Newslink Case-notes for May 2022   prepared 20 April 2022.

~~~~~~

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

- Two High Court appeals involving subdivision and development in the Queenstown area relating to effects on landscape and visual amenity;
- Another appeal about effects on landscape – this related to a pedestrian bridge across the Mataura River;
- An appeal by Wellington Regional Council against the grant of consent for a rural-residential subdivision at Whitemans Valley, Upper Hutt;
- The sentencing of a person who had undertaken unauthorized reclamation of land in the coastal marine area at Mount Maunganui;
- An unsuccessful appeal against a consent granted to another party by Auckland Council to demolish buildings and construct new dwelling units at Torbay, Auckland;
- A further decision amending an enforcement order against Auckland developers who had undertaken significant earthworks without resource consent. The enforcement order will now apply to successors in title of the land.

~~~~~~

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 MAY 2022:

~~~~~~

Guthrie v Queenstown Lakes District Council - [2022] NZHC 532

Keywords: High Court; resource consent; subdivision; landscape protection; character; visual impact

This was an appeal against a decision to decline resource consent for a residential subdivision on the grounds it would adversely affect landscape, character and visual amenity. The appellants had applied for consent for a 12-residence subdivision near Arrowtown in the Wakatipu Basin area. After the Queenstown Lakes District Council declined that application, the appellants appealed to the Environment Court ("EC"). The EC dismissed the appeal, finding that the proposal would have adverse effects on landscape, character and visual amenity, would be contrary to the operative plan and proposed plan in relation to those values, and would not accord with pt 2 of the RMA 1991. In these proceedings, the appellants were appealing the EC's decision, alleging three errors in law.

The first error argued by the appellants was the EC's failure to properly consider the zoning provisions in the proposed district plan ("the PDP"). The PDP divided the Wakatipu Basin zone into 24 landscape character units, and gave descriptions of the characteristics of each unit and a rating of each unit's capability to absorb development. The site in question was within a unit rated with "high" capability. The appellants argued that the EC failed to properly consider this development rating as well as the factors that explained why this unit had a high rating. They argued this should have been the "overriding" factor. The Court disagreed. It found that the EC had clearly considered and discussed the development rating, but nothing required it to treat this as the "overriding" consideration. Instead, the EC gave more weight to other planning provisions in the PDP, such as the stated purpose of the zone to "maintain and enhance the character and amenity of the Wakatipu Basin" as well as an objective of providing rural living opportunities "provided landscape character and visual amenity values are maintained or enhanced". It was for the EC to determine the weight to attach to all relevant parts of the PDP, and the weighting it gave a particular part could not be an error of law. Further, the Court found that a unit's description was a "broad" measure and that the potential to develop particular sites within a unit could vary. A site-specific assessment was required. Evidence from a landscape expert indicated that "the proposed development would take the landscape beyond the tipping point where its value as a rural edge to Arrowtown is significantly undermined". The Court also noted that the relevant zoning and unit description were still subject to change as a result of appeals on the PDP.

The second error alleged by the appellants was that the EC had incorrectly approached the minimum and average lot sizes expressed for the zone. The proposed subdivision sought by the appellants would be classed as a non-complying activity because the lots exceeded those general standards. The appellants alleged that the EC erred in interpreting these density standards as a guide to what might be considered the actual acceptable absorption capacity of the landscape. The Court rejected this and said the density standards were just one matter the EC took into account. It said the EC had regarded these standards only as indicating that capacity for development *was limited*.

Finally, the Court considered the appellants' third argument that the EC had allegedly found the landscape was "rural", which was a conclusion without evidence or one to which, on the evidence, the EC could not reasonably have come. The Court found that the EC had made no such categoric determination that it was "rural". In assessing effects on landscape character, the EC had acknowledged the existing residential uses and had described the proposed development as tipping the area into "more" rural-residential use. It had found that notwithstanding a retirement village and some nearby denser housing, there remained "a clear edge between the urban development on [one side] and the open space and rural character of the [other side]". The Court said the EC was entitled to make this finding as to the current character and had reasonably relied upon the evidence of landscape experts in doing so. The Court recognised the specialist nature of the EC and that it was entitled to make conclusions such as these from the evidence. The appeal was dismissed.

Decision Date 22 March 2022 – Your Environment 4 April 2022

(See previous report in case-notes – August 2021 – RHL)

~~~~~~

Waterfall Park Developments Ltd v Hadley [2022] NZHC 376

Keywords: High Court; declaration; district plan; farming; landscape protection; resource consent

