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Legal Case-notes October 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:

- An unsuccessful appeal against and an application for judicial review, of a decision by an expert consenting panel to decline resource consents for a housing development in an area known as "Ladies Mile" at Frankton near Queenstown;
- Settlement by consent order of two appeals regarding flood hazard overlays in the proposed Marlborough Environment Plan in the vicinity of the Tuamarina township;
- Enforcement orders following demolition of a fence between two properties at New Lynn, Auckland requiring design and construction of a pile wall and a replacement fence;
- An unsuccessful appeal against landscaping and vehicle access conditions included in the decision of Auckland Council on a private plan change for land adjacent to SH1 near Warkworth;
- Is a "tiny house" on a trailer a dwelling? This decision results from an unsuccessful appeal against an abatement notice issued by Auckland Council. The abatement notice required resource consent or removal of a "tiny house" from a rural property near Riverhead.

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CASE NOTES OCTOBER 2023:

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Glenpanel Development Ltd v Expert Consenting Panel - [2023] NZHC 2069

***Keywords**: High Court; activity non complying; objectives and policies; effects; environment; judicial review*

This matter concerned an appeal against, and an application for judicial review of, a decision by an expert consenting panel ("the Panel") convened under the COVID-19 Recovery (Fast-track Consenting) Act 2020 ("FTC Act") to decline resource consents for a housing development in an area known as "Ladies Mile". The project was considered by the Panel as a referred project from the Minister for the Environment, rather than a listed project. The Panel decided that the project failed both limbs of the "gateway" test in s 104D of the RMA 1991 for non-complying activities. This was on the basis that: (a) it was contrary to a set of important and directively worded objectives and policies in the proposed district plan ("PDP"), namely, avoidance of urbanisation of rural land outside the present Urban Growth Boundary, and protection of landscape values of Outstanding Natural Features; and (b) it would have adverse effects (landscape, visual, traffic and transport) that were more than minor, even accounting for mitigation.

In its appeal, the project applicant, Glenpanel Development Ltd ("Glenpanel"), alleged four overarching errors of law by the Panel. The first was that the Panel allegedly erred by treating the

FTC Act as incorporating s 104D of the RMA 1991 as a mandatory gateway test. Glenpanel argued that sch 6, cl 32 of the FTC Act, which provided that ss 104A to 104D applied to referred projects, merely incorporated s 104D as a "relevant consideration" when cl 32 was interpreted in light of its context and the purpose of the FTC Act. However, the Court disagreed. The FTC Act clearly distinguished between *listed* and *referred* projects. While it expressly stated that s 104D did not apply to *listed* projects, the Court was satisfied that it preserved the consequences of activity classification for *referred* projects, including the application of s 104D in the usual way to non-complying activities.

Regarding the application of s 104D, the Court rejected Glenpanel's argument that the Panel erred in concluding that the project was contrary to an important group of PDP objectives and policies. The Panel's thoughtful analysis of the planning documents occupied 100 paragraphs, reviewed the objectives and policies as a whole, and reached conclusions that were clearly open to it. The Court was not persuaded that the Panel was wrong in reasoning that policies using directive terms such as "avoid", "protect" and "ensure" should be given greater weight than less directively worded policies. The Panel was also correct to rely on *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110, in which the Court said that a proposal that was contrary to a single policy could potentially fail s 104D if, reading the plan as a whole, that policy was very important and central to the proposal. While Glenpanel was critical of this view, *Akaroa Civic Trust* had been cited with approval in the higher courts. In any case, the Panel's decision was not based on the proposal being contrary to any single policy or objective. Regarding the Panel's assessment of effects, the Court rejected Glenpanel's argument that the Panel erred when it considered the "environment" in its present state rather than its future urbanised state. Although Ladies Mile was part of an "Indicative Future Expansion Area" in the PDP, that descriptor made it clear that *no firm decision* had been made about rezoning. It was also open to the Panel to determine that it would be speculative and premature to assume the Ladies Mile environment was urban in reliance on a Spatial Plan and Masterplan that identified Ladies Mile as a priority development area. There was some evidence to suggest that the outcome of a PDP variation being progressed might not necessarily reflect the Masterplan.

