of 26 March 2021 required the implementation of the proposal agreed between the council and the respondents and filed with the Court on 22 June 2020. They argued if not for the opposition of the Higgs to this proposal, the further costs incurred by the respondents would have been avoided. The respondents claimed costs of $41,906.

The Court considered that there was a very simple and direct assessment which could be made as to whether or not it was reasonable to award costs against the Higgs. That was that the root cause of these proceedings was the failure of the respondents to identify, on the plans which were filed with their resource consent application, the extent of earthworks which they proposed undertaking or to discuss the extent of those works with the Higgs prior to commencing them. This was compounded by an apparent failure on the part of the council to adequately consider whether the Higgs should at least be consulted by the respondents or council officers as to the potential effects of somewhere in the order of 1500 cubic metres of earthworks. The Court stated that although the Court approved the solution agreed upon by the council and the respondents, nothing unreasonable could be seen in the position adopted by the Higgs in these proceedings. Their reluctance to accept a solution agreed by the other parties was entirely understandable in light of the criminal convictions of the respondents for illegal works and apparent failure of the council to adequately consider their interests. The respondents' costs application was declined.

Decision Date 28 June 2021 - Your Environment 29 June 2021

(See previous report in Newslink case-notes in March 2020. There is clearly a responsibility by applicants for development to include an adequate assessment of the extent of proposed works in development applications. – RHL.)

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Rutherford v Canterbury Regional Council _ [2021] NZHC 1506

Keywords: prosecution; appeal procedure; interpretation; river; earthworks; discharge

J Rutherford ("R") pleaded guilty to six charges brought by the Canterbury Regional Council ("the council") under the RMA. He was sentenced on 15 August 2018 to fines totalling $34,000 along with court costs. An associated enforcement order was also made. R now sought leave to appeal those convictions out of time. Given the connection between the merits of the appeal and the application for leave to appeal, the two issues were heard together.

In 2017 Mr Rutherford undertook works on 90 hectare area of land ("the subject area") situated in close proximity to the Waiau River. The works involved scraping and levelling the subject area, removing vegetation on it, and then seeding it and fertilising it with superphosphate. These actions resulted in six charges alleging breaches of ss 13 and 338 of the RMA because

they constituted works within the bed of the Waiau River which were not authorised by a resource consent or otherwise ("the s 13 charges"). As a result of the works, sediment was able to enter the water of an irrigation intake channel that discharged into an irrigation intake pond. The council charged R with discharging sediment into water in breach of ss 15(1)(a) and 338 of the RMA ("the s 15 charge"). On 24 October 2017, R entered not guilty pleas to all the s 13 charges and elected a judge-alone trial. A guilty plea was intimated to the s 15 charge. The key issue in dispute in relation to the s 13 charges was whether the subject area fell within the "bed" of the Waiau River as that term was defined by s 2 of the RMA.

At the same time as R was being prosecuted, the council was prosecuting Dewhirst Land Co Ltd and its director Mr Dewhirst ("D"), for unlawful works carried out in the bed of the Selwyn River. In *Canterbury Regional Council v Dewhirst* [2018] NZDC 7650, the Judge decided that the RMA definition of "bed", being "the space of land which the waters of the river cover at its fullest flow without overtopping its banks" should be interpreted by determining what is "fullest flow" and then finding a "suitable bank". This approach meant more land was captured as the "bed" of the river than D or R considered was the case. On 14 May 2018, R entered guilty pleas to the five s 13 charges and to the s 15 charge, and was convicted. Subsequently in *Dewhirst Land Co Ltd v Canterbury Regional Council* [2018] NZHC 3338, (2018) 20 ELRNZ 881, the High Court allowed D's appeal and adopted his interpretation of "bed" under s 2 of the RMA. The High Court held that the words "usual or non-flood" should be implied and read into the RMA definition of "bed" before the word "fullest flow" ("bank to bank" test). The Court of Appeal in *Canterbury Regional Council v Dewhirst Land Company Ltd* [2019] NZCA 486, [2020] 2 NZLR 10 dismissed the council's appeal and confirmed that the correct legal test for determining the bed of a river was the "bank to bank" test.

