Draft Newslink Case-notes for March 2023 prepared 20 February 2023.

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Legal Case-notes March 2023

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We would appreciate comments and suggestions from members on content, format or information about cases that might be of interest to members as not all cases may have been reported in "Your Environment".

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

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

- A consent order settling an appeal following refusal by the Waikato District Council to consent for a non-complying subdivision of a rural property at Eureka, with two existing houses on it;
- A successful appeal against enforcement orders issued by Southland District Council alleging unlawful clearance of regrowth of indigenous vegetation at Te Anau Downs Station;
- An unsuccessful high court appeal against a decision of the Environment Court on an appeal against granting of consent by Palmerston North City Council on an application for resource consent made under a trading name rather than the applicant's correct legal identity;
- A decision on appeal against a requirement of NZTA – Waka Kotahi to require certain land to be taken for road safety improvements on SH 16 between Huapai and Waimauku;
- The settlement by consent of an appeal against a decision of QLDC to grant consent to establish a walking & cycling track alongside the Kawarau River;
- Settlement by consent of appeals against granting approval for dredging of marine areas by Ports of Auckland Ltd;
- The successful prosecution by Greater Wellington Regional Council of landowners of a property on which a private wastewater system was sited but protected by an easement.

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CASE NOTES MARCH 2023:

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Jones v Waikato District Council - [2022] NZEnvC 216

***Keywords**: consent order; subdivision; conditions*

This consent order concerned an appeal against a decision of the Waikato District Council ("the council") to decline an application for subdivision consent to create one additional lot at a location in Eureka. Following discussions, the parties had filed a consent memorandum outlining their agreement that the consent could be granted subject to appropriate conditions. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the subdivision consent was granted, subject to the conditions agreed by the parties. There was no order as to costs.

Decision date 28 October 2022 - Your Environment 16 November 2022.

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Southland District Council v Chartres - [2022] NZEnvC 215

Keywords: existing use; tree protection; forest indigenous; district plan rules; enforcement order

This was an application by the Southland District Council ("the council") for enforcement orders against a farmer who, the council alleged, had been unlawfully clearing vegetation. P Chartres
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("C") was a third-generation farmer at a property known as Te Anau Downs Station ("the Station"). He had taken over the Station in 1984 following his father's death. The council alleged that C had been clearing indigenous vegetation in breach of district plan rules since 2001. It now applied for enforcement orders requiring cessation of any further indigenous vegetation clearances on the Station, as well as further orders requiring a suite of remediation/mitigation measures of the environmental effects alleged to have resulted from the clearances since 2018.

Counsel for C had described the council's case as "baseless". C had raised concerns about a lack of clarity in the council's allegations of unlawfulness, and the vagueness of the remediation measures being sought. C submitted that if any remedial orders were to be made, that must follow a finding (on the balance of probabilities) that areas of the Station had been unlawfully cleared of indigenous vegetation. The Court agreed to address the allegations of unlawful clearances. The applicable rules framework in this case was complicated by the fact that the district plan had changed during the relevant period, and each subsequent version of the relevant activity rules had effectively "grand-fathered" a type of existing use rights. The Court had noted at the outset that the factual analysis required was more complex than that stated by the council. The rules were broadly as follows: prior to 2001, indigenous vegetation removal was unregulated. Then from 2001 until 2018, the first district plan permitted "[t]he clearance, modification or destruction of indigenous vegetation which has grown naturally on land cleared of vegetation in the 15 years immediately prior to this plan becoming operative" (known as rule "HER.3"). Then, from 2018, the second (operative) district plan permitted "[t]he clearance, modification or removal of indigenous vegetation which has grown naturally on land lawfully cleared of vegetation since 2000" (known as rule "BIO.1.6"). Thus, the Court noted the possibility of a chain of events where land was cleared after 1986 but before 2001, clearances of regrowth were permitted by HER.3 between 2001 and 2018, and clearances of regrowth of vegetation cleared lawfully under HER.3 were permitted by BIO1.6 after 2018.