The Court then addressed Glenpanel's application for judicial review. Firstly, it disagreed that the Panel as convened did not collectively have the skills and experience required under the FTC Act, and that the Panel members failed to properly acquaint themselves with all relevant information in order to reach their decision. The next ground of review concerned claims that one panel member - a partner at a law firm - was conflicted because his firm represented another company that was allegedly a competitor of Glenpanel. The Court said that even if there were evidence of that company having any direct competitive interest in the Ladies Mile area (which there was not), there was no evidence of any connection between declining the application and a financial benefit to the law firm. The Court also rejected a claim of bias based on Auckland Council - an ongoing client of the firm - having an interest in its preferred interpretation of key provisions of the FTC Act being upheld. Further, the law firm partner's previous advocacy for Auckland Council on FTC Act provisions was not a statement of his personal views or an indication of how he would decide an issue if confronted by it as a decision maker. Ultimately, it was clear that the Panel had carefully and thoughtfully considered the evidence and further memoranda of Glenpanel and there was no indication of any pre-determination. Finally, the Court dismissed Glenpanel's claim of procedural unfairness and ruled that the Panel was not obliged to present its preliminary views on certain matters to allow Glenpanel a further opportunity to respond. The Panel had been required to assess the application within 50 working days, and it would have been impractical for the Panel to revert to the applicant whenever it proposed to make a finding which was adverse to the applicant. The Court also noted that Glenpanel had had extensive consultation with the Ministry for the Environment and the Environmental Protection Authority before submitting its application. All grounds of appeal and review were dismissed. There was no order for costs.

Decision date 4 August 2023 Your Environment 17 August 2023

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Broughan v Marlborough District Council - [2023] NZEnvC 144

Keywords: consent order; flooding; regional plan

This consent order concerned two appeals regarding flood hazard overlays relating to the Tuamarina township in the proposed Marlborough Environment Plan ("PMEP"). The parties had filed a consent memorandum setting out their agreement to resolve the appeals, which involved
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amending the Level 1 and Level 2 Flood Hazard Area overlays. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the PMEP be amended as agreed by the parties. By consent, there was no order as to costs.

Decision date 05 July 2023 – Your Environment 27 July 2023

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Wason v Two Kooner Properties Ltd - [2023] NZEnvC 149

Keywords: enforcement order; fencing

This was the making of enforcement orders against Two Kooner Properties Ltd ("TKP") on the application of two individuals ("the applicants"). The Court's reasons were to follow. TKP was ordered to remedy adverse effects caused by it or on its behalf by reinstating the applicants' fence and installing a bored cast in-situ pile wall along a common boundary. The works were to be designed, approved and supervised by a particular consulting firm named in the orders. A timetable for completion, including obtaining the appropriate building consent, was imposed. Costs of the works were to be met by TKP, and a bond of $75,000 was required to be paid to secure performance. Costs were reserved.

Decision date 11 July 2023 - Your Environment 3 August 2023

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Wason v Two Kooner Properties Ltd - [2023] NZEnvC 165

Keywords: enforcement order; fencing

This matter concerned enforcement orders that had previously been made on the application of two individuals ("the applicants") and their concerns that the respondent, Two Kooner Properties Ltd ("TKP"), was not making progress towards compliance. The orders made on 11 July 2023 required TKP to reinstate the applicants' fence and instal a bored cast in-situ pile wall along a common boundary (see *Wason v Two Kooner Properties Ltd* [2023] NZEnvC 149). The works were to be designed, approved and supervised by a particular consulting firm, Babbage Consultants Ltd ("Babbage"). A timetable for completion, including obtaining the appropriate building consent, had been imposed. Costs of the works were to be met by TKP, and a bond of $75,000 was required to be paid into the trust account of an identified stakeholder in order to secure performance. The applicants had since filed a memorandum expressing concern that TKP had not made progress towards engaging Babbage or paying the bond, as required by the orders. TKP explained that it was facing financial difficulty in securing finance, but the applicants were concerned that TKP was "playing for time" to avoid its obligations.