R's appeal was brought on the grounds that a miscarriage of justice had occurred because, as a consequence of the High Court and Court of Appeal's decisions, the subject area was not within the "bed" of a river as defined in s 2 of the RMA. As a result, R could not in law have been convicted of the offences charged. In light of the Court of Appeal's decision, the council acknowledged that the subject area where R's offending occurred, fell outside the bed of the Waiau River. The council did not oppose the application for leave to appeal out of time. However, the council opposed the substantive appeal.

Regarding the s 13 charges, in the Court's view, declining the application for leave to appeal would be objectionable and work a substantial injustice. First, the prosecuting authority accepted the conviction could not have succeeded on the law as it now currently stood. Second, as the council accepted, the delay was reasonably explained. It was not until the question of interpretation of the definition of "bed" of a river in the RMA was finally determined by the Court of Appeal, that R could make his application for leave to appeal. Thirdly, R raised this issue from the outset, and it was the reason he did not initially plead guilty to the s 13 charges. In the Court's view, this case was analogous to the case in *R v Knight* [1998] 1 NZLR 583 (CA), where there were special circumstances which justified departing from the principle of finality. Accordingly, the application for an extension of time within which to appeal against the s 13 convictions was granted. The appeal on those convictions was allowed. The convictions were quashed and an acquittal entered on each count.

The Court noted that the conviction on the s 15 charge was not affected by the subsequent decisions of the superior courts on the interpretation of the term "bed" in s 2 of the RMA. The sole ground for seeking to appeal this conviction out of time was that the sentencing exercise would be different if it was the only conviction R was facing and he might be in a position to seek a discharge without conviction. The Court stated there were a number of impediments to R's application on this charge. First, he entered the conviction following a guilty plea. More importantly though, R had not given any reason why a s 106 application could have been entertained if he had just been facing this one charge. The only consequence he referred to was the blemish of having a conviction. That was a consequence which inevitably flowed from conviction, and there was nothing to suggest it was out of all proportion to the offending involved. Accordingly, the application for leave to appeal the conviction on the s 15 charge was dismissed.

Decision Date 15 July 2021 - Your Environment 16 July 2021

(See previous decision reports following the initial "Dewhirst" decision in Newslink case-notes in May and December 2019, November 2020 and March 2021- RHL.)

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Seafort Holdings Ltd v Far North District Council _ [2021] NZEnvC 70
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Keywords: council procedures; charges

Seafort Holdings Ltd (“SHL”) filed an appeal under s 358 of the RMA relating to "the unreasonable charges for unnecessary work undertaken by the Far North District Council (“the council”) to process a resource consent". The appeal related to additional charges made by the council amounting to $6,979. Total charges amounted to $8,829 and the applicant paid at the time of filing $1,850. The council considered it had charged appropriately in accordance with fees and charges pursuant to s 36(5) of the RMA. The council said it had incurred extra costs in processing the resource consent application and sought to recover these charges from SHL.

The Court was satisfied that an objection was filed by SHL against a requirement by the council to pay an additional charge under s 357B(a) of the Act. The Court noted s 358 of the Act provides: any person who has made an objection under s 357B may appeal to the Environment Court against the decision on the objection. The issue for the Court was whether or not the council had made a decision on the objection. The Court found it was clear that the council had not undertaken an objection hearing as required under s 357C(4)(b). As the council had clearly failed to comply with s 357C(4)(b), this in turn meant that the Court could not proceed to deal with the appeal because it had no decision on the objection. The Court noted it was anxious that the matter be dealt with by mediation and that this issue would have been addressed if such mediation had occurred. The council's refusal to do so led to the current situation.

The Court stated that the council was clearly obliged to comply with the Act as it related to the objection. The Court would have the power to issue enforcement orders if necessary and deal with the appeal once a decision was issued. There was no evident power for the Court to assume that the council had dismissed the objection. The Court expected the council to make appropriate arrangements to promptly resolve this issue with SHL. An objection hearing would clearly be required. If one was not forthcoming, there were powers for the Court to consider enforcement actions, particularly under s 314(1)(b), to require the council to undertake its statutory duties. Alternatively, powers might be reviewed by the Local Body Ombudsman. The Court directed that this decision be brought to the attention of the council urgently, and required an affidavit to be filed by a council officer confirming that the matter had been drawn to the attention of the council and a copy of any resolution that was passed as a consequence. The Court adjourned the matter for a further report from the council as to its position and outcome by 11 June 2021. Costs were reserved.