This was an appeal of a decision of the Environment Court ("EC") to make declarations that the planting of trees along a property boundary was a non-complying activity and in breach of the RMA. Waterfall Park Developments Ltd ("Waterfall Park") owned land in the Speargrass Flat area of the Wakatipu Basin. One boundary of this property ran alongside the Queenstown Trail. In 2019 and 2020, Waterfall Park planted a variety of tree species along that boundary. Two local residents, J and R Hadley, applied to the EC seeking declarations that the planting was not a permitted "farming activity" under the Queenstown Lakes District Council Proposed District Plan ("PDP"), but rather "landscaping", which required resource consent. The purpose of the tree planting then become a matter of dispute; Waterfall Park had aspirations to develop the land for residential and retirement village purposes, but said that if it could not achieve the rezoning required to undertake that
~~~~~~

development, future use of the land would be limited to farming options. It allowed nearby farmers to graze some sheep on the property, but acknowledged the purpose of this was to ensure the property was looked after while it explored residential development possibilities. The EC agreed with the applicants that the tree planting was not a permitted "farming" activity and made declarations that it was non-complying under the PDP and therefore in breach of s 9(3) of the RMA 1991 (see *Hadley v Waterfall Park Developments Ltd* [2021] NZEnvC 18). In these proceedings, Waterfall Park was appealing the EC's decision pursuant to s 299(1) of the RMA 1991, asserting various errors of law.

The Court first examined whether the EC erred in finding that the planting was not a "farming activity". The PDP defined this as "the use of land and buildings for the *primary purpose* of the production of vegetative matters and/or commercial livestock" [emphasis added]. The EC had found that the planting did not meet this "primary purpose" test. The Court said the EC had applied the correct legal test because it was logical and uncontentious that the word "primary" required the purpose to be of "first importance" or the "chief" purpose. That was consistent with the wider context of the PDP, which aimed to protect landscape values in the area by controlling activities that could change them, unless it was an activity of recognised economic importance, eg for the primary purpose of farming. Further, the Court saw no fault with the EC's factual conclusions that the purpose of Waterfall Park's planting was not primarily for farming. Not only was there no evidence that the planting was required for the current farming activity, but the suggestion the planting might serve a shelterbelt purpose for farming in the future was speculative at best. Waterfall Park had acquired the land for residential development purposes, and it was only a *possibility* that the planted trees would have some utility to a farming owner in the future if the land remained zoned for rural use. It was also open to the EC – a specialist tribunal which had undertaken a site visit – to reach a factual conclusion that the land had little economic value as a farm due to its size.

The Court then addressed the argument that the EC erred in finding that a land use that did not qualify as a permitted activity defaulted to a non-complying activity under the PDP. Waterfall Park had submitted that the effect of the EC's "absurd" approach was that the planting of any tree in any rural zone not planted as part of an existing or future farming activity or a residential activity, and which fell within the definition of "landscaping", required consent as a non-complying activity. It argued that nothing in the PDP suggested it intended such careful scrutiny and control of day-to-day land uses, and that the EC had narrowly focused only on the immediate provisions and failed to consider wider contextual issues, such as the previous position under the operative district plan ("ODP") that planting for amenity purposes was permitted. The Court disagreed and concluded that the PDP did intend to exercise a high level of control over activities to achieve the stated objective of maintaining landscape character values. It also found that the outcome – requiring resource consent for tree planting outside of farming or residential purposes – was not an "absurd" one. Further, the Court said it was not an unintended consequence that the previous position under the ODP had been reversed. The s 32 report for the Rural Zone of the PDP supported this because that report said the PDP provisions had a "more prescriptive" approach than the ODP. The report also stated that because it was difficult to anticipate every potential activity, "requiring a resource consent for these activities that are not contemplated as a non-complying status directs attention to the objectives and policies of the District Plan to determine whether they are appropriate". This pointed to an intentional change to have greater control over the activities. The Court also highlighted specific policies in the PDP that suggested landscaping was intended to be subject to controls. The Court therefore concluded the EC had made no error of law. The appeal was dismissed. Costs were reserved. The Court expressed a preliminary view that Waterfall Park was liable to pay costs on a 2B basis and invited submissions in the event costs could not be agreed upon.

Decision Date 7 March 2022 - Your Environment 21 March 2022

(See previous reports in case-notes – August and December 2021 – RHL)

~~~~~~

Waimea Plains Landscape Preservation Society Inc v Southland Regional Council - [2022] NZEnvC 29

