~~~~~~

Legal Case-notes February 2022

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".

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>

~~~~~~

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

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

- A successful application for judicial review of a consent granted by Auckland Council for the construction of 13 terrace houses on a 1684m^2 residential site in Remuera, Auckland without adequately considering the adverse effects on the neighbouring environment;
- A successful prosecution of a person who had undertaken unauthorized reclamation of land in the coastal marine area at Mount Maunganui and operating a piggery that discharged waste into the harbor;
- An unsuccessful appeal to the Court of Appeal against a decision of the High Court which struck out his claims that the activities of some major NZ companies contributed to the adverse effects of climate change;
- An unsuccessful appeal to the High Court against a decision of the Environment Court which declined a private plan change to the Ashburton district plan seeking to remove a heritage listing from an old industrial building so that it could be redeveloped for safe and reasonable use;
- A successful application for a declaration that an application to the Whangarei DC for extension of time made before the lapse date could not be granted if the if the Council failed to decide the application before the consent lapsed;
- An interim decision on an application by Tasman District Council for an enforcement order seeking to terminate the existing use of a private airstrip at Awaroa in Golden Bay.

~~~~~~

Log-in and download these summaries, earlier case summaries and other news items at:
https://www.surveyors.org.nz/Article?Action=View&Article_id=23

CASE NOTES February 2022:

~~~~~~

Wallace v Auckland Council _ [2021] NZHC 3095

Keywords: High Court; judicial review; public notification; subdivision; resource consent; effect adverse; amenity values; traffic; building

G and V Wallace and others ("the applicants"), applied for judicial review of the decisions of Auckland Council ("the council"): not to notify an application by the second respondent, 44 Ventnor Ltd ("44VL"), for resource consents to develop 44 Ventnor Rd by constructing 13 terraced houses on the site; and to grant resource consents for the construction of the 13 terraced houses and the subdivision of the site. The applicants argued that, in taking the decisions, the council failed to comply with the notification and decision requirements of the RMA 1991 and failed to apply correctly the Auckland Unitary Plan – Operative in Part ("AUP").

The applicants' statement of claim alleged six errors of law by the council when making the decisions. However, the applicants' counsel advised that the applicants were pursuing only the first, second, third and fifth alleged errors. The applicants alleged the following errors of law: (a) the council failed to identify the neighbourhood, the neighbourhood character and residential amenity when assessing the effects of the development and had inadequate information upon which to assess those effects (first error of law); (b) the council failed to consider the adverse effects of the intensity of development on the neighbourhood character, residential amenity, safety and the surrounding residential area (second error of law); (c) the council failed to identify affected persons (third error of law); and (d) the council's decision was unreasonable because of the inaccuracy and inadequacy of information on adverse traffic effects (fifth error of law).

The Court concluded that the first alleged error of law was not made out. The council did not fail to identify the neighbourhood, the neighbourhood character and residential amenity when assessing the effects of the development and did not have inadequate information upon which to assess those effects. The second and third alleged errors of law were made out. The council did not properly consider the adverse effects of the building intensity of the development on the neighbourhood character, residential amenity, safety and the surrounding residential area because, in assessing those effects on the environment and on who may be affected persons: (a) the council considered matters which were not part of the existing environment and which were not permitted as of right under the AUP; and (b) the council did not turn its mind to the effects of building intensity, neighbourhood character and residential amenity in its consideration of the assessment criteria in H4.8.2 of the AUP. The fifth alleged error of law was not made out. The council's assessment of traffic effects was not unreasonable.

The Court considered relief. The Court was not satisfied that the proposal for a significant development was properly assessed in accordance with the RMA 1991 and the AUP. As a consequence, the applicants may have been deprived of their rights to be notified and to have their views taken into account before consents were granted. The Court was satisfied, therefore, that the applicants should be granted relief and that the decisions and the resource consents should be set aside. The Court quashed the decisions and the resource consents. The Court directed the council to reconsider the application, subject to any amendments 44VL might wish to make, and to reconsider who may be affected persons for the purposes of s 95E of the RMA 1991. As the successful parties, the applicants were entitled to costs on a 2B basis.

Decision Date 25 December 2021_ Your Environment 26 December 2021

~~~~~~

Bay of Plenty Regional Council v Faulkner [2021] NZDC 21536

Keywords: prosecution; coastal marine area; reclamation; contaminant; discharge to land; piggery; Māori land; abatement notice

This matter concerned charges brought by the Bay of Plenty Regional Council ("the council") against T Faulkner ("F") for alleged offences under the RMA. F was a resident and one of the proprietors of a property at Mount Maunganui. The western edge of the property was within the coastal marine area ("CMA"). On several occasions council officers observed construction waste such as concrete and fill deposited on the foreshore of the CMA, which created a platform that extended the property onto the foreshore. Council officers also observed liquid flowing from a piggery on the property, and samples collected from flowpaths and puddles between the piggery and the CMA revealed high levels of faecal bacteria. After serving F two abatement notices, the council filed several charges for offences under the RMA.

In relation to the construction waste, the Court found F guilty of reclaiming foreshore or seabed as prohibited by s 12(1)(a). The word "reclaim" was not defined in the RMA, but the Court accepted the council's submission that in the absence of a legislative definition, the definition in the council's coastal environment plan was appropriate to refer to. This broadly defined reclamation as an activity resulting in the "formation of permanent land located above mean high water springs from land that was formerly below the line of mean high water springs". The Court accepted that this had occurred.

F was also charged with an offence relating to s 12(1)(e), which provides that a person may not disturb any foreshore or seabed in a manner likely to have an adverse effect on plants or animals. F argued he should not be prosecuted for multiple offences in respect of the same act (ie the depositing of construction waste) because this would offend the rule against double jeopardy. However, the Court noted that s 12(1)(e) involved a distinct element of offending in that the disturbance must have occurred in a manner likely to have an adverse effect on plants
~~~~~~