The Court said the council had not provided evidence that demonstrated explicitly (ie with dates) how C's clearance activities on any identified area of land had *not* complied with the rules. The Court also ultimately found that the council may have taken an incorrect approach to the technical operation of the above rules. In assessing the lawfulness of C's clearances, the Court considered the detailed evidence. Ultimately, it could not accept that the evidence of the council's planner gave any useful guidance on the relevant rules or could safely be relied upon to support the council's application. Thus, the Court was unable to find that any clearance activities had breached HER.3 or BIO.1. Although there may have been some breaches, these were likely to be considerably smaller than the areas assessed by the council, and it was impossible to identify the areas involved with the accuracy required for the purpose of making enforcement orders.

The Court then addressed C's claim to "existing use" rights under s 10 of the RMA 1991, which were separate to the permitted activity rules under the district plans. The Court noted that existing use rights do not arise unless the lawfully established activity becomes non-conforming upon subsequent notification of a rule. Therefore, to make a finding that clearances were undertaken in accordance with existing use rights, there needed to be a (prior) finding that the clearances breached the district plan rules in force from 2001. The Court had been unable to do so on the evidence before it. However, the Court nevertheless endeavoured to give some guidance on the issue of existing use rights.

The Court cited authority that the appropriate approach to scale in this case, in terms of the "use" claimed to be lawfully established and the "land" being used in the context of s 10(1)(a)(i), was the farm *as a whole*. If the land was rightly regarded as a unit and it was found that *part* of its area was physically used for the purpose in question, it followed that the "land" was used for that purpose. The authorities established that it did not matter that the whole of the land was not actively used; it was sufficient that the land was held in reserve for use at some point in the future. Further, the relevant "use" in s 10 was identified by reference to the use that was regulated by the rule giving rise to the existing use rights. In this case, the relevant "use" was the clearance of indigenous vegetation. The purpose of the clearances was irrelevant. The Court distinguished this from another vegetation clearances case in which the use was not just the clearances, but also the broader farming activities. In that case, the relevant district rule permitted clearances "carried out within, and for the purpose of, maintaining an area of improved pasture". That was not the case here.

When assessing the character, intensity, and scale of the effects of the use at the relevant time (ie when the regulating rule comes into force, at which time existing use rights arise), the Court noted

authority that seasonal or cyclical/rotational variations were to be taken into account. Here, C's vegetation clearances were not fixed to any particular season, but involved land management practices carried out periodically on an "as needs" or "as can" basis. In his grazing activities, C would "farm around" areas of regrowth for years at a time before embarking upon further clearances of that regrowth. The Court accepted that it was an impossible feat to keep on top of the rate at which regrowth occurred across the whole Station on a continuous basis. However, while the majority of clearances appeared to have occurred on a more regular cycle, the Court doubted that a recurrence of clearance every 60 years (or thereabouts) in discrete areas across the Station would be sufficient to maintain existing use rights. Assessing the evidence, the Court concluded that *if* it had been able to make a finding that the clearance activities had breached the district rules in force from 2001, it would find that existing use rights would apply to clearance of all of the areas used for productive purposes over the tenure of C's family that were subject to cycles of clearances and regrowth, other than those areas comprising vegetation regeneration at least 60 years old. The application for enforcement orders was declined. Costs were reserved.

Decision date 28 October 2022 - Your Environment 16 November 2022

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Currie v Palmerston North City Council - [2022] NZHC 2909

Keywords: High Court; resource consent; error; information required

This appeal challenged an application for resource consent on the grounds it was lodged using the applicant's trading name rather than its correct legal identity. Tolly Farm Ltd ("Tolly Farm") operated a pet cremation business under the trading name "Soul Friend Pet Cremations". It wished to build a custom-designed building for its cremation services at a new location and had engaged a planning consultancy firm to lodge a resource consent application on its behalf. The consultants had completed and signed the application form and gave the applicant's name as "Soul Friend Pet Cremations" in the contact details section. The consent was granted by Palmerston North City Council in 2021. The appellants, the Curries ("Cs"), were two local residents who opposed the new crematorium. As a preliminary matter in the appeal, the Environment Court ("EC") had been asked to address the Cs' claim that the application was not valid because it had not been made by a real "person". The EC concluded that the application was valid; it found that Tolly Farm was the applicant and that this had been ascertainable from a close reading of documents filed with the application (see *Currie v Palmerston North City Council* [2022] NZEnvC 32). The Cs now appealed the EC's decision on that preliminary question.