Keywords: resource consent; visual impact; amenity values; effect; district plan
~~~~~~

This was an appeal by Waimea Plains Landscape Preservation Soc Inc ("the Society") against a decision to grant resource consent for the construction of a dual-purpose bridge across the Mataura River. This was a joint decision of Gore District Council ("the district council") and Southland Regional Council, made by three independent hearing commissioners appointed by those councils. The bridge would serve as both a single-span pedestrian and cycle bridge and a supporting structure for a pipeline that would connect drinking water reticulation networks. The commissioners had acknowledged that the proposal would have significant adverse visual amenity effects associated with visual dominance for the dwellings closest to the site of the proposal. However, they effectively weighed this against the benefits to the community, reaching a conclusion that the benefits outweighed those adverse visual effects for some residential properties. They acknowledged that it was a "close call", but granted consent for the proposal. The Society then appealed the decision to grant consent in its entirety.

The Court assessed the considerations required to be taken into account under s 104 of the RMA and it considered the relevant provisions in the Gore District Plan. In particular, it focused on Chapter 5: Transportation. The relevance of this chapter was in dispute; the district council had argued that the bridge was a "utility" and that another chapter on utilities prevailed over this transportation chapter. The Court disagreed. It took the view that the bridge had a dual function and the transportation provisions were therefore equally relevant. These provisions were central to the Court's ultimate decision in these proceedings. Objective 5.3(3) in that chapter was to "[p]rotect where practical the quality of the adjoining environment and amenity values from the adverse effects of the land use of land transport routes". The Court held that in the context of this provision, the bridge was to be regarded as a transport route for pedestrians and cyclists. It also found that the quality of the adjoining residential environment would *not* be protected from the adverse effects of the bridge. Further, Policy 5.4(2) was to "[c]ontrol, where practical, the adverse effects of land transportation networks and their use on the adjoining environment and amenity values". In the Court's view, this terminology implicitly recognised that alternative options should have been considered, that is, for the control of the relevant effect. The Court said, in taking this approach, it was guided by the Supreme Court decision in *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc* [2017] NZSC 199, which "supports giving colour to the word 'practical' from its policy context".

The district council, as applicant and respondent, had undertaken some assessment of alternative locations for the bridge, but this was deficient in two respects. First, during the application stage, it had failed to consider the critical visual and amenity effects in its assessment. Although it had attempted to rectify this at the council hearing stage, the alternative options considered then were based on a "desktop" analysis; its assessment was not based on a site visit, and the Court noted from its own site visit that this would have provided valuable insight for the district council's assessment. The Court therefore considered that this assessment was not adequate. Secondly, in these proceedings no evidence on the consideration of alternatives had been provided to the Court because the district council's case was that the effects on visual amenity were not significant, so according to the district council, the statutory requirement to consider alternatives was not triggered. The Court concluded that these issues had not been adequately addressed in the case presented.

The Court determined that the proposal was inconsistent with Policy 5.4(2) to the extent that consent should not be granted. Although the proposal had some benefits for the community, the district council would need to submit a revised proposal that addressed the deficiencies in its earlier assessment. The application for resource consent to construct the bridge and associated infrastructure was declined.

Decision Date 11 March 2022 – Your Environment 31 March 2022

~~~~~~

Greater Wellington Regional Council v Adams - [2022] NZEnvC 25

Keywords: enforcement order; wetland; subdivision; national policy statement; regional plan