At the time of making these orders, it appeared to the Court that while TKP was not yet in breach of the orders, a breach was foreseeable as Babbage had not been engaged and would not be able to complete the design and get approval by the due date. TKP had been given sufficient information to enable compliance, and all it had had to do was confirm Babbage's engagement and responsibility for the fee. Further, while the orders had not explicitly stated a due date for payment of the bond, the Court said that given the other obligations, it followed that the bond needed to be paid prior to the design process (or at least be "in line" with it). The Court clarified that the due date for payment of the bond was the same as the due date for completing the design. TKP had offered no indication that it intended to pay the bond, and non-compliance could reasonably be anticipated. The Court therefore granted the applicants' request for orders under s 315(2) of the RMA 1991 that, in the event of TKP's non-compliance, the Court consented to the applicants undertaking the works required and seeking recovery as a debt due. Allowing the applicants to get on with the works would avoid further damage and allow resolution of the matter. The applicants were authorised to enter TKP's property for these purposes and could exercise the powers in s 315(2)(a) to (c). Leave was also granted for TKP's director to be joined as a party to the enforcement orders. Costs were reserved.

Decision date 8 August 2023 – Your Environment 29 August 2023

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Middle Hill Ltd v Auckland Council - [2023] NZEnvC 154

Keywords: zoning; landscaping; subdivision; private plan change

This matter concerned a dispute over a landscape planting standard under private plan change 25 ("PC25") to the Auckland Unitary Plan ("AUP") and its impact on future vehicle access. Middle Hill Ltd ("MHL") owned a site that was subject to PC25. MHL had aspirations to develop the site in future. In 2022, the Court upheld an appeal by MHL to the extent that the zoning for MHL's site was changed from "Future Urban" to "General Business" (see *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162). Several minor amendments to PC25 were also directed by the Court, including a requirement for a landscape planting area along the north-eastern boundary of the site in order to assist with the transition from rural to urban land. The parties now disagreed on that final landscape planting standard. Auckland Council ("the council") and Auckland Transport had agreed on wording that provided that landscape screening planting to at least 3 m deep "shall apply along the full length of the north-eastern boundary". However, MHL sought inclusion of the words "except for any accessway". MHL was concerned to ensure that its existing entrance way to a residence and farm operation could still be used for current and future approved activities. It argued that it was not clear from the Court's 2022 decision requiring a landscaping yard that the Court intended to deny the only legal and physical access to the property.

It was common ground that the AUP permitted the use of the existing, established vehicle crossing to service *existing* activities. However, the parties disagreed as to what type of development activities would trigger the proposed landscaping standard. The council argued that the proposed standard was predicated on the land being developed for business uses, while MHL argued that any subdivision or development, even a boundary adjustment, would trigger the standard. MHL had indeed recently applied to adjust a boundary to reflect the new General Business zoning approved by the Court, and argued that if the council's proposed landscaping standard had applied at the time, the landscaping standard would have been triggered. MHL argued that it could be many years before the site was fully developed, and it could not risk losing access as it tried to derive an income from the land in the intervening years.

The Court identified the relevant issue as whether it was appropriate to try and protect future access. It found that this matter had not been raised at the hearing, and it was too late to do so now. It also noted that MHL's recently requested boundary adjustment had now been completed. It concluded that "any further development or subdivision [was] likely to be for the purpose of developing the land, and as such should trigger the requirement to provide the yard". The Court did not see it as helpful to leave open the possibility that any subdivision or development could occur without there being a requirement to provide the landscaping. It was appropriate that any proposal from now on to alter the status quo should comply with all the applicable standards (including landscaping) and for any non-compliance to be considered as part of any consent application. PC25, including the landscaping standard, was confirmed. There was no order as to costs.