or animals. Thus, the Court ruled that an additional finding of liability, separate to the reclamation offence, was possible. The Court heard evidence of multiple adverse impacts on plant and animal species and found that T had indeed contravened s 12(1)(e).

F also argued that some of the charges under s 12 were out of time because the depositing of construction waste had occurred in a very public place and the council should have been aware of these activities earlier. The Court disagreed, noting that the council does not have the ability to detect all offences at the time they occur. It ruled that the limitation period did not commence until the council became aware of these activities and none of the charges were out of time.

With respect to the piggery effluent, F was found guilty of permitting the discharge of a contaminant onto land in circumstances which may result in the contaminant entering water (s 15(1)(b)). The piggery was badly run-down with no effluent capture or treatment system. Accordingly, the Court found F's failure to manage the effluent constituted an offence. The Court agreed with the council's submissions that the term "may result" in s 15(1)(b) merely required that it is realistically *possible* that the contaminant could enter the water, and it need not be *likely*.

The Court also found F guilty under s 338(1)(c) of contravening an abatement notice he had been served, which required him to immediately cease discharging the piggery effluent. The Court was satisfied that the continued act of allowing effluent to be discharged could result in separate convictions for the core punishable act itself, and for failure to comply with an abatement notice to cease that act. F was also found guilty of one charge of failing to provide information requested by an enforcement officer under s 22(2).

In closing, the Court considered arguments by F that because his property was Māori freehold land, his reclamation activities were lawfully conducted in accordance with his rights as tangata whenua or mana whenua to exercise undisturbed customs and usage rights over Māori-owned land. He further argued that enforcement officers had had insufficient regard to the Treaty of Waitangi and/or tikanga when entering his property and collecting evidence. The Court dismissed these as valid defences, citing the decision in *Smith v Auckland Council* (1996) 2 ELRNZ 177 that requirements to have regard to Māori culture and traditions do not apply to offending under the RMA. Further, these cultural considerations did not completely abrogate officers' powers of entry under the RMA.

Decision Date 6 December 2021 _ Your Environment 7 December 2021

~~~~~~

Smith v Fonterra Co-operative Group Ltd [2021] NZCA 552

Keywords: Court of Appeal; nuisance; duty of care; environment

This appeal concerned tort proceedings by M Smith ("S") against seven large New Zealand companies ("the respondents"), alleging that the greenhouse gases emitted as a result of their business activities contributed to adverse effects of climate change.

S was a Māori elder and a climate change spokesperson for the Iwi Chairs Forum. The respondents operated businesses in industries spanning dairy, energy, steel production, petroleum and oil, and coal mining. S pleaded three causes of action in tort: public nuisance, negligence and a proposed new tort described as "breach of duty". He sought declarations that the respondents unlawfully caused or contributed to the effects of climate change or breached duties owed to S, as well as injunctions requiring each respondent to produce or cause zero net emissions by 2030. The High Court had struck out the claims in nuisance and negligence but declined to strike out the claim based on the proposed new tort.

At the outset, the Court of Appeal ("the Court") expressed the view that private tort proceedings were not an appropriate mechanism for addressing climate change. Not only would every entity and individual in New Zealand responsible for net emissions be liable in tort, but courts would also be practically unable to supervise complex remedies, such as ensuring companies achieve zero net omissions. The Court stressed that the problem instead required a sophisticated regulatory response with national and international cooperation. Nevertheless, the Court examined each tort claim in detail.

The Court agreed with the High Court that the public nuisance action was untenable but considered the High Court's reasoning to be erroneous. It did not agree that the public rights that S alleged the respondents had interfered with (being rights to public health, safety, comfort, convenience and peace) were not legitimate and found they were not in themselves a reason to strike out the claim. It also disagreed that the claim should fail because the respondents were
~~~~~~

conducting their business in accordance with all laws and regulations; it was not necessary, the Court ruled, for the respondents' activities to be unlawful – what mattered was that it caused common *injury.*

Instead, the Court concluded that the claim must fail because of the lack of sufficient connection between the pleaded harm and the respondents' activities. The Court disagreed that it should follow a number of English authorities that supported a "nuisance due to many" proposition. Those cases said a defendant may be liable even if they were simply one of *many* causing a nuisance. However, those cases involved a finite number of known contributors to the harm. In the present case, the effects of climate change had been caused by many actors worldwide. The Court ruled that the activities of the seven respondents could not be said to have a sufficient connection to the pleaded harm.