Decision Date 15 June 2021 - Your Environment 16 June 2021

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Tauranga Environmental Protection Society Inc v Tauranga City Council _ [2021] NZHC 1201

Keywords: resource consent; conditions; electricity; utility; coastal; regional plan; national policy statement; effect; alternative location; Māori values; Waitangi treaty; effect adverse

Tauranga Environmental Protection Soc Inc, supported by the Maungatapu Marae Trustees from Ngāti Hē, appealed the decision of the Environment Court (“EC”) in *Tauranga Environmental Protection Soc Inc v Tauranga City Council* [2020] NZEnvC 43. The EC upheld the decision by hearing commissioners on behalf of Tauranga City Council and the Bay of Plenty Regional Council to grant land use consents and coastal permits to Transpower New Zealand Ltd (“Transpower”). The proposed works were to realign an existing electricity transmission line, Hairini - Mt Maunganui A (“the A-line”) which traversed the Maungatapu peninsula, Tauranga Harbour at Rangataua Bay and the Matapihi peninsula.

The Court stated the issues were: was the EC wrong to “bundle” the effects together; was the EC wrong in its findings about adverse effects; did the EC err in its approach to pt 2 of the RMA; did the Court err in interpreting and applying the planning instruments; and was the EC wrong in its assessment of alternatives?

The Court found the “bundled” way in which the EC considered the effects of removing the A-Line and construction of the new line did not constitute an error of law. The two elements of the proposal, removing old infrastructure and constructing new infrastructure, were integrally related. The EC was correct to consider the effects of the proposal relating to Rangataua Bay in a realistic and holistic way.
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Regarding the EC's findings on adverse effects, the Court found the EC's conclusion in relation to the cultural effects of the proposal did not reflect the evidence before it. The EC accurately summarised Ngāti Hē's clear opposition to the proposal on the basis of its significant adverse effects on an area of cultural significance and on the Māori values on the Outstanding Natural Features and Landscapes ("ONFL"). However, it refused to find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē and it found that the long-term visual effects from the marae and vicinity would be "de minimis". The Court found proper application of the law required a different answer from that reached by the EC. When the considered, consistent, and genuine view of Ngāti Hē was that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it was not open to the EC to decide it would not. Ngāti Hē's view was determinative of those findings. Deciding otherwise was inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA.

Concerning the EC's approach to pt 2 of the RMA, the Court found the EC erred in law in applying an "overall judgment" approach to the proposal and in its approach to pt 2. Instead, what the EC was required to do was to carefully interpret the meaning of the planning instruments it had identified, the Bay of Plenty Regional Coastal Environment Plan ("RCEP") in particular, and apply them to the proposal.

The Court considered whether the EC erred in interpreting and applying the planning instruments. The submissions on this ground of appeal centred on whether one national policy statement, the New Zealand Coastal Policy Statement ("NZCPS"), was inconsistent or took priority over another, the National Policy Statement on Electricity Transmission ("NPSET"). The Court stated that the NZCPS and NPSET were reconciled and given effect in the RCEP and District Plan. However, the EC needed to carefully interpret the RCEP and apply it to the facts in light of the higher order instruments. There were cultural bottom lines in the RCEP. Policy IW 2 of the RCEP required adverse effects on Rangataua Bay, an "area of spiritual, historical or cultural significance" to Ngāti Hē, to be avoided "where practicable". Policies NH 4, NH 5(a)(ia) and NH 11(1) required the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 to be avoided unless there were "no practical alternative locations available"; the "avoidance of effects [was] not possible"; and "adverse effects [were] avoided to the extent practicable". Whether the cultural bottom lines in the RCEP were engaged depended on whether the "practicable", "possible" and "practical" thresholds were met. That required consideration of the alternatives to the proposal.

The Court considered whether the EC erred in failing to adequately consider alternatives. The Court stated both the IW 2 and NH 4 policies of the RCEP required consideration of whether it was "practicable" and "possible" to avoid adverse effects and whether alternative locations were "practical". The Court found the EC misdirected itself in law by not interpreting and analysing the "practicable", "possible" and "practical" in the context of the policies and the proposal. It erred in failing to recognise that the practicability, practicality or possibility of alternatives were directly relevant to whether the proposal could proceed at all. Further, the Court considered the EC's consideration of the alternatives was focused too widely on the alternatives considered by Transpower.