This application for enforcement orders by the Greater Wellington Regional Council ("the regional council") concerned claims that controls for a land subdivision were inadequate
~~~~~~

because the land had more extensive wetlands than was identified at the consent stage. A rural-residential subdivision had been undertaken, with consent of the Upper Hutt City Council ("the city council"), at Whitemans Valley, Upper Hutt. As a result, the land was subdivided into 12 lots, which had all been issued and sold. To protect the wetlands that had been identified on lots 6 and 7, the consent included some restrictions for those lots regarding the location of buildings, earthworks, and effluent disposal systems, as well as more general protective requirements for all 12 lots. However, the regional council was concerned that the subdivision consent had been granted on the basis of inadequate information about the true extent of the wetlands. It alleged that the wetlands comprised a much larger area impacting lots 1 to 7 (including almost 100 per cent of lots 1 and 6). To remedy this, it sought various enforcement orders pursuant to s 314 of the RMA 1991. The respondents in these proceedings included the owners of lots 1-7, the parties involved in the subdivision and development, and the city council. The enforcement orders sought would broadly change the resource consent granted by the city council to reflect the "natural wetlands" delineated by the regional council's expert. This would mean these areas were captured by the natural wetlands provisions in the Proposed Natural Resources Plan for the Wellington Region ("PNRP") and the National Policy Statement for Freshwater Management 2020 ("NPS-FM"). This would result in significant new restrictions, including that no house could be built on any part of lots 1 and 6. The proposed orders would also require relevant respondents to develop, implement and pay for a wetland restoration management plan to remedy alleged damage to the wetlands.

The key issue before the Court was the whether the regional council had correctly identified the areas in contention as "natural wetlands" as defined in the PNRP and NPS-FM. The respondents argued that the areas met specific exclusions contained in those instruments – namely, the "pasture" exclusion in the PNRP definition of natural wetland (being wetted pasture or pasture with rushes) as well as the "improved pasture" exclusion in the NPS-FM definition of natural wetland (being pasture containing at least 50 per cent exotic pasture species and which is subject to temporary rain-derived water pooling). The Court considered there was an evidential burden on the respondents to place "sufficient probative evidence before the Court to raise the reasonable possibility" that the exclusions applied. Then, if there was probative evidence of this kind, it would be incumbent on the regional council to negate that proposition on the balance of probabilities.

The Court concluded that both exclusions applied. In relation to the PNSP "pasture" exclusion, it noted that a senior terrestrial ecologist from a consulting firm hired by one of the respondents had produced a report that concluded the areas studied constituted "pasture". The regional council did not necessarily dispute the methodology used in the report, but argued the conditions at the time represented an "atypical" situation, brought about by works the respondents had undertaken on the site, that should not have been used to determine whether the pasture exclusion applied. The Court disagreed. It found that these works (consisting of mowing, soil ripping and claims of drain deepening) were either unsubstantiated, had no effect on the vegetative cover, or had an effect that could be described as resulting from "typical" farming activities, notwithstanding that the works were performed by subdividers and not farmers. The Court was therefore satisfied the ecologist's report was accurate. Further, even if the report was inaccurate on the grounds of "atypicality", the regional council had not made any further comprehensive enquiry as to what the vegetative state typically was, but merely assumed it did not qualify as pasture. The Court also found that the NPS-FM exclusion applied, as both the 50 per cent exotic pasture and temporary rain-derived pooling tests were met. Regarding the pooling test, the Court rejected the regional council's argument that this test required the absence of wetland hydrology. The Court expressed concerns about using the wetland hydrology tool found in guidance published by the Ministry for the Environment, not only because that guidance was not law but also because it did not appear to be an appropriate tool for this purpose.

Although it had found that the exclusions applied, the Court nevertheless considered whether the areas could have constituted a natural wetland under the PNRP or NPS-FM. It said the onus lay with the regional council to prove this, and found that it had failed to do so by a "massive" margin. The evidence of the regional council's expert (who delineated the "natural wetlands" alleged in these proceedings) was not supported by other evidence heard at trial. Further, another independent witness provided by the regional council itself could not conclude the areas were "natural wetlands". The Court concluded not only that the regional

council had failed to prove the areas were natural wetlands, but also that the evidence pointed to a contrary conclusion.

The application for enforcement orders was dismissed. Costs were reserved in favour of the respondents. The Court directed the regional council to provide a response addressing the issue of the Court's costs pursuant to s 285(3) of the RMA 1991. The Court indicated it was inclined to consider such an award in light of the regional council's failures to substantiate the grounds of its application, to undertake a more comprehensive assessment of the site and to provide adequate expert evidence.

Decision Date 4 March 2022 – Your Environment 23 March 2022

See news report 18 March 2022

Stuff reports that the Greater Wellington Regional Council insisted that there were wetlands which needed protecting, at the site of a subdivision in Upper Hutt's Whiteman's Valley. This contention has been thrown out by the Environment Court, which said the council had failed to prove their case by a "massive margin". The subdivision had already been approved by the Upper Hutt City Council with a few isolated wetlands on the edges already being protected. Read the full story here.

~~~~~~

Bay of Plenty Regional Council v Faulkner _ [2022] NZDC 2754

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

This was the sentencing of T Faulkner ("F") for offences relating to unlawful depositing of waste within the coastal marine area ("CMA") and the discharge of pig effluent on land adjacent to water. F was tried and convicted by the Court in November 2021 (see *Bay of Plenty Regional Council v Faulkner* [2021] NZDC 21536).