The Court agreed with the High Court that the negligence claim should also be struck out. There was not a sufficient connection between the parties in terms of a physical, temporal, relational or causal proximity. S would not be able to establish that "but for" the respondents' activities, he never would have suffered the harm claimed. The Court rejected S's arguments that the Court should follow examples in case law where claimants who had been unable to prove which *particular* potential defendant had caused the harm had an actionable claim because there was a "probability" a particular defendant had caused harm, or a defendant was said to be partly responsible proportionate to their "market share". In the present case, the class of potential contributors to the effects of climate change was virtually limitless. The Court also found that there were strong policy considerations against recognising a duty of care in the present case.

The Court also allowed the respondents' cross-appeal to strike out the new "duty" S had proposed, which the High Court had declined to do. S had asserted that the courts should recognise that the defendants owed a duty "to cease contributing to damage to the climate system". The Court rejected this as the pleadings were largely unsubstantiated and did not identify how any existing duty of care could be incrementally expanded to recognise the proposed new duty.

The Court made no award of costs. It recognised that climate change was an important issue to New Zealanders and found that S, who was represented pro bono, had acted in the public interest to test the legal boundaries of tort law. This was accepted by the respondents.

Decision Date 9 December 2021 _ Your Environment 10 December 2021

~~~~~~

Redmond Retail Ltd v Ashburton District Council [2021] NZHC 2887

Keywords: High Court; district plan; heritage value; building historic; existing use; safety

Redmond Retail Ltd ("RRL") appealed the decision of the Environment Court ("EC") in *Redmond Retail Ltd v Ashburton District Council* [2020] NZEnvC 78, (2020) 21 ELRNZ 848 that declined RRL's application for a change to the Ashburton District Plan ("the plan"). The change sought was to remove the heritage listing of the building at 229-241 West St, Ashburton, known as Peter Cates Grain Store ("the building"), from the plan's schedule of heritage buildings. RRL contended the listing under the plan made the land incapable of reasonable use and placed an unfair and unreasonable burden in terms of s 85(3B) of the RMA. The EC had concluded the heritage scheduling of the building did not make the land incapable of reasonable use. The EC remarked that it did not need to go further with its analysis, but observed that had it been required to reach a conclusion as to whether the heritage listing placed an unfair and unreasonable burden on RRL, the company would have faced the difficulties under the second limb of the s 85(3B) test as it did under the first limb of the test, namely that it was the financial difficulties arising from the need to undertake earthquake strengthening and comply with the requirements of the Building Act 2004, rather than the heritage listing in the plan, that created the financial difficulties that placed an unfair and reasonable burden on it.

The grounds of appeal relied on by RRL were: (1) the EC applied the wrong legal test, specifically with regard to s 85(3B)(a) of the RMA in that: (a) the EC wrongly held that available restricted discretionary and discretionary consenting pathways meant the land was capable of reasonable use; (b) the EC erroneously held that relevant characteristics of the land, namely the need to remediate the building to address its proneness to earthquake damage and its current physical state, were irrelevant impediments created by other legislation; (c) the EC failed to consider s 85(3B)(a) in light of the purpose and principles of the RMA as set out in pt 2;
~~~~~~

(d) the EC failed to properly apply s 85(3B)(b); and (e) the EC failed to assess the application against s 85(3C); (2) the EC made findings regarding existing use rights that were not available on the evidence; and (3) on the basis of its prior findings, the EC could not reasonably have come to its ultimate conclusion that the test in s 85(3B) was not made out.

The Court considered whether the EC had applied the wrong legal test. Regarding ground (1)(a), the Court did not consider the EC's identification of a number of restricted discretionary and discretionary activities that it considered could be undertaken on the land of itself involved any error of principle or resulted in the EC applying an illegitimate "bright-line" test.

Regarding ground (1)(b), the Court stated the essential issue that arose under this ground was whether the EC was correct to put aside the consequences to the landowner from the Building Act requirements and/or the earthquake strengthening notice when assessing whether the land was capable of reasonable use. The EC considered it was obliged to do so because those obligations arose separately from the plan and, insofar as they presented a potential impediment to the reasonable use of the land, they represented a financial impediment which, by reference to *Steven v Christchurch City Council* [1998] NZRMA 289, the EC held was not a relevant consideration when determining whether the heritage status imposed by the plan made the building incapable of reasonable use. RRL accepted that the s 85(3B)(a) test did not allow for consideration of the impact of other legislation. However, it maintained the earthquake-prone status of the building remained relevant to decision-making under the RMA. RRL described the building as earthquake "prone" and that, because of that factual state of affairs, the building was unsafe to be used. The Court found RRL's argument was reliant on its categorisation of the building as earthquake prone being tantamount to a finding that it was unsafe for any activity. Moreover, there was no suggestion in the evidence that the building could not be rendered "safe" by the necessary remedial work and earthquake strengthening, albeit at substantial cost. Any future decision-maker was likely to require compliance with the Building Act, or with any notice issued pursuant to that legislation to undertake the necessary seismic work. The impediment to RRL was therefore not the building's heritage listing under the plan but the legal requirements imposed by other legislation. To the extent it was necessary, the Court was satisfied the EC did consider the earthquake prone status of the building.