The Court clarified that the first relevant legal question was not whether the application had been made by a real person, because the EC had not held that a trading name could meet the test of "personhood". The question was whether the EC was entitled to look beyond the name of the applicant on the application form to all the material provided with the application to determine that Tolly Farm was the applicant. The Court found that, based on the relevant legislative framework, the EC had taken a correct approach. The prescribed form for applying for resource consent was found in the Resource Management (Forms, Fees, and Procedure) Regulations 2003 ("the Regulations"). Notably, reg 9 stated that the forms listed must "generally" be followed, and reg 5 provided that any document that was required to be attached to the application "is part of the form". Further, there was no expressly stated requirement in the RMA 1991 or the Regulations to name the applicant, because the focus was rather on describing the activity. The Court was satisfied that the application form and the required Assessment of Environmental Effects ("AEE") that was attached to it were to be regarded in their entirety as the "application". The EC was therefore entitled to take information in the AEE into account and to find, as a matter of fact, that Tolly Farm was the applicant.

The Court considered this determinative of the appeal. However, in case it was wrong, it considered the Cs' second argument that the absence of a "person" as the applicant made the resource consent invalid and that this was unable to be remedied. Regulation 4 of the Regulations provided that use of a form was not invalid only because it contained minor differences from the prescribed form, as long as the form used had the same effect and was not "misleading". The Court rejected the Cs' argument that the trading name used on the application form had been "misleading". The site and its ownership had been correctly identified, and a detailed assessment of the activity and its effects had been provided. Again, there was no express requirement for the applicant to be named. No one had been misled. The Court also added that in this case there was an entity against whom the conditions of resource consent could be enforced (ie Tolly Farm), that
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no benefit had accrued to Tolly Farm through the use of the trading name in the application, and that there had been no prejudice to those identified as affected persons (including the Cs, who had suffered no detriment). In contrast, it would be a "futile exercise", and a "disproportionate and unreasonable" response, to make Tolly Farm make a new application for consent, and thereby suffer potential delay and prejudice.

Further, the Court agreed with the EC that finding the application to be void would be "a significant triumph of form over substance". It emphasised the "well-established" position that general resource management practice was to favour substance over form in terms of whether there had been compliance with statutory requirements. Therefore, if the Court had found that the EC was wrong to find that Tolly Farm was the applicant, the Court would have found that the error in the applicant's name did not have the effect of making the application (and the resource consent) invalid. The appeal on the preliminary question was dismissed. Costs were reserved.

Decision date 8 November 2022 **-** Your Environment 17 November 2022

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Chen v New Zealand Transport Agency - Waka Kotahi - [2022] NZEnvC 220

***Keywords**: requiring authority; designation; traffic safety; traffic; road; road widening; public work*

This appeal concerned a decision of New Zealand Transport Agency – Waka Kotahi ("NZTA"), as requiring authority, in relation to proposed road works on private land. NZTA proposed to undertake safety improvements on State Highway 16 ("SH16") between Huapai and Waimauku. Various land adjacent to the highway was needed to accommodate these works and NZTA had notified its requirement to alter the existing designation for the state highway to include its works on that land. Independent hearing commissioners appointed by the Auckland Council considered NZTA's proposal, and then recommended to NZTA that the notice of requirement ("NoR") to alter the designation be confirmed. NZTA then accepted the recommendation. This appeal involved a property at 601 SH16, owned by a company of which the appellant, W Chen ("C"), was a director and shareholder. C appealed against NZTA's decision to accept the recommendation.

The principal objective for the project was to improve traffic safety. Overall, this section of the highway was classified as "high risk" because of its crash history, traffic volumes and road safety rating. One of the project measures was the construction of a median barrier to avoid collisions. However, one downside of this measure was that it would restrict full access to and from properties along that section of highway (i.e. it would restrict right turn movements from those properties). NZTA had therefore proposed several "turnarounds" to mitigate those restrictions on access, including one at C's property. C submitted that the turnaround on his property was not necessary and that consideration of alternatives had been flawed.