The Court found that the errors identified were material errors and the Court quashed the EC's decision. The Court considered it desirable for the EC to further consider the issues of fact relating to the alternatives. The Court stated it might be possible for an operationally feasible proposal to be identified that did not have the adverse cultural effects of the current proposal and, if the realignment did not proceed over Rangataua Bay, it might still be able to proceed in relation to Matapihi. The Court remitted the application to the EC for further consideration.

Decision Date 17 June 2021 - Your Environment 18 June 2021

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Eden Epsom Residential Protection Society Inc v Auckland Council - [2021] NZEnvC 68

Keywords: procedural; evidence; district plan change

Eden Epsom Residential Protection Soc Inc ("the society") appealed against a decision of hearing commissioners of Auckland Council ("the council") approving, with modifications, a requested plan change to enable establishing and extending certain Southern Cross private hospital facilities. Prior to the hearing, the society requested the issue of witness summonses to six experts, some of whom produced evidence at the council hearing on a proposed plan change and the others at a later hearing for a resource consent proposal on the site.
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Submissions in partial opposition were filed on behalf of the council and the plan change requestor, Southern Cross.

The council and Southern Cross opposed the applications for summonses to three witnesses who were involved in the separate resource consent application hearing at council level. The Court stated there was force in the submission by the two parties that the basis for assessment of plan change matters was different from assessment of an application for a non-complying activity. The Court noted it had previously directed in these proceedings that the resource consent appeal (by Southern Cross against refusal of consent by the council's independent hearing commissioners) was not to be joined into the present proceedings. The present plan change proceedings were to be heard and determined before the hearing of the resource consent proceedings, which the Court found would provide a proper foundation for assessment of the resource consent application against settled plan provisions.

The Court concurred with the findings of *Brooker v West Coast Regional Council* [2015] NZEnvC 31, that the Environment Court has an inherent power to determine whether or not to issue a witness summons notwithstanding the approach appearing to have been taken in the drafting of r 9.4.3 of the District Court Rules 2014. The Court stated that the calling of expert evidence was not a “numbers game”, and that there were at least sufficient numbers of experts on relevant topics in the present proceeding for the Court to gain substantial help in understanding all the evidence before it, including after questioning of the relevant witnesses in a focused way on matters that might have the potential to alter the outcome of the proceedings. The Court authorised the issuing of witness summonses to three experts, but in a modified form to those tendered by the society. The directions to the witnesses in the summonses were to be confined to requiring them to attend the hearing and producing their reports (or in the case of one expert, her evidence to the plan change hearing before the council). Costs on the present application were reserved.

Decision Date 11 June 2021 - Your Environment 15 June 2021

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Auckland Council v Cowlin _ [2021] NZEnvC 86

Keywords: enforcement order; amenity values; effect adverse

On 1 June 2021, Auckland Council (“the council”) applied for enforcement orders against E Cowlin and Dylan Lewis (“the respondents”) pursuant to s 316 of the RMA in relation to the properties situated at 13 and 15 Watling St, Mt Eden. The orders sought to address adverse amenity effects caused by the respondents keeping a high and continuously breeding population of rabbits at the properties. The council and the respondents had reached an agreement that enforcement orders should be made that would resolve the matter.

The Court was satisfied that the orders proposed were necessary under s 314(1)(b)(ii) of the RMA to avoid, remedy and/or mitigate persistent and ongoing adverse effects on the environment, namely adverse amenity effects. The Court made the enforcement orders, as specified in the decision, by consent. Costs were reserved.

Decision Date 13 July 2021 - Your Environment 14 July 2021

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The above brief summaries are extracted from “Alert 24 - Your Environment” published by Thomson Reuters and are reprinted with permission. They are intended to draw attention to decisions that may be of interest to members. Please consult the complete decisions for a full understanding of the subject matter.

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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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Legal Casebook

Property Law Act 2007 – application to cancel covenant - a recent Court decision.

Private covenants are frequently registered upon transfer of new lots from a subdivider.