In ground (1)(c), RRL argued that the lack of any specific discussion of the statutory purpose, in particular the need to enable people to provide for their economic wellbeing and their health and safety, when assessing s 85(3B)(a) represented an error of law. The Court did not consider the EC erred in its treatment of potential economic impediments for the purpose of assessing whether the land was incapable of reasonable use. Further, the Court did not consider the reference to the pt 2 principles would have made any material difference to the interpretation and application of that part of the statutory test, particularly having regard to the balance of the matters set out in pt 2.

Regarding ground (1)(d), given the EC's findings regarding s 85(3B)(a), and that it did not consider it was necessary to go further in its analysis of RRL's application, the Court did not consider it was necessary to express a view regarding the obiter comments of the EC. As to ground (1)(e), the Court stated that the EC had already found the statutory test under s 85(3B) had not been met. In the absence of the statutory threshold having been satisfied, the EC had no power to exercise its jurisdiction. It followed that no error arose from not considering subs (3C).

Regarding ground (2), the Court accepted that the EC raised the issue of existing rights but only as a matter of conjecture. It followed that any contended error that the EC made was ultimately immaterial to its findings relating to s 85(3B)(a). Regarding ground (3), the Court did not uphold RRL's arguments: that the EC had held that neither the front nor the rear parts of the building were capable of reasonable use which was irreconcilable with its ultimate decision that the test in s 85(3B)(a) had not been satisfied; that the EC erred in relying on the availability of permitted activities when it concluded the land was not incapable of reasonable use; that there was no evidence on which the EC could find that the rear part of the building could be reconfigured for some of the activities provided for in the plan; that the EC's conclusion regarding the rear part of the building did not take into account the fact that that part of the building was effectively "landlocked"; and that EC had overlooked that the rear of the building could not be configured for some reasonable use without such work consequentially impacting on the front of the building. The appeal was dismissed. The Court found that the council as the successful party was entitled to costs on a 2B basis.

Decision Date 18 November 2021 _ Your Environment 19 November 2021

(Note – This situation is applicable throughout the country where old buildings that have been given heritage status in district plans and the owners are unable to economically repair and repurpose buildings that no longer meet earthquake safety standards. See also the cases involving a dangerous heritage building in Mount Eden, Auckland on ***View West Ltd v Auckland Council*** *_ [2018] NZEnvC 237 and* ***View West Ltd v Auckland Council*** *_ [2019] NZEnvC 95 in case-notes dated March 2019 and August 2019. – RHL)*

~~~~~~

Wolf 2008 Ltd v Whangarei District Council - [2021] NZEnvC 190

Keywords: resource consent; consent lapse; interpretation

This application for a declaration involved the interpretation of s 125(1A) of the RMA, which outlined how an applicant may apply to extend the lapse date of a resource consent that has not yet been given effect to. The key issue was whether a consent authority must make a decision on the application *before* the original lapse date in order for an extension to be possible under the RMA.

Wolf 2008 Ltd ("Wolf") had been granted a resource consent in 2011 to operate a new highway service centre at Ruakaka, which was due to lapse in 2021. Prior to the lapse date, Wolf applied to the Whangarei District Council ("the council") to extend the lapse date. The council did not make a decision before the lapse date. Wolf applied to the Court under ss 310 and 311 for a declaration as to the operation of s 125(1A). The text of s 125(1A) stated that a consent does not lapse on the date specified in the consent "if, before the consent lapses ... an application is made to the consent authority to extend the period after which the consent lapses, *and the consent authority decides to grant an extension* ... " [emphasis added]. It was common ground that this section required an application to be filed before the lapse date. However, Wolf and the council disagreed as to whether it also required that the consent authority make a decision before that lapse date.

The Court considered other provisions of the RMA and previous amendments to s 125 to ascertain the intention of s 125(1A). It agreed with the view in *Ruck v Horowhenua District Council* [2013] NZEnvC 175, [2013] NZRMA 415 that the intention was to provide "a generous period for implementation of decisions and the potential for repeated extension". The Court did not accept the council's argument that a consent authority's decision must be made before the lapse date in order for an extension to be possible. The Court noted that if that were the case, a consent authority could overcome an applicant's rights to object under the RMA simply by not making any decision by the lapse date. A further question then arose as to whether a decision to extend a lapse date made *after* the lapse date would have retrospective effect. The Court concluded this was not the case. It held that the lapse date does not change until, and if, an extension is granted, meaning that the consent cannot be utilised after the lapse date by the applicant until the application is granted. However, after the lapse date an applicant would still have rights of objection and appeal. Wolf's application to extend the lapse date was therefore subject to consideration and decision under the RMA.

The Court approved Wolf's application for a declaration. It suggested that both parties attempt to file a joint memorandum to propose final wording or, if this could not be achieved, each party submit their preferred wording. Costs were reserved.

Decision Date 7 December 2021 _ Your Environment 18 December 2021

(See also the report on Ruck v Horowhenua DC in Newslink Notes October 2013. In that case, the matter in contention was the failure of the plan to deposit within the three years specified in Section 224(h), notwithstanding that the resource consent was granted for the default period of 5 years, because the certification under Section 223 "gives effect to" the subdivision and Section 224(h) then applies – RHL.)