The key issue for determination was whether the territorial authority had had regard to the matters outlined s 171 of the RMA 1991, and in particular, whether "adequate" consideration had been given to alternatives, and whether the work and designation were "reasonably necessary" for achieving the objectives of the requiring authority. The Court summarised a number of useful authorities in the case law on these s 171 requirements.

On the first question of whether "adequate" consideration had been given to alternatives, the Court heard that a long list and then a short list of alternatives had been considered, and various assessment processes undertaken. The Court heard detailed evidence as to the rationale for the option that was chosen. However, an expert planning consultant called by C opined that there were deficiencies in a certain options assessment that had been performed. From a timing perspective, this assessment had been completed after the NoR was lodged and confirmed and after C's appeal was filed. C claimed this was not good practice and raised concerns that the outcome of the assessment could have been pre-determined or arbitrary. C's expert also criticised the criteria used in the assessment framework and their application. The Court found that despite these criticisms, it was satisfied that NZTA had made sufficient investigations of alternatives and had not done so on a "cursory" basis. It cited authority that NZTA was not required to consider every alternative. Its obligation was to give adequate consideration to alternative sites and methods. NZTA did so, and the timing of this consideration did not detract from the assessment.

On the question of whether the work and designation was "reasonably necessary", the Court heard evidence that the inclusion of wire rope median and side barriers (as well as widening of the carriageway shoulder) were predicted to reduce the occurrence of crashes resulting in death and
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serious injury by 60 per cent in 10 years. Further, it was not practicable to implement median barriers preventing access to properties without the provision of appropriate turning facilities; insufficient turning facilities had the potential to encourage drivers to attempt unsafe manoeuvres. C argued that if the turnaround at his property were not included in the project, there would still be enough turnarounds per road safety guidelines. However, the Court agreed with evidence for NZTA that this turnaround was reasonably necessary on the basis it was approximately midway between two larger turnaround facilities designed to accommodate larger vehicles (eg semitrailers). This turnaround also had excellent sight lines and enough space available to complete the turnaround in a single movement. The Court was satisfied the project would significantly improve the safety and reliability of this route.

The Court also assessed the effects on the environment and was satisfied the project would not have any adverse effects that could not be appropriately mitigated. It was also satisfied the project was consistent with pt 2 of the RMA 1991 and the National Policy Statement on Urban Development 2020, and that the NZTA had carefully weighed the issues, objectives and policies in the Regional Policy Statement and District Plan section of the AUP. These matters were not disputed by C.

The proposed alteration to the designation was approved. The appeal was dismissed. Costs were reserved.

Decision date 2 November 2022 Your Environment 21 November 2022

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Cardrona Cattle Company Ltd v Queenstown Lakes District Council - [2022] NZEnvC 224

Keywords: consent order; resource consent

This consent order concerned an appeal against a decision of Queenstown Lakes District Council granting resource consent to a third party to establish a walking and cycling trail between Nevis Bluff and the Citroen Rapid and the Kawarau River, and associated earthworks and construction of an associated retaining structure and bridges anchored to the cliff faces. The parties had now filed a consent memorandum outlining their agreement to resolve the appeal. They had reached agreement on trail alignments. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that consent be granted subject to conditions agreed by the parties. There was no order as to costs.

Decision date 03 November 2022 - Your Environment 22 November 2022

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Protect Aotea v Auckland Council - [2022] NZEnvC 230

Keywords: consent order; coastal marine area; port

This consent order concerned appeals by Protect Aotea and Protect Our Gulf Inc against decisions by the Auckland Council to grant Ports of Auckland Ltd the necessary resource consents to undertake capital works dredging and ongoing maintenance dredging within the Waitematā Navigation Channel Precinct and Port Precinct. In 2021, the Court had ruled on two preliminary questions of law (see *Protect Aotea v Auckland Council* [2021] NZEnvC 140). Protect Aotea had then unsuccessfully appealed the Court's decision on one of those questions to the High Court (see *Protect Aotea v Auckland Council* [2022] NZHC 1428). Following discussions and mediation, the parties had then reached agreement that the appeals could be resolved subject to amendments to the conditions for the capital works dredging. These included the introduction of a pre-commencement notification process to mana whenua to determine interest in further involvement on a range of matters (such as the draft Dredging Management Plan, accidental discovery protocols and monitoring processes) as well as refinements to a number of methods and processes under the consent. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the conditions of consent imposed on the capital works dredging be amended as agreed by the parties. There was no order as to costs.