This is a decision of the Court of Appeal confirming a High Court decision to not cancel covenants restricting further subdivision and development of a property at 41 Redoubt Road, Manukau; it provides an insight into the scope for enforcement of private covenants – RHL.

Chand v Auckland Council and others_ [2021] NZCA 282

Keywords: Civil procedure, Appeal, Determination, Subdivision

Court Provided Information: Property law – covenants – extinguishment or modification of covenants

The parties to this appeal own properties that were part of an 8-lot subdivision. All of the titles are both subject to and beneficiaries of covenants limiting subdivision and construction. The appellants now wish to subdivide their property so that it contains three structures and five lots. They applied for the covenant restricting subdivision to be extinguished under s 317(1)(d) of the Property Law Act 2007, which permits a court to vary or extinguish a covenant if satisfied that the proposed modification or extinguishment would not "substantially injure" any person entitled to the benefit of the covenant. The High Court found the proposal would substantially injure the owners of the neighbouring properties.

Would the proposed modification substantially injure the owners of the neighbouring properties? Held: Yes. The evidence established that the neighbouring properties would suffer a loss of property values, loss of privacy and increased disturbance from increased traffic on a shared driveway. The onus was on the appellants to show that the respondents will not suffer injury. The respondents would also suffer a loss of property rights. The parties agreed that the covenants confer property rights on each of the owners of the benefitted land. Where property rights are infringed, that party is deprived of a valuable asset and the loss can be measured by determining the economic value of that asset. By modifying or extinguishing a covenant, the Court deprives the owner of an asset, which forms part of the injury done by modification. The loss of property rights is an injury for the purpose of s 317 and can be the subject of compensation where appropriate. The High Court was correct to find that the injury to the respondents would be substantial. All properties would suffer a loss of property rights and loss of property value. Under the proposal, two two-storey structures would be erected very near the boundary of two of the respondents' properties. The impact on privacy for those properties would be significant. The other respondent would be less affected by loss of privacy, but is situated close to the entrance of the appellants' property and would be affected by the substantial increase in traffic. Following the Supreme Court decision in Synlait Milk Ltd v New Zealand Industrial Park Ltd [2020] NZSC 157, all those injuries must be considered when determining whether extinguishing the covenant would case substantial injury. Those injuries taken together are substantial. Compensation need not be considered.

Summary from Thomson Reuters Alert24 Land, 3 August 2021

The following image from Auckland Council's GIS provides the context:

Other News Items for September 2021

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Genesis Energy not planning to build wind farm at Castle Hill

Radio New Zealand reports that Genesis Energy has has no currrent plans to build what would be the biggest wind farm in the country at Castle Hill, on a site north of Masterton. Its resource consent expires in 2023, with no construction planned. The company says it has other renewable energy projects that it is building. Read the full story here.

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Boarding house inquiry silence

Otago Daily Times reports that an investigation is underway by the Ministry of Business, Innovation and Employment (MBIE) into boarding houses. An MBIE team has identified Queenstown property, which had been retrofitted to accommodate up to 28 people before it was destroyed by fire last year, as part of its investigation. Team national manager Steve Watson said the inspections were done "following concerns raised around overcrowding and living conditions in some properties". Read the full story here.

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Taranaki landlord's compliance with Residential Tenancies Act under investigation

Taranaki Daily News reports that the landlord of New Plymouth's Egmont Eco Lodge, Gary Ogle, has been taken to the Tenancy Tribunal for failing to lodge/return an erstwhile tenant's bond. Ogle maintains he did not think the tenant was entitled to a bond, as being under 18 years of age, he did not think he was covered by the Act. The tribunal ruled Cavanagh had signed a boarding hostel agreement and ordered Ogle to pay him $1454.01 immediately. Read the full story here.

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Office space demand 'shrinks' while inner-city living increases

Stuff reports that inner-city living is being viewed as an ideal way to fill vacant space in central Invercargill while also helping ensure the CBD thrives in the future. One of Invercargill's largest commercial property owners, Gaire Thompson, said the demand for office space throughout New Zealand was shrinking, but there had been an increased demand for apartment living in the inner city. "Not everyone wants a section that they have to mow or do the gardens, they just want a warm place to live," Thompson said. Read the full story here.