~~~~~~

Tasman District Council v Awaroa Aerodrome Ltd _ [2021] NZEnvC 184

Keywords: enforcement order; existing use; district plan; airfield; noise; interpretation; effect adverse; safety

This interim decision concerned an application by the Tasman District Council ("the council") under s 316 of the RMA for enforcement orders regarding use of a private airstrip at Awaroa in Golden Bay. The council alleged that use of the airstrip contravened land use rules in the Tasman Resource Management Plan ("TRMP"), while the respondents argued its use was

permitted under existing use rights.

For many years it had been assumed that use of the airstrip was lawful, but following an investigation into a noise complaint, the council concluded that existing use rights did not apply to the airstrip and that the owners and operators would need to obtain a resource consent. It sought enforcement orders against 18 parties (the respondents), being the company operating the airstrip and its director, the owners of the private land on which the airstrip was situated, and owners of other properties with registered rights of way for aircraft use. The proposed orders required the respondents to cease using the airstrip for plane and helicopter flights until a resource consent was in place.

All parties agreed that the current use of the airstrip contravened rules in the TRMP that specifically provided that airstrips, aerodromes and airports were not permitted without a resource consent. However, the respondents argued that use of the airstrip was permitted by the "existing use" provisions in s 10 of the RMA, which provided that land may be used in a manner that contravenes a rule in a district plan if the use was lawfully established before that rule became operative and the effects of the use are similar in character, intensity and scale to those which existed at that earlier time. The TRMP began to apply in 1996, when it replaced District Scheme Review No.2 ("DSR#2"). The parties agreed that DSR#2 also did not authorise the use of airstrips. However, the parties agreed that an earlier instrument, District Scheme Review No.1 ("DSR#1"), identified "Airstrips" as a use permitted as of right. That instrument was operative from 1982 to 1989.

The scope of the term "Airstrips" in DSR#1 was disputed. The council argued that this had to be narrowly interpreted in the context of other provisions of the relevant zoning rules at that time that perhaps suggested commercial activities were not allowed. It followed, according to the council, that the existing use of the airstrip for *commercial* charter flights was not lawfully established under DSR#1 in 1989. While the Court agreed that the current use was technically "commercial", it did not agree that commercial use was unlawful under DSR#1. "Airstrips" had been plainly permitted, without limitation, and the Court rejected the council's attempt to constrain the scope of that term.

The question then turned to whether the effects of the current use of the airstrip were similar in character and scale to those which existed before the current district plan (the TRMP) became operative. The council submitted that the relevant comparison point under s 10 of the RMA was 1996 when the TRMP replaced DSR#2, not 1989 when DSR#2 replaced DSR#1. The Court found that nothing turned on this because there was no material difference in the effects of air traffic at the airstrip between 1989 and 1996. The Court heard evidence from a number of witnesses and concluded that there had been approximately 250 to 300 fixed-wing aircraft movements per annum around 1989, but little (if any) helicopter use. While the number of fixed-wing flights had in fact decreased in the present day, there had been a significant increase in the volume of helicopter traffic. The Court noted that helicopters have a distinctive sound, which one respondent conceded was "pretty annoying". The Court found that this current sound "effect" of the airstrip's use was not similar to the effects in 1989. For this reason, the Court concluded that use of the airstrip was permitted under existing use rights in respect of fixed-wing aircraft, but not helicopters. The Court was prepared to treat these as two separate activities, declining to issue any enforcement order regarding aircraft use but directing the council to prepare and submit to the Court a proposed enforcement order prohibiting helicopter use until the relevant respondents obtained a resource consent.

The Court also considered an alternative submission by the council that its proposed enforcement orders were justified, including as to aircraft use, because the activities were "likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment" (s 314(1)(a)(ii) of the RMA). The council alleged that use of the airstrip produced adverse effects concerning noise, safety, amenity and rural character, natural character and wildlife values. The Court dismissed this claim, finding that the council had not produced any objective evidence measuring these alleged effects. Although the council had offered some witness statements from local residents who found the noise objectionable, the Court found these were not representative of everyone in the community. The Court said that s 314(1)(a)(ii) conveyed a level of "seriousness", and it questioned whether the witnesses had lost a sense of perspective about the noise of a single aircraft a few times a day during daylight hours.

The application for enforcement orders in respect of use of the airstrip by single engine, fixed wing aircraft was declined. The application for enforcement orders in respect of use of the airstrip by helicopters was to be granted, subject to the form of orders being settled. Costs

were reserved.