Decision date 07 November 2022 - Your Environment 28 November 2022

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Greater Wellington Regional Council v Crosbie - [2022] NZEnvC 233

Keywords: enforcement order; water; sewage disposal
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This matter concerned an application for enforcement orders after interim orders had been obtained against the respondents. Nikau Lakes Biosystem Ltd ("NLB") owned a wastewater disposal system serving the Nikau Lakes subdivision in Paraparaumu. This was contained within, and protected by an easement over, a property owned by the first respondent, J Crosbie ("C"). In 2020, on application by Greater Wellington Regional Council ("the council"), the Court had made interim enforcement orders against C and her spouse, A Page ("P"), who was the second respondent in these proceedings, because the system had been damaged by agricultural activities (particularly cattle grazing) and other activities (such as removal of toby boxes) undertaken by C and P (see *Greater Wellington Regional Council v Crosbie* [2020] NZEnvC 219). These interim orders broadly required C and P to cease and not commence any activities that would interfere with or damage the system and the field, or that would interfere with the lawful operation of that system and the field under NLB's resource consent. C and P were also required to permit NLB or its agents to access the system and the field in order to remedy any damage or maintain the system and the field.

Since then, C and P had been prosecuted and convicted of a number of offences arising from activities on the property. As part of sentencing, the District Court had made enforcement orders against C and P concerning wetlands on the property (see *Greater Wellington Regional Council v Crosbie* [2021] NZDC 23312). Now, the council applied for full enforcement orders concerning the disposal system. NLB agreed with the council's application. Since the interim orders had been made, this application had been delayed due to the criminal proceedings.

The Court reviewed the evidence supporting the council's application. It observed that the grazing of cattle on the easement area had been established beyond reasonable doubt in the prosecution proceedings. It was noted that there was still an ongoing issue of compliance with the interim enforcement orders. The Court was satisfied that wastewater discharging to a road and presenting a public health risk had been caused by damage to the field occasioned by the activities of C and P. It heard that ongoing interference with the field (mainly from livestock) meant any repairs by NLB were quickly overtaken by further damage. This was resulting in NLB breaching its resource consent. NLB had advised that the interim orders "really made no practical difference". The Court heard that P had become aggressive and on one occasion had assaulted an NLB director (resulting in a criminal assault charge against P). NLB's director feared for his safety, and had also been "trespassed" from the property by C. Thus, NLB was unable to attend the property for maintenance purposes. The Court found that C and P had blatantly disregarded NLB's easement rights.

The Court was satisfied that it could make orders pursuant to ss 314(1)(a) – (c) of the RMA 1991 against C and P. Regrettably, it was also necessary to make orders under s 314(1)(a) and (b) against NLB, even though it was not at fault, because it had an obligation to discharge wastewater from the Nikau Lakes subdivision in compliance with the terms of its resource consent. The Court agreed with the council's suggestion that the existing orders needed refinement to provide the financial and physical security necessary to allow NLB to conduct the repairs and maintenance. The council had suggested that costs incurred by NLB in repairing the disposal field and (if necessary) employing private security guards may be considered actual and reasonable costs necessary to avoid further adverse effects on the environment arising from C and P's failure to comply. The Court agreed that for this reason it could order C and P to pay such costs pursuant to s 314(1)(d). The application for enforcement orders was granted. The council was to submit orders in final form, including an order pursuant to s 314(1)(d). Costs were reserved against C and P in favour of the council and NLB.

Decision date 09 November 2022 - Your Environment 30 November 2022

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

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OTHER NEWS ITEMS

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Legislation unveiled that will replace the Resource Management Act

The New Zealand Herald reports that Environment Minister David Parker has unveiled the legislation to replace the Resource Management Act 1991. The RMA is being replaced by one major piece of legislation, the Natural and Built Environment Act, and two more minor pieces of legislation: the Spatial Planning Act and the Climate Adaptation Act.

Read the full story here.