Decision date 25 July 2023 _ Your Environment 14 August 2023

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Bears Home Project Management Ltd v Auckland Council - [2023] NZEnvC 156

Keywords: consent order; resource consent; conditions; conservation; covenant

This consent order concerned an appeal against specific conditions imposed by Auckland Council in granting consent for the construction, operation and maintenance of a golf course, sports academy and luxury accommodation complex in Muriwai Valley. The parties had filed a consent memorandum setting out their agreement to resolve the appeal, which involved a number of replacement conditions that balanced development of the golf course with preventing ad hoc development of the site and protecting environmental features. These covered: restriction on the use of certain land for rural production; some lots being held in common ownership for a period of time; measures concerning protection of significant ecological areas and wetlands, indigenous flora, wildlife habitats and the natural landscape; and covenants on the relevant titles to record some of these conditions. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that resource consent was granted, subject to the conditions agreed by the parties. There was no order as to costs.

Decision date 27 July 2023 _ Your Environment 15 August 2023

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Beachen v Auckland Council - [2023] NZEnvC 159

Keywords: building; residential; abatement notice

This matter concerned an appeal against an abatement notice by a property owner who argued that his tiny home was not a "minor dwelling" and therefore did not require resource consent under the Auckland Unitary Plan ("AUP"). D Beachen ("B") had moved the tiny home on to his property around three years earlier. While B resided in another cottage on the property as a principal dwelling, the tiny home was sometimes used by his mother. The tiny home - which contained kitchen and bathroom facilities - sat on a trailer with wheels, although the wheels were not touching the ground as the trailer had been placed atop wooden pallets. At the time of investigation by Auckland Council ("the council"), the tiny home was connected to the property's wastewater system, although B had since disconnected that service. The council believed that the tiny home was a "minor dwelling" under the AUP, and therefore required consent as a restricted discretionary activity. It issued an abatement notice to B, requiring him to disestablish the tiny home. B now appealed that notice, arguing that it was a "vehicle" that could be moved at any time. The Court noted that in order to be a "minor dwelling" under the AUP, the tiny home firstly had to be a "dwelling". To be a dwelling, it had to be a "building", and to be a building it had to be a "structure". The Court therefore examined the meaning of each of those terms in turn.

Firstly, regarding the term "structure", the Court noted that as this was not defined in the AUP, the RMA 1991 definition applied. This definition required that it be "fixed to land". The Court agreed with the earlier reasoning by this Court in *Antoun v Hutt City Council* [2020] NZEnvC 6 (which also considered whether a tiny home was a "structure") that the two main indicators of fixture to the land were the degree and object of annexation. The Court in Antoun had further observed that the definition of "fixed" could include things held permanently in place by their weight and bulk, or firmly placed in a stable position. They did not need to be tied or connected by reinforcing, foundations or piles imbedded in the land. Here, the Court found that the tiny home was fixed to the land in a way that demonstrated that it was not intended to be readily moved, and that it would be difficult to do so. While the trailer was registered, it did not have a warrant of fitness, and there was no credible evidence to support the contention that the tiny home could be moved without a great deal of work being done. Features that illustrated the degree of annexation included: a deck and shed next to the tiny home which, while not physically connected, abutted it and were clearly constructed to complement the tiny home; the way the home was partially nestled into the land, with the home sitting on the trailer atop the wooden framing; and access to the property's water, wastewater and power systems. The home was therefore a "structure".

The Court was also satisfied that the home was a "building" under the AUP, which was defined as "any permanent or temporary structure" and expressly included "structures used as a dwelling" that were over 1.5 m in height and in use for more than 32 days in any calendar year. The Court noted that even if the tiny home were unoccupied, it would still be a building because the AUP's definition was inclusive and did not exclude other types of structures not listed. The tiny home also met the definition of "dwelling", being "living accommodation used or designed to be used for a residential purpose as a single household residence contained within one or more buildings, and served by a food preparation facility/kitchen". The Court found that it clearly had been designed and used as such. This was the case, even though B had made efforts to disconnect it from certain utility services, dig out the land around it in places, retain the trailer's wheels, register the trailer, and ensure that the deck was not connected in any way to the home. Finally, the Court was satisfied that the tiny home was a "minor dwelling" because it was "secondary to the principal dwelling on site".