Decision Date 17 December 2021 _ Your Environment 20 December 2021

(Note – this situation is echoed in many rural areas where established noise-generating activities like heavy industries, gun-clubs and airstrips are becoming surrounded by residential developments. – RHL.)

~~~~~~

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.

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

~~~~~~

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

~~~~~~

Other News Items for February 2022

~~~~~~

"Townhouse bill" passes into law

Stuff reports that the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill has passed into law. From August 2022, councils will be forced to allow townhouses of up to three storeys with up to three dwellings on almost all residential sites in Auckland, Wellington, Christchurch, Tauranga, and Hamilton, as these will not require resource consent.

Read the announcement here.

This amendment to the RMA contains specific obligations on "Tier 1" territorial authorities (i.e. all major territorial authorities) which must following a prescribed process, and publicly notify a change to their district plans incorporating the objectives, policies and standards set out in the amendments to the RMA and its schedules.

The provisions will be operative from the date of public notification of the plan change, which must be on or before 20 August 2022. The rules in a proposed plan change to incorporate the new standards has immediate legal effect from the date of public notification.

Different provisions apply to other territorial authorities.

It is a permitted activity to construct or use a building if it complies with the density standards in the district plan once the plan changes are notified as required by section 77F. (Density standard means a standard setting out requirements relating to building height, height in relation to boundary, building setbacks, building coverage, outdoor living space, outlook space, windows to streets, or landscaped area for the construction of a building.)

Subdivision requirements must (subject to section 106) provide for as a controlled activity the subdivision of land for the purpose of the construction and use of residential units in accordance with clauses 2 and 3. – RHL

~~~~~~

How NZ's new planning law might radically alter supply

NZA takes us inside the latest changes to planning regulations, which could prove to be a game changer for property prices, especially in Auckland and Wellington. The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021, passed just before
~~~~~~

Christmas, radically altered planning requirements in New Zealand by increasing the number of storeys that can be constructed on a family home, offering a potential solution to the affordability crisis that many young people are facing. The act was passed with bipartisan support, reflecting the acknowledgment from both sides of the political spectrum that the supply of housing in New Zealand, especially in large cities, has become a major issue. Read the full story here.

~~~~~~

'Realistic pricing' likely to prevail in 2022 with single-digit value growth

Newshub reports that QV released its latest House Price Index on Thursday morning, revealing the average house in New Zealand is now valued at $1,053,315, an average annual increase of 28.4 percent for 2021. It's thought that "realistic pricing" will prevail in 2022 as house value growth is expected to slow into the single-digits after two years of unprecedented growth. It was reported by QV in December that three-quarters of major urban areas were still seeing an increase in the rate of quarterly growth. However, half are now showing a decline. Read the full story here.

~~~~~~

Raukūmara Range regeneration project

Radio New Zealand reports that the Raukūmara Pae Maunga restoration project is underway with the first group of workers being sent into the ancestral forest to cull deer and goats. In 2020 it was announced that $34 million was being given to Ngāti Porou and Te Whānau-ā-Apanui in partnership with the Department of Conservation Te Papa Atawhai to restore the mauri of the forest. Read the full story here.

~~~~~~

Luxury lodge proposal near Queenstown to be publicly notified

The Otago Daily Times reports that the developer behind a luxury lodge proposal near Queenstown has decided to publicly notify it after an unfavourable planning report. The proposal is to build 24 luxury villas, each on a freehold title, on a 1.8 ha site overlooking Bobs Cove. Read the full story here.

~~~~~~

Land purchased for Southland data centre

Stuff reports that Datagrid has bought a 43-hectare site in North Makarewa near Invercargill, where it plans to begin construction of a huge cloud computing facility later this year. The $1 billion-plus project would see Southland become a "green" hub for storing data and providing cloud computing services. Read the full story here.

~~~~~~

Healthy homes contributing to rent rises

Southland Times reports that the Government's healthy homes legislation appears to have resulted in improved living conditions for many renters. But it has also contributed towards rent rises for those tenants, an Invercargill property management business owner says. Leeann Tautari says "The industry has changed greatly in the last two years with [legislation] making it quite difficult for landlords and property investors." The healthy homes legislation meant landlords had to meet minimum standards for heating, insulation, ventilation, moisture and drainage when renting out their properties. Read the full story here.

~~~~~~

Heritage-listed High Flyers building looks set for development

Radio NZ reports that there are renewed hopes a long-awaited new development could return a Palmerston North inner-city eyesore to its former glory. The Edwardian, heritage-listed, former central post office, known to many as the High Flyers building, named after a bar, has been crumbling for the past five years since its last tenant moved out. In recent years plans to develop it as a bus shelter, retail space, conference venue and hotel, have come to nothing. However, city mayor Grant Smith has confirmed to RNZ that the building is finally subject to a sale and purchase agreement. Read the full story here.

~~~~~~
~~~~~~

'Eyesore' of a building attracts squatters, and ongoing criticism

Taranaki Daily News reports that Education House in New Plymouth has stunning views, but the site has sat empty for more than 10 years, attracting not only illegal tenants, but the dubious title of being one of New Plymouth's ugliest buildings - described online as an "eyesore". Members of the public are calling for action to either save the six-storey structure, which is land-banked and under the management of Toitū Te Whenua/Land Information New Zealand, or for it to be demolished. Read the full story here.

~~~~~~

Family builds sustainable home from clay

Stuff reports that tucked away in the small Horowhenua town of Shannon are two houses handcrafted from the earth and locally-sourced timber. Leigh and Joanna Harrington, and their four children, lived in the first house for 4 years, and moved into the second one, their current home, a bit over a year ago. The walls of the two houses were built using Adobe bricks that were handcrafted by the family and their friends using a combination of clay, wood shavings and paper pulp. The couple was assisted by a friend who is a builder and worked off plans that had been approved by the council. Read the full story here.