F was one of the proprietors of a property at Mount Maunganui. One edge of the property was within the CMA, namely Waipu Bay on the edge of Tauranga Harbour. Officers from the Bay of Plenty Regional Council ("the council") had observed large volumes of construction waste such as concrete and fill deposited on the foreshore of the CMA, which created a kind of platform that extended F's property onto the foreshore. This covered an area of $979m^2$. 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. F was charged with and found guilty of offences of: reclaiming foreshore or seabed (s 12(1)(a) of the RMA); disturbing foreshore or seabed in a manner likely to have an adverse effect on plants or animals (s 12(1)(e)); permitting the discharge of a contaminant onto land in circumstances which may result in the contaminant entering water (s 15(1)(b)); contravening an abatement notice (s 338(1)(c)); and failing to provide information requested by an enforcement officer under s 22(2).

The Court noted that there were a number of aggravating factors in this offending. First, this area in Tauranga Harbour was one of ecological and cultural importance. Second, the effects of the offending were serious; these included loss of indigenous plant cover, the likely death of indigenous marine fauna, loss of habitat, short-term sedimentation, compaction of underlying intertidal flats, and contamination with faecal bacteria, which was potentially harmful to fauna and human health. The Court concluded that the offending "has resulted or is likely to have resulted in serious actual and potential effects to an area of particular significance and sensitivity". In examining F's culpability, the Court found his actions were deliberate, sustained and unrepentant. The evidence suggested that in depositing the construction waste, F had intentionally set out to create "something similar to Memorial Park" for his whānau. Although he had not directly gained anything financially, the reclamation had extended the usable area of his property to a material extent, which (if it had remained in place) may have improved the property's value. The Court also noted that F had been involved in creating a fictitious document that he held out to both the council and the Court as amounting to permission for the work. In relation to the discharges of pig effluent, the Court said F's failure to take any steps to remedy the problem after he had received an abatement notice was "shameful". The Court also took into account F's attitude towards council investigations and court proceedings. Not only did he fail to provide information to enforcement officers, which impeded their investigation, he also refused to comply with the
~~~~~~

Court's direction to provide the requested information, demonstrating contempt for his legal obligations. F had also been uncooperative with council officers, evading the service of documents and locking a gate at his property to prevent access. At all times, F had shown no remorse for his offending.

Turning to the appropriate penalty, the Court rejected F's submission that it ought to take into account the mahi apparently imposed through a Paa Kooti process in light of the decision in *Oneroa-Hill v District Court at Tauranga* [2017] NZHC 2471. It said F had overstated the position in that case, and that that case had plainly stated that an order of mahi has no formal legitimacy as an enforceable court-sanctioned order. It was therefore not a relevant consideration. The Court said that if it were to impose a financial penalty, it would be inclined to set a global starting point for all charges of $200,000. However, it determined that a fine was not appropriate; not only was the Court not satisfied that F had the ability to pay such a fine, it did not believe the fine would achieve the purposes of sentencing set out in s 7 of the Sentencing Act 2002 in terms of holding F accountable or promoting a sense of responsibility in him. The Court also concluded that neither home detention nor community detention were appropriate; instead, only a term of imprisonment would achieve the sentencing purposes. For comparative purposes, the Court carefully considered the decision in *Auckland Regional Council v Lau* [2018] NZDC 1133, in which a sentence of two months and two weeks' imprisonment was imposed. The Court said F did not have the same extensive enforcement history as the defendant in that case, but F's offending was more serious given the sensitivity of the environment involved. The Court then determined that a sentence of three months and two weeks' imprisonment was appropriate. It also concluded that F should contribute towards the council's costs, as he had put the council to proof on every element of every charge laid against him.

F was sentenced to three months and two weeks' imprisonment. He was ordered to pay costs of $5,000 to the council.

Decision Date   17 February 2022 Your Environment 29 March 2022

(See previous report in Newslink case-notes February 2022 – RHL.)

~~~~~~

Nevin v Auckland Council – [2022]NZEnvC024

Keywords**: **jurisdiction; resource consent

This was an appeal by C Nevin ("N") against a consent granted to another party by Auckland Council ("the council") to demolish buildings and construct new dwelling units at Waiake (Torbay). After N filed her appeal, it was revealed she had not made a submission on the consent application at the council-level hearing because she had not been notified of the application. The Court therefore agreed with the council that it had no jurisdiction to hear the appeal because N did not fall into any of the categories of persons in s 120(1) of the RMA 1991 who had a right of appeal against a resource consent decision.