The Court also rejected a separate argument by B that the 12-month limitation period in s 338(4) of the RMA 1991 meant the abatement notice was invalid because the council had not issued the notice until two years after it became aware of the tiny home. The Court found that this limitation period applied only to the filing of criminal charges for offences, and did not apply to the issuing of an abatement notice. The abatement notice was confirmed, and the appeal was disallowed.

Decision date 3 August 2023 _ Your Environment 23 August 2023

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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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Natural and Built Environment Act 2023 (2023 No 46) assented 23/08/2023

(1) The purpose of this Act is to uphold te Oranga o te Taiao.

(2) The purpose must be achieved in a way that -

(a) protects the health of the natural environment; and

(b) subject to paragraph (a), enables the use and development of the environment in a way that promotes the well-being of both present and future generations.

(3) Te Oranga o te Taiao means all of the following:

(a) the health of the natural environment; and

(b) the relationship between the health of the natural environment and its capacity to sustain life; and

(c) the relationship between the health of the natural environment and the health and well-being of people and communities; and

(d) the interconnectedness of all parts of the environment; and

(e) the relationship between iwi and hapū and te Taiao that is based on whakapapa.
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Beehive: Bottom-trawling ban for most of Hauraki Gulf

Oceans and Fisheries Minister Rachel Brooking has announced that the Labour Government will ban bottom fishing from the vast bulk of the Hauraki Gulf as part of its plan to better protect the 1.2-million-hectare marine park for future generations, with public consultation opening tomorrow.

Options announced today show bottom-trawling and Danish seining could be banned from up to 89 per cent of the marine park.

"Aucklanders and others have called for greater protection for their beloved big blue backyard, the Hauraki Gulf/Tikapa Moana. We have listened and we have acted," Rachel Brooking said.

"The Gulf is a taonga with deep rooted historical importance for tangata whenua, a vital part of our society and of our tourism, transport and seafood sectors, with an economic value of $100 billion. But it's in trouble, and we have to strike the right balance between being able to use it, and making sure it's healthy and available for our grandchildren.

"At the moment, bottom-trawling and Danish seining are banned in just over a quarter of the Gulf's waters. Today, I am announcing options that would see this ban go from current protection levels, of just over a quarter, to up to nine-tenths."

The trawling ban was foreshadowed earlier this month when Prime Minister Chris Hipkins announced plans to create 19 new marine protection areas in the Gulf.

"At the same time, I released the new Hauraki Gulf Fisheries Plan - the country's first area-specific, ecologically based fisheries plan," Rachel Brooking said.

"The plan overturns the presumption that bottom-trawling and Danish seining can be used everywhere except in specified areas.

"Instead, they will be banned everywhere except in very specific and limited places, called trawl corridors, or Bottom Fishing Access Zones. Today I'm announcing the options for those corridors

and inviting people to have their say from tomorrow on which option they support," Rachel Brooking said.

- Please click on the link for full statement. Media release

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Beehive: 94 resilience projects confirmed for state highways

Transport Minister David Parker has announced that work will start this year on the first 94 projects under a dedicated fund for early preventative works to protect our state highway network from future severe weather disruption.

Waka Kotahi has confirmed that the Transport Resilience Fund projects will start in 2023/24. The list covers projects across the country, and it includes some substantial projects in Northland and the West Coast in particular.

"Budget 2023 established the $419 million Transport Resilience Fund. It complements the Government's funding of more than $1 billion in 2023 for immediate works to repair cyclone-affected roads.

"We know that severe weather events will be an ongoing challenge. This fund will help identify and repair vulnerable points in the network to help mitigate the risk of them failing in future storms or other natural hazards," David Parker said.

"Nearly $44 million will be invested in Northland, including a $25 million project to help stabilise subsidence risks across the region's highway network. This will focus on 92 sites where urgent works are required. The works will be programmed over seven years.