~~~~~~

Cyclone Cody: Hawke's Bay developer warns tenants council stormwater systems may not cope

Hawkes Bay Today reports that a Hawke's Bay commercial development company has warned its tenants the remnants of a cyclone in the Pacific could cause flooding that will overwhelm council stormwater systems in Napier and Hastings. Wallace Development Company Limited on Wednesday sent an email to tenants of its buildings in the region letting them know to be prepared for a cyclone. The email said council systems may not cope with the predicted amounts of rainfall and said if a tenancy had experienced any previous leaks then they should put out buckets to prepare to catch the water overflow. Read the full story here.

~~~~~~

'Massive' labour shortage on the West Coast amid housing market boom

The Press reports that houses on the West Coast are three times cheaper than the national average, but a labour and housing shortage is leaving local businesses desperate for staff. Property developer Geoff Ball began developing the Paroa Estate development subdivision in 2004, but the housing market took a nose-dive with the global financial crisis and the loss of mining jobs after the Pike River disaster. Ball said the region's housing market had turned a corner and there was now "massive" demand. The 49 sections in stage one of his Paroa Estate development near Greymouth had finally sold out after 18 years. Read the full story here.

~~~~~~

Environmental investors buy West Coast land to protect native species

Stuff reports that two Christchurch environmental philanthropists have bought large blocks of West Coast land to protect them from mining or logging and encourage the regeneration of native bush. One of the country's most high profile forensic scientists, Dr Anna Sandiford, and former police officer turned private investigator Glynn Rigby have bought separate blocks of land near Westport, for environmental reasons rather than as financial investments. Sandiford said she took out a mortgage to buy the property between Westport and Charleston late in 2021 as an "investment for my children and New Zealand" rather than for financial gain. Read the full story here.

~~~~~~

Classic Kiwi bach at Piha on open market for first time in 70 years

Stuff reports that a three-bedroom bach with two-room sleepout, on 862 square metres of land, has been listed on the open market for the first time since it was built in 1951. And, although it was sold more than 40 years ago, it was a private sale to neighbours. The property has a grandstand position opposite the Piha beach and is large enough to take a new build behind the old bach. Read the full story here.

~~~~~~

Average New Zealand house price exceeds $1 million for first time

Radio NZ reports that 2021 was a record year for the property market, seeing the national average value of a house top $1 million for the first time. CoreLogic head of research Nick Goodall said there was a persistently strong demand for residential property last year. All major centres saw their property values increase by at least 20 percent, with Christchurch having the highest rate, a new regional record of 38 percent. Read the full story here.

~~~~~~

'Pōkeno Piranha' property developer must pay out over $5m to jilted backers

Stuff reports that a property developer dubbed the 'Pōkeno Piranha' who served nine months' home detention for ripping off her co-investors has now been ordered to pay them over $5m after losing a civil case over the failed deal. The plan for a huge residential housing development on the fringe of the growing Waikato town of Pōkeno foundered when Xiaoling Shiu's business partners realised they had been duped into paying her $500,000 in 'finder's fees'. Read the full story here.

~~~~~~

Property market ends 2021 on a high

NZA reports that Corelogic NZ's latest House Price Index, covering property value changes last month, shows that some heat remained in the property market, although signs of a cooldown linger. Their head of research Nick Goodall commented: "2021 has truly been a remarkable year in the property market, with low-interest rates and the continued ability for most borrowers to secure finance both key contributors to persistently strong demand for residential property. It must be acknowledged though that both these factors are changing." Read the full story here.

~~~~~~

Fuming rental contacts Tenancy Services over alleged rental bidding

Stuff reports that an Auckland renter has been left fuming after the owner of a Silverdale property bumped the rent up and extra $50 per week after their online listing received an "overwhelming response". The resident said the rent hike strikes her as an investor exploiting a housing crisis, and has lodged a complaint with Tenancy Services, saying it breaches a law that prohibits rental bidding. The Ministry of Business, Innovation and Employment, which is in charge of Tenancy Services, is looking into whether the landlord had breached anti-bidding rules. Read the full story here.

~~~~~~

2022 - the year of moderation?

Stuff reports that if 2021 was the year of the property market, then 2022 may present some moderation. But property investors say there are still deals to be had, if you know where to look. People who had been pushed out of Auckland were likely to be looking elsewhere, he said, and it was still possible to buy a new property in Christchurch for $550,000 or $660,000. One investor, Graeme Fowler, said he would recommend any area with a population of at least 50,000, where investors could get a gross yield of 6 per cent. That is a measure of how much rent a property returns compared to its purchase price. Read the full story here.

~~~~~~

Company may apply to court for mine expansion under conservation land

Bay of Plenty Times reports mining company OceanaGold may choose to bypass Hauraki District Council consenting processes and apply straight to the Environment Court for its proposed mine expansion under public conservation land at Wharekirauponga between Waihi and Whangamata. Wharekirauponga is deemed nationally significant and a Significant Natural Area in the Hauraki District Plan. It is a stronghold for the critically endangered native Archey's Frog. Read the full story here.