Decision Date 28 February 2022 _ Your Environment 22 March 2022

(Note - that Ms Nevin was <u>not</u> an affected party as she had not been a submitter to the Council hearing, but was a <u>witness</u> for a submitter to the Council hearing. - RHL.)

~~~~~~

Auckland Council v Banora _ [2022] NZEnvC 45

Keywords: enforcement order; error; earthworks

This application to vary existing enforcement orders was made to ensure that obligations to refrain from undertaking earthworks at a property and to remediate the site would extend to future purchasers of the property. In 2016 the Auckland Council ("the council") had observed significant environmental issues at a property owned by Mr and Mrs Banora ("the Banoras") as a result of earthworks undertaken without resource consent. The council had then successfully obtained interim and final enforcement orders against the Banoras, which required them to cease and not recommence earthworks and to stabilise the site. In these proceedings, the council said it had learned that the Banoras had recently listed the property for sale. However, the majority of the remediation work required under the enforcement orders had not yet been completed, despite the deadline for compliance having passed in

2020. The council had received a quote from engineers indicating that it would cost the council over $200,000 to complete the work. The council therefore sought a variation to the enforcement orders to ensure that the Banoras' existing obligations would extend to their personal representatives, successors and assigns, with "successors" to include any subsequent purchasers of the property. The Banoras opposed the application, but did not enter any argument that specifically addressed the variation being sought. Instead, their response included allegations and arguments about historical aspects of this enforcement action, which the Court found did not concern the specific issue for determination in these proceedings.

The Court noted that s 314(5) of the RMA 1991 provided the Court with the power to impose an enforcement order on successors, and that the definition of "successor" in the RMA 1991 broadly encompassed subsequent purchasers of property. However, s 314(5) stated that an enforcement order shall apply to successors "if the court so states", which was why the council was seeking the Court's approval to vary the order by including this requirement. The Court also reviewed case law on s 314(5) and noted that the Court had previously held that an order could extend to successors and assigns where the purpose of the enforcement order was to impose obligations in respect of *the land* as well as the respondent (see *Auckland Council v Waiwera Heights Country Club Ltd* [2016] EnvC 117).

The Court noted that in this case, when the council had first applied for enforcement orders in 2016, the council had specifically requested that they apply to successors. However, for reasons that were not clear, this had been omitted from the wording of the orders made. The Court reviewed that earlier matter and concluded that the wording had been omitted purely as an oversight because the issue of binding successors was never raised in proceedings. The Court could not identify any reason why the orders would have been made so as to intentionally exclude successors. The Court agreed with the council that the variation sought in these proceedings could be viewed as a rectification of that earlier mistake. The Court also noted that the Banoras had not provided any relevant argument in these proceedings as to why the variation should not be made. The Court was therefore prepared to make the variation.

The application for variation was granted. The Court said that although the council would usually be entitled to costs, in this case the Court would not make any costs order as the variation had been necessary to address a mistake in prior proceedings on the original application that was not the fault of either party.

Decision Date 25 March 2022 _ Your Environment 18 April 2022

(See previous reports in case-notes –December 2019. There were earlier court decisions issued in 2016 and 2017 but were not reported in Newslink. If interested - see Auckland Council v Banora [2016] NZEnvC 246 and Banora v Auckland Council [2017]NZHC 1705. – 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 May 2022

~~~~~~

Environment Court issues decision on appeals against Mangawhai Central Private Plan Change

Voxy.co.nz reports that the Environment Court has given approval to Mangawhai Central's Private Plan Change 78 to the Kaipara District Plan. Through a series of mediation meetings and direct discussions, parties to the Mangawhai Matters appeal (including Kaipara District Council) were able to reach agreement on this appeal without going to court. Read the full story here.

~~~~~~

Easement granted to developer to build wall over Whangārei District Council land

Northern Advocate reports that an underground wall will be built to protect slips on a new housing development in Whangārei, not far from areas earlier identified in geotec reports as risky. Whangārei District Council has allowed land developer TDC Ltd easement over a council-owned esplanade reserve adjacent to the Kotātā Heights subdivision in Morningside for the installation of the underground palisade wall. Read the full story here.

~~~~~~

One step closer to resolution of Māori land occupation

One News reports that a couple at the centre of a Māori land occupation in the Far North have met with those occupying their land in a bid to reach a solution. The couple, who purchased the land more than 10 years ago, weren't aware of its cultural significance until a local Hapū began camping on their property, at the coastal community of Ahipara. Far North Councillor Felicity Foy told 1News: "When this site was subdivided there was an original consent on the title which gave specific protection to that tree the environment court changed that and removed that protection from the tree." Read the full story here.

~~~~~~

Helipad planning putting archaeological sites at risk

Radio NZ reports that Heritage New Zealand wants helipad planners to give more consideration to the wealth of archaeological sites on Aotea Great Barrier Island, in advance of six proposed helipad sites. One is near an urupā and site of a significant battle between Māori at Waitematuku/Medlands Beach. At least 800 archaeological sites on the island are identified in Auckland Council's Cultural Heritage Inventory and the Archaeological Association's database, Pouhere Taonga / Heritage NZ said. Read the full story here.