"On the West Coast, $22.7 million will go into several projects including river erosion protection works at the Gates of Haast bridge on State Highway 6, which borders Mt Aspiring National Park and connects the West Coast to Central Otago.

"A long list of other regions will benefit from the small to medium-scale resilience project funding. The list doesn't yet include cyclone-hit Tairāwhiti and Hawke's Bay, because immediate recovery efforts are the priority in those regions this year.

- Please click on the link for full statement - Media release

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Retiree battles council for five years over collapsing property

Stuff reports that Carolyn Middleton, an Auckland retiree, has been battling council for five years as her property continues to collapse with no resolution in sight. A retaining wall was required as part of the development’s resource consent, but it was never built.

https://www.stuff.co.nz/national/300917161/a-retirees-exhausting-5year-battle-with-council-over-collapsing-property

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Hutt City Council scraps heritage areas, allows higher-density building

RNZ reports that the Hutt City Council has voted to scrap six proposed heritage areas. The proposal was intended to get around a government mandate that allowed higher density housing. Mayor Campbell Barry said "While council does not agree entirely with the approach of central government in how to enable intensification, we have fulfilled our obligations."

Read the full story here.

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Russian space craft smashes into Moon as historic mission ends in disaster

https://www.stuff.co.nz/world/europe/300954121/russian-space-craft-smashes-into-moon-as-historic-mission-ends-in-disaster

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Thiel takes fight over luxury lodge build to Environment Court after mediation fail

Stuff reports that billionaire Peter Thiel is taking the fight to build a luxury lodge near Wānaka to the Environment Court after mediation between Thiel’s company Second Star and the Queenstown
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Lakes District Council broke down. The Council rejected Second Star's plan to build the lodge on a 193-hectare block at Damper Bay, saying it would have "significant adverse landscape and visual effects" on the environment.

Read the full story here.

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45 turbines may be added to Kaiwera Downs Wind Farm

Stuff reports that Mercury will decide on whether to add an additional 45 turbines to Kaiwera Downs Wind Farm near Gore this financial year in Stage 2 of its wind farm project. Mercury has already received consent for the additional 197MW of generation needed for Stage 2, or about 45 additional turbines. Stage 1, with 10 turbines, is expected to be operational in October.

Read the full story here.

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Piggery farm faces prosecution for polluting; could take years to stop it

RNZ reports that a Waikato piggery farm is facing prosecution for repeatedly discharging effluent into Patuwhao Stream over a long time period and in large volumes. Waikato Regional Council compliance manager Patrick Lynch said despite an emergency Environment Count order, "...there is still work to do..." and the court case could take more than a year.

Read the full story here.

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Superhome founder says building code improvements not good enough

Stuff reports that Superhome founder, Bob Burnett, says that while there have been improvements to building codes, code-minimum standards in new builds are still not good enough. Burnett said multi-unit projects “usually by greedy property developers” are the worst offenders, “Built with thin.wall framing, no ventilation systems and incorrect solar orientation, these homes are built to maximise profits and do not consider the health or wellbeing of the occupants or the planet”.

Read the full story here.

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Three arrested as climate protesters shut down SH1 in Kilbirnie

Stuff reports that three people from the protest group Restore Passenger Rail have been arrested after shutting down SH1 in the Wellington suburb of Kilbirnie during rush-hour traffic. Waka Kotahi confirmed that the road closure at SH1 and Hamilton Rd on Tuesday morning caused “significant delays” in both directions.

Read the full story here

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Controversial $500 million Shelly Bay development scrapped

RNZ reports that Sir Peter Jackson and Dame Fran Walsh have announced that they will "return Shelly Bay to its natural state", scrapping a proposed $500 million development project. The proposed development has been embroiled in litigation and protests for years and was the site of a fire in June.

Read the full story here.

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Company damages “nationally significant” archaeological site

Stuff reports that a company has admitted in court to damaging a “nationally significant” archaeological site on Marlborough’s Wairau Bar. The company, with interim name suppression, was charged with modifying archaeological sites without the authority of Heritage NZ by using earthworks to excavate an irrigation trench 50cm deep.

Read the full story here.

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