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Mediation between environmental groups fails to resolve disagreement over Christchurch estuary walkway

Stuff reports that mediation between two of Christchurch's leading environmental groups (Christchurch 360 Trail and Avon-Heathcote Estuary Ihutai Trust) has failed to resolve disagreement over a 135-km long walking circuit which Christchurch 360 Trail wants to run
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along the estuary edge at the Bromley oxidation ponds. The Avon-Heathcote Estuary Ihutai Trust maintains that this stretch of the estuary must be reserved for wildlife, especially birds. Read the full story here.

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$2.6 million project to replace old pipelines in Gore

Stuff reports that a $2.6 million project to replace some of the oldest pipelines in Gore is to begin. About 1 km of water main and 800 m of wastewater main will be replaced. Read the full story here.

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Co-ownership for home-ownership

Stuff reports that one first-time home buyer, determined to remain living in central Auckland, left her mortgage broker discouraged when she discovered the $100,000 deposit she had saved was still insufficient - she was going to be limited to a shoebox or moving to the outer suburbs. As it turned out, a friend was in a similar position, so they entered into a co-ownership arrangement, allowing them to purchase an inner-city property of reasonable size, with a mortgage of only $400,000 each. They have a property agreement covering the purchase of the house and have talked through issues such as maintenance, decor and what happens if a partner arrives on the scene. Read the full story here.

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First home buyers locked out as record-low listings push up Northland prices

Stuff reports that Northland first home buyers fear they will be forever trying to save as property prices continue to climb in what was, until recently, an affordable region. “At its peak in December 2010, Northland had over 4600 properties available to buy. Now it has just 470, a drop of 90 per cent in nine years,” spokeswoman from Realestate.co.nz Vanessa Williams said. Figures from REINZ show the median sale price for Northland was $700,000 in June 2021, up 33 per cent in a year. The increased demand is being driven largely by Aucklanders moving north and former Northlanders returning from Australia.

Read the full story here.

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Invercargill property owners jostle for prospective tenants

Stuff reports that a Invercargill property owner, Gaire Thompson, says he is surprised by the reported level of tenant interest in a multi-million dollar city block development that's being built by one of his competitors. Invercargill Central Ltd, the company behind the development, announced last week that 65 percent of the development has already been leased. A further 16 percent at the contract stage and awaiting sign off. Thompson says the retail tenancy market is really tough at the moment, throughout New Zealand. Read the full story here.

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Marsden Point to become import-only terminal

Radio New Zealand reports that Refining NZ shareholders have voted to switch Marsden Point to an import-only fuel terminal. This will mean the Marsden Point operation will no longer process crude oil, and all of the country's fuel and petrol supplies will be imported from Asia. Read the full story here.

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Opportunity to buy large, prominent site, with a "fantastic tenant"

Otago Daily Times reports that quality industrial property remains very scarce in the market, with few options available for either lease or purchase and a lack of available development sites. However, a prominent freehold site at Fairfield in Dunedin has gone on the market. The property comprises a total land area of 9000sqm with a part purpose-built, redeveloped factory. Tuapeka Gold Print originally bought the property and in 2017 it sold the property with an initial 10-year lease in place, plus two further rights of renewal of four years each, to the current owner. Read the full story here.

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Research finds staying put in a rental can make significant saving
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Stuff reports that for the first time researchers have measured how much tenants can save by staying put, rather than moving rentals. Drawing on data from the last census, researcher Alan Bentley found Wellington renters faced the biggest potential rent increases, with residents paying an estimated $110 more if they sought out a new rental during the first quarter of 2018. Bentley said the numbers did not surprise him but doing the calculations brought home that many tenants faced a risk of increased rents when their tenancies ended. Read the full story here.

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Project to protect and restore the Rangitata River

Radio New Zealand reports that a $16 million project has been announced to protect and enhance unique habitats in the Rangitata River in Canterbury. The project is divided into two intiatives: an $8.7 m project focusing on the Lower Rangitata and a $7.3 m project focusing on the Upper Rangitata. Read the full story here.