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Resource management system reforms criticised by other political parties

Newshub reports that National and ACT are warning the Government's proposed resource management reform will create more bureaucracy and centralisation, and not improve the process. The Green Party is expecting to support the new legislation at first reading so it heads to public consultation, but says it "falls short of what is required".

Read the full story here.

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Government appoints investigator over council's refusal to implement housing density rules

Stuff reports that Associate Minister for the Environment Phil Twyford has appointed mediator John Hardie to “understand the issues with housing intensification” in Christchurch, after Christchurch City Council refused to approve new housing density rules. Twyford said Hardie would also explore a way forward, so the council complied with the law.

Read the full story here.

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$540 million plan to build housing infrastructure

Stuff reports that the Government has announced a $540 million plan to build pipes, roads and a cycle bridge which Housing Minister Megan Woods says should support the development of 16,600 new houses.

Read the full story here.

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Queenstown Lakeview development faces fast-track rejection

Stuff reports that the proposed Lakeview/Taumata development proposal will be rejected unless building heights are significantly reduced. The billion-dollar central Queenstown development would include three hotels, 500 apartments and commercial spaces on a former camping ground site.

Read the full story here.

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$57.1 m upgrade of Timaru's Theatre Royal

Stuff reports that Timaru District councillors have voted to go ahead with a $57.1 million upgrade of the town's Theatre Royal and construction of a new adjoining heritage centre.

Read the full story here.

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New Zealand’s largest timber office building begins construction

Stuff reports that construction on Tauranga City Council’s future administration building will begin next month. The 10,000sqm building will use engineered timber in place of concrete and steel elements, with a view to reducing embodied carbon.
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Read the full story here.

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Waste-not want-not: Social housing tackles climate change

Newsroom reports that local companies are looking for ways to further the affordable housing sector, leading the way with innovative designs and techniques that increase energy efficiency and reduce waste. Our homes also have a profound impact on our planet. When it comes to carbon, construction industry emissions have increased and overall our built environment is responsible for 20 per cent of NZ's carbon footprint. The significant gap left behind by decades-long failures in the private housing market is in affordable homes. Homes, whether long-term rental or progressive home ownership, that are designed and built specifically for people on lower incomes that allow ageing in place and intentional community-building.

Read the full story here.

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Kawarau Gorge Trail to proceed after agreement

Radio New Zealand reports that the Kawarau Gorge Cycle Trail will proceed after objections in the Environment Court were settled. The 35-kilometre Kawarau Gorge Trail will link the highly acclaimed Dunstan Trail at Bannockburn to Queenstown's network at Gibbston Valley.

Read the full story here.

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Research on airborne microplastics in Auckland

Radio New Zealand reports that University of Auckland research, published in *Environmental Science & Technology*, has found 74 metric tonnes of microplastics in Auckland's atmosphere, the equivalent of three million plastic bottles per year.

Read the full story here.

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Crown seeks feedback on application for customary marine title

Stuff reports that Te Arawhiti, the office for Māori Crown relations, is seeking public feedback on Ngāti Koata's application for customary marine title to the area surrounding Rangitoto-ki-te-Tonga (D'Urville Island). Public comment submissions are open until February 17, 2023.

Read the full story here.

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“Globally significant” Foulden Maar site bought by Dunedin City Council

Stuff reports that the Dunedin City Council has purchased 42 hectares of land, containing the Foulden Maar site, from receivers. Foulden Maar is the world’s only known layered record of climate and environment from 23 million years ago and contains New Zealand's largest collection of fossils. The Council said it intends to preserve the property for scientific and environmental research.

Read the full story here.

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Dunedin City Council rezones land for possible development of 1000 homes

Stuff reports that the Dunedin City Council has rezoned 43 rurally zoned properties to allow for the development of up to 1000 homes. City development manager Dr Anna Johnson said the rezoning was necessary, as the city is preparing for a housing shortage over the next ten years.

Read the full story here.

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Analysis: For sale: new, warm and dry homes. The catch? They're in a flood plain, and the flood is coming sooner than you think
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Stuff has published an investigation by reporter Kate Newton, who asks why, with 55,000 Auckland houses already build in flood zones, do we keep allowing building in flood zone areas?

Read the full analysis here.

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