~~~~~~

$496 m wastewater upgrade for Palmerston North

Stuff reports that the $496 million Nature Calls project will give Palmerston North the most modern wastewater treatment system in New Zealand. The project will take the city's kitchen, bathroom and laundry water and industrial wastewater and convert it into clear liquid just one reverse osmosis step away from clean drinking water. Read the full story here.

~~~~~~

Developer's battles over Palmerston North subdivision continue

Manawatu Standard reports that Aokautere Land Holdings Ltd and its owner Les Fugle have been locked in various legal battles relating to subdivisions in Palmerston North. Fugle has a history of issues with regulators and is attempting to get abatement notices issued in relation to a Palmerston North development overturned. “Abatement notices must be complied with at all times unless they are stayed or cancelled,” said Judge Brian Dwyer from the Environment Court. Read the full story here.

~~~~~~

New lease of life for heritage-listed Northland building

Northern Advocate reports that Lindy Davis and her family took ownership of the old Waipū National Bank of New Zealand building just over a year ago. It is listed as Category 2 with Heritage New Zealand Pouhere Taonga, limiting the work that could be done on it - what followed was essentially a hands-on apprenticeship in the rudiments of heritage restoration. "It was a beautiful building with essentially good bones, but I could see it slowly disintegrating," Davis said. Read the full story here.

~~~~~~M

Mt Iron land sold to Queenstown Lakes District Council for safekeeping

NZ Herald reports that the Queenstown Lakes District Council has bought nearly 100ha of land surrounding Wanaka's Mt Iron, to protect it from development. The land would be held in reserve for the community, while the owners, the Cleugh family, would retain 22ha of the former farm. The Department of Conservation already owned a reserve on Mt Iron and administered a popular 4.5km walking track to a lookout at the top. The council was negotiating with Doc about combining both reserves into one council-owned entity. Read the full story here.

~~~~~~

Māori trusts receive funding to provide 'whare for whānau'

Radio NZ reports that new papakainga housing is set to be built in Ngāruawāhia to provide safe and affordable homes for local whānau. Three sites managed by separate Māori trusts have been given funding to support infrastructure and building costs. The Māori trusts involved include Mary Roberts Kotahi Roberts trust, Tāwhia Te Ao Papakainga trust and Pareaute Epāpara Ahu Whenua Trust. It's a part of a joint initiative between each Māori trust, the ministry for housing and urban development and Te Puni Kōkiri which intends to increase the Māori housing supply across the region. Read the full story here.

~~~~~~

Lawyer engaged over West Coast stewardship land

Local Democracy Reporting reports that West Coast councils have engaged a specialist lawyer in the hope of gaining the government's ear as it launches the long-awaited review of stewardship land. More than two million hectares of land was parked in the 'stewardship' box under Conservation Department management, when the Forest Service and other government departments were abolished in the 1980s. About half of it is on the West Coast, where it makes up 30 percent of all public conservation land in the region, and cash-strapped councils are keen to see as much released as possible for development that could yield rates. Read the full story here.

~~~~~~

Could ‘build-to-rent’ be our solution to housing affordability?

Stuff provides opinion and analysis regarding the potential for 'build-to-rent' options within the NZ housing market. In a recent interview Professor Anthony Hoete, drawing on extensive experience in Britain, showcased a successful example of the architect-as-developer model (seen elsewhere but infrequently in New Zealand). So what is build-to-rent? It is a form of housing that’s developed with the intention that units will be retained by the developer as permanent rental properties. Read the full story here.

~~~~~~

2021 New Zealand's warmest year on record

Radio New Zealand reports that NIWA's annual climate summary states that 2021 had an
~~~~~~

average temperature of 13.56 degrees which was 0.95 degrees above average and became New Zealand's new warmest year on record. Read the full story here.

~~~~~~

Revival for Moriori, pushed close to cultural death

New York Times reports that a milestone came late last year when Parliament approved a settlement over historical injustices suffered by the Moriori. The government agreed to pay the group 18 million dollars, hand over a range of property and grant a degree of control over cultural sites important to the approximately 2,000 people who now identify as Moriori. The history of the Moriori is one of peaceful isolation and violent subjugation. Some archaeologists, argue that the Moriori descended from successive groups of Maori who travelled to the Chatham Islands from the New Zealand mainland, perhaps around the year 1500. Read the full story here.

~~~~~~

Construction could still be delayed despite record number of consents for new homes

Radio New Zealand reports that a lack of workers and materials may delay construction despite a record number of consents for new homes issued last year. Building Industry Federation chief executive Julien Leys said the industry would not be able to build all of the 48,522 new homes consented in the year to November 2021. Read the full story here.

~~~~~~
~~~~~~