~~~~~~

Plan to set up 3000-hectare ecosanctuary in Wainuiomata

Radio New Zealand reports that a 3000-hectare ecosanctuary is proposed for Wainuiomata, Lower Hutt. The project would see 29 km of predator fencing around native bush which would then be restocked with kākāpō and other endangered birds. Read the full story here.

~~~~~~

Company allowed to search for oil and gas off Taranaki coast

Stuff reports that Greymouth Petroleum has been given permission to conduct a massive seismic survey off the coast of Taranaki. The crown minerals regulator has allowed Greymouth Petroleum to "piggyback" off an existing mining permit to survey an adjacent area of more than 260 square kilometres. Read the full story here.

~~~~~~

Eco-apartments proposed for Nelson's Buxton Square

Stuff reports that Nelson city councillor Matt Lawrey has unveiled a plan for 56 "eco" apartments above the open-air council car park in Buxton Square, Nelson. The four-storey block would have trees and shrubs planted on its balconies and roof, with only timber columns, lifts, stairs, a toilet block and bike storage touching the ground. Read the full story here.
~~~~~~

~~~~~~

First building installed as part of Scott Base redevelopment

The New Zealand Herald reports that the first new building has been installed as part of the multi-million-dollar upgrade of New Zealand's Antarctic outpost, Scott Base. The small building will support several science experiments. Read the full story here.

~~~~~~

Court to consider whether Rakaia River water conservation order breached

Newsroom reports Environmental Defence Society has announced it has agreed in principle to seek – jointly with Canterbury's regional council, ECan, and statutory body Fish & Game – an Environment Court declaration over an unpublished scientific report, leaked from within ECan, which said there was evidence a water conservation order on the Rakaia River was being breached, and too much water was being taken by irrigators, who were occasionally breaching consent limits. Read the full story here.

~~~~~~

Floods, wastewater overflow and missing fluoride: What will it take to fix NZ water?

The New Zealand Herald has published an article on the recent problems with New Zealand's water management. "Right after it was revealed that Wellington hasn't had fluoride in its water for months, streets across Auckland flooded due to problems with stormwater systems, and this was then shortly followed by floods and wastewater spillage in the capital." The article asks whether this cacophony of issues push the public toward greater acceptance of the Government's plans to revamp water management across the country. - Read the full story here.

~~~~~~

Signs to combat the increasing wallaby population

Otago Daily Times reports that if left unchecked, wallabies are estimated to potentially spread to cover more than a third of the country over the next 50 years. To prevent this from happening, the Otago Regional Council and Environment Canterbury are asking the public to report any sightings of wallabies outside the Canterbury containment area, and have erected signs as a reminder to the public. While the Bennett's wallaby remains in a 900,000ha containment area in South Canterbury, where populations were established for recreational hunting in the 1870s, the animals have been steadily increasing in density and geographic range. Read the full story here.

~~~~~~

The waterfront land with a poisonous past

Stuff reports that for decades the erstwhile NZ Defence Force landfill at Whenuapai was used as the dump for both the Whenuapai and Hobsonville bases. It's now been capped, but there are concerns about its environmental impact. In the time of a housing crisis and a squeeze on public land, many drive past and wonder: why is it empty? The land spans about 1.43 hectares, rolling green beneath which lie contaminated waste and soil piled up to 13 metres deep. Read the full story here.

~~~~~~

New insurance bill following "years of effort"

Insurance Business NZ reports that the New Zealand insurance market is undergoing a transformation – with reforms including the Financial Markets (Conduct of Institutions) Amendment Bill, the new financial advice licensing regime, the Insurance Contracts Bill, and now being added to the mix is the recently introduced Natural Hazrds Insurance Bill. Sacha Cowlrick, executive general manager of Suncorp NZ, opined “The Natural Hazards Insurance Bill follows years of effort by the government and the insurance industry to improve New Zealand’s recovery from natural disasters". Read the full story here.

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

Environment groups outraged at proposed drinking water standards

Radio NZ reports that environment groups are outraged at a proposal by the brand new water regulator to increase the amounts of some toxic chemicals allowed in drinking water. Pesticide Action Network NZ coordinator Dr Meriel Watts says it is "bizarre" and "unjustified". Taumata Arowai is a key pillar of the Government's Three Waters reform programme - and came out of the inquiry into the Havelock North's drinking water supply contamination outbreak. Read the full story here.