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Buyers paid more than $7m for Christchurch home - and will bowl it

Star News reports that a sprawling property on the banks of the Avon River in Christchurch's top suburb has sold for well in excess of $7 million - but the house will be bowled. "It's a record price for a section," says Bayleys agent Adam Heazlewood. It was the location and plot size of over 4000 sq m that drew buyers from around the country and overseas, Heazlewood says, as the sweeping lawn leads down to the river with outstanding views. The existing home was earthquake damaged and will be demolished. Read the full story here.

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Government project targets 'ghost houses'

Stuff reports that a government project is investigating how to locate empty 'ghost homes', find their owners, and encourage them to bring them back to being occupied. The Government has allocated $500,000 towards testing initiatives that aim to encourage owners to fill their empty properties. The initiatives are being run under Housing Market Renewal with funding allocated from the $1.9 million from the Budget 2019 homelessness contingency. Read the full story here.

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Doubts expressed over hotel viability

Otago Daily Times reports that it will take much more than major events to make a hotel at Dunedin's Forsyth Barr Stadium viable, hotel operators say. Dunedin Stadium Property Ltd, which owns Forsyth Barr Stadium, has called for expressions of interest about building a hotel, multistorey car park, sports bar, commercial office space and revamping the stadium entrance. Land around the stadium could be leased or sold to developers. Dunedin City Holdings Ltd chairman Keith Cooper said there were no plans to use ratepayer money for the venture. Read the full story here.

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Property listing demands flatmate leave house six hours a day

Newshub reports that a flat-share in Wellington is being described as "awful" by renting advocates, as the existing flatmate won't allow any potential roommate to be there during the daylight hours. The listing for the bedroom at the top of Cuba St strictly specifies any flatmate would be "a matured professional", who is almost never home. The flatmate would also never touch the desk in the bedroom as this is for the existing flatmate's use "ONLY". On top of the $400 price tag, the laundry in the building is coin-operated. Read the full story here.

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Government funding for Auckland Film Studios expansion

Stuff reports that the Government is contributing $30 m in funding, and Auckland Council another $5 m, for a project which will see two 2000 square-metre sound stages built and the development of workshops and offices on the site of Auckland Film Studios in West Auckland. Construction is expected to start in the last quarter of this year. Read the full story here.

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Development of Auckland's waterfront - is the money in the right place?

Newsroom reports that plans for Auckland's first new central city park in 100 years will shortly go to the council for approval. Those plans involve spending $300 million on developing the waterfront over 15 years - Hundreds of millions has been poured into developing Auckland's waterfront, and there's more mega-funding to come. Is it being spent in the right place? The transformation of Wynyard Point from a toxic industrial wasteland to a park could be the most challenging phase of the entire Auckland waterfront development for Eke Panuku, Auckland Council's development and property agency. Read the full story here.

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Development potential for CBD buildings in Timaru

Timaru Herald reports that a possible developer has been found for five old buildings owned by Timaru District Holdings Ltd, on Stafford Street in the town's CBD. TDHL, a wholly Timaru District Council-owned trading organisation, made an appeal in June to potential developers who would be interested in coming forward with a proposal for the buildings that house the former Majestic Picture Theatre and others, all directly opposite the soon-to-be developed heritage hub and upgraded Theatre Royal. Read the full story here.

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Gold mine proposed near Waikaia

Stuff reports that Bromoore Gold Ltd has sought land use consent to establish an alluvial goldmine in the Winding Creek valley, about 2 km east of Waikaia township. The resource consent application has been publicly notified by the Southland District Council. Read the full story here.

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Taranaki trust temporarily loses fight over land rights around pipeline

Taranaki Daily News reports that the Maui pipeline was damaged on a north Taranaki farm which has a high risk of landslide and coastal erosion, and needs to be fixed by 2023. But First Gas is having to fight to do so. The Gibbs Family Trust has been fighting to keep First Gas off their north Taranaki property, through which the company's Maui pipeline runs, as the family has a strong connection to the land and is concerned about its Māori heritage. There has been ongoing disagreement between the company and trust over the extent of First Gas' rights of entry on to the property. Read the full story here.

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Council to enter mediation with Sleepyhead over Ōhinewai development

Stuff reports that Waikato Regional Council will enter mediation with Sleepyhead over the proposed billion dollar industrial and housing community at Ōhinewai. It is expected that the mediation will take between three and four months. Read the full story here.

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