Newslink Case-notes for February 2024 prepared 23 January 2024.

~~~~~~

Legal Case-notes February 2024

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 eight court decisions covering diverse situations associated with subdivision, development and land use activities from around the country:

~~~~~~

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

- An unsuccessful appeal to the Court of Appeal over the application of transferrable subdivision rights for "environmental lots" formerly "conservation lots" under Franklin District plan within the area near Port Waikato, now included in Waikato district;
- Settlement by consent of an appeal by Federated Farmers of New Zealand against aspects of the Natural Hazards and Climate Change ("NH") provisions of the proposed Waikato District Plan ("PDP");
- A pre-trial application by the Crown concerning admissibility of evidence and the validity of the delegation of powers by Manawatū-Whanganui Regional Council to its chief executive ("CE"). The defendants were facing charges under the RMA 1991 arising from their forestry and harvesting activities;
- A successful objection to taking of land under the Public Works Act at Queenstown for building a new arterial road in the town's commercial district;
- An application for judicial review of decisions of Whangarei District Council to support the relocation of the Northland Emergency Services Trust to Whangarei Airport;
- An unsuccessful appeal against a decision of Queenstown Lakes District Council to decline consent to an application to build a new building adjacent to a historic church in Arrowtown's heritage area;
- An unsuccessful appeal against the decision of Palmerston North City Council to return an application for land development and subdivision consent as incomplete. Several shortcomings had been identified in the application, these included: large-scale earthworks requiring a high standard of geotechnical compliance, lack of natural hazards assessment; and lack of stormwater management planning
- Prosecution of a land owner who had undertaken unconsented vegetation removal and depositing of clean-fill and contaminated material on a property at Albany, Auckland;

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

CASE NOTES FEBRUARY 2024:

~~~~~~

Soroka v Waikato District Council - [2023] NZCA 510

Keywords: Court of Appeal; subdivision; conservation

This appeal concerned a dispute over the appellants' entitlements to "transferrable rural lot rights" ("TRLRs"). TRLRs concerned a type of subdivision under a regime that began under the former Franklin District Council's District Plan. Under that original subdivision regime, lots known as "Conservation Lots" could be created in exchange for a landowner protecting significant native flora and fauna by way of covenant registered over the land. In 2003, Plan Change 14 ("PC14") was notified, proposing changes to these subdivision rules. The Conservation Lots became known as Environmental Lots, and a new feature of the amended regime was that these lots could be utilised either on the same land, or transferred to other sites (as "TRLRs"). This ability to transfer lots to other sites was introduced to enable development on other sites in areas that were suitable for development so as to accommodate the Franklin District's growing population, while preserving and enhancing the natural features of the protected area. PC14 became operative in 2014.
The appellants were trustees of a trust that owned 220 ha of land covered in native bush known as the "Klondyke Block" west of Port Waikato. In 2012, the appellants applied to both Waikato District Council ("WDC") and Auckland Council ("AC") to create "Environmental Lots" from the Klondyke Block. At this time, Franklin District Council had been disestablished but its planning instruments remained operative. Under the proposal, the appellants would register a covenant with the Queen Elizabeth II National Trust over most of the Klondyke Block (which was now within WDC's jurisdiction), in return for 29 Environmental Lots or "TRLRs", 13 of which would be immediately utilised for a subdivision to be carried out on separate land in Auckland (within AC's jurisdiction). The balance of the 29 lots would be utilised later in separate applications that would follow. In July 2012, the appellants were granted consent in a combined decision of the two councils. The covenant was registered over the Klondyke Block and the 13-lot subdivision proceeded. A dispute then arose between the appellants and WDC as to whether the appellants had further existing TRLR entitlements that could be utilised for further subdivisions. This dispute appeared to have been resolved by the parties via a 2015 consent order in the Environment Court (which, in the context of a variation to PC14, amended that variation to confirm that the appellants still had the balance of the 29 TRLRs remaining as at November 2015, pursuant to the 2012 resource consent). However, for reasons that were unclear to this Court, the appellants now claimed that they were entitled to a total of 59 TRLRs. They argued that no further resource consent was required to create these; rather, once the preconditions for the protected area had been met, WDC had no discretion as to the number of lots that arose from the "donor" site. They argued that calculating the lot entitlement was simply a mathematical exercise under the rules of PC14. The appellants were unsuccessful in the High Court (see *Soroka v Waikato District Council* [2020] NZHC 2191) and now appealed to this Court.

The Court did not agree with the appellants that they had an entitlement to a specific number of lots regardless of what they had sought in their resource consent application. Under the rules, the scheme was such that the council first needed to be satisfied that Environmental Lots should be created by assessing specific performance standards and assessment criteria. This included an assessment of whether the proposed subdivision met the specified standards and assessment criteria. In other words, no Environmental Lots were created without the council being satisfied about both the protected area and the proposed subdivision. There was no mechanism under the rules that provided for a determination of a hypothetical yield of Environmental Lots able to be accessed in the future. While the Court did not agree with WDC that two consents were needed to utilise lots off-site (one to create the Environmental Lots in situ and another to transfer them off-site), it did agree that a resource consent was necessary in order to create Environmental Lots (whether to be utilised in situ or as TRLRs). This reflected how WDC and AC had approached the consent application in 2012. The application was to create and transfer 13 Environmental Lots, and that is what was assessed. Therefore, in order to create any further Environmental Lots, the appellants needed to apply for them with a development proposal.

The Court disagreed with the appellants' claim to a "59" lot entitlement, a number they had derived from tables setting out figures such as size of protected area required per Environmental Lot. The Court considered that these tables set out the number of lots that could be given consent. However, as the creation of Environmental Lots required consent, it was necessary to apply for them; until consent was granted, they did not exist. In any event, the Court noted that 59 lots would
~~~~~~