~~~~~~

Helping the environment, one chip packet at a time

The *Northern Advocate* reports that Northland school students are getting behind an initiative called the Chip Packet Project. Those behind the project collect freshly-washed chip packets, or any foil-wrapped food item, before fusing them together with an iron to create "survival sheets" like thermal blankets for those in need, such as the homeless. "I am into helping the environment by reducing pollution, deforestation and the like" said one Kamo Intermediate student. Read the full story here.

~~~~~~

Wasp wipeout gets support from trans-Tasman forestry

Stuff reports that trans-Tasman forestry company, OneFortyOne, has joined the fight to take New Zealand's forests back from wasps and return it to our native birds. OneFortyOne has put $10,000 towards this year's Wasp Wipeout programme. Company spokeswoman, Kylie Reeves, said the project was one that aligned with both the company's wider sponsorship goals to positively contribute to the environment and to the community. Read the full story here.

~~~~~~

Developers of Waiheke's Kennedy Point Marina able to capture and move kororā/little blue penguins

Stuff reports that the Department of Conservation has granted authority under the Wildlife Act for approved handlers to capture, handle and relocate kororā during construction work on Waiheke's Kennedy Point Marina. DOC says granting the authority was in the best interests of kororā welfare and would ensure their physical safety. Read the full story here.

~~~~~~

Work on the next stage of Wanaka's lakefront upgrade to begin

The Otago Daily Times reports that Queenstown Lakes District Council has announced construction on stage two of the Wanaka Lakefront Development Plan will start on April 11. Stage two will see the implementation of a shared pathway on the lakefront and there will be 110 new car parks and four accessible spaces added along the lake side of Ardmore St. Read the full story here.

~~~~~~

Site restoration a boost for tribe's emotional connection to land

Radio NZ reports that historically-significant sites in and around Tongariro National Park are to be restored by Ngāti Tūwharetoa hapū as part of a new Jobs for Nature project. Conservation Minister Kiri Allan announced half a million dollars of funding for the project on Tuesday. Other sites will benefit from extensive riparian planting to better manage run-off and improve water quality in rivers and streams. "The project marries tikanga, Te Ao Māori and mātauranga Māori with western science and environmental and conservation tools", Allan said. Read the full story here.

~~~~~~

Proposed Westcoast mine scrutinised

Stuff reports that the Westland Mineral Sands mining proposal, for a mine at Cape Foulwind, has been described by an opponent as "incomplete", with respect to the company's assessment of environmental effects. The opponent is Mark Buckley, a planning officer at the Waimakariri District Council, with previous environmental assessment experience for the

Department of Conservation. Buckley maintained both the West Coast Regional Council and the Buller District Council should decline the application based on the "incomplete assessment" of environmental effects and adverse effects on natural character, at the proposed consent site. Read the full story here.

~~~~~~

Inquiry announced into lack of fluoridation in Wellington water

Newshub reports Wellington Water's board chair Lynda Carroll has commissioned an independent inquiry into why the company stopped fluoridation of Wellington's water supply and why the board was not told. Initially it was reported that fluoridation had been halted for a month, however Carroll said that information was wrong and it was stopped at one plant in May 2021 and at another in November 2021. Read the full story here.

~~~~~~

New Mount Victoria mountain bike track plan hits resistance

Dominion Post reports a proposal for a 1.4km mountain bike trail along the eastern side of Mount Victoria in Wellington is being met with opposition from residents and conservationists. Trails Wellington operations manager Tom Cappleman said the location was an area of low ecological value and currently inaccessible to cyclists or pedestrians. The group plans to plant native trees alongside the new trail, and improved access would enable other conservation work. Read the full story here.

~~~~~~

Hydrogen factory - create more issues than it solves?

Stuff reports that a large green hydrogen factory could create more problems – and emissions – than it solves, warned Parliamentary Commission for the Environment Simon Upton. If made from renewable electricity, hydrogen is a low-carbon source of energy and may one day be used for metal-making, shipping and aviation. But it relies on an inefficient process: up to 30 per cent of energy is lost in the manufacture of green hydrogen. Read the full story here.

~~~~~~

Council turns down request for school site

The Otago Daily Times reports that Queenstown Lakes District Council councillors voted unanimously to decline a Ministry of Education request to use all, or part of, a property at 516 Ladies Mile for a future high school. The ministry still has the option to go through a compulsory acquisition process under the Public Works Act. Read the full story here.

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