be in excess of the maximum total yield available under the tables, which was 20 lots in the case of Klondyke Block. The appeal was dismissed. The appellants were to pay WDC costs for a standard appeal on a band A basis and usual disbursements. The Court certified for second counsel.

Decision date 20 October 2023 - Your Environment 2 November 2023

~~~~~~

Federated Farmers of New Zealand v Waikato District Council - [2023] NZEnvC 220

Keywords: consent order; district plan proposed; natural hazard; farming

This consent order concerned an appeal by Federated Farmers of New Zealand against aspects of the Natural Hazards and Climate Change ("NH") provisions of the proposed Waikato District Plan ("PDP"). Federated Farmers was seeking amendments to ensure a more granular approach to managing risks from natural hazards and to avoid imposing unnecessary restrictions on rural landowners and communities. The parties had filed a consent memorandum setting out their agreement to resolve the appeal. This involved: amendments to enable earthworks for the maintenance and/or repair of farm tracks and fencing; and amendments to permit the construction of a farm building with a flood-resistant floor (which was considered more efficient than the relief originally sought to restrict the application of minimum floor levels only to habitable buildings). The parties had prepared a s 32AA evaluation of the agreed amendments. The Court was satisfied that the amendments were within the scope of Federated Farmers' submission and appeal. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the NH provisions of the PDP be amended as agreed by the parties. There was no order as to costs.

Decision date 17 October 2023 - Your Environment 9 November 2023

~~~~~~

R v John Turkington Ltd - [2023] NZDC 23182

Keywords: prosecution; evidence; search warrant; delegated authority; enforcement

This pre-trial application by the Crown for admission of evidence pursuant to s 101 of the Criminal Procedure Act 2011 concerned the validity of evidence obtained by officers of Manawatū-Whanganui Regional Council ("the council") during inspections, and specifically the validity of the delegation of powers of appointment of the officers by the council to its chief executive ("CE"). The defendants, John Turkington Ltd ("JTL") and W Findlay ("F"), were facing charges under the RMA 1991 arising from forestry and harvesting activities. They had elected trial by jury. The contested evidence had been obtained by council enforcement officers exercising the power of inspection in s 332 of the RMA 1991. These officers had been appointed by the CE and warrants had been issued. The key issue was whether the officers had been lawfully appointed, which turned on whether there had been a valid delegation from the council to its CE of the power to appoint the officers. The defendants argued that the delegation had been invalid, and therefore the evidence had been improperly obtained, because cl 32A of sch 7 of the Local Government Act 2002 ("LGA 2002") applied to the delegation and this clause had not been complied with. Clause 32A explicitly provided that a local authority could delegate to a committee, member, or officer the power to issue warrants to enforcement officers, provided the local authority first determined what limits, restrictions, conditions or prohibitions should be included in the power. The defendants argued that the council had not completed this step when delegating the power.

The Crown had already made a similar s 101 application for admission of evidence in relation to separate charges laid against JTL and another defendant, K Speedy, concerning activities at different forestry sites ("the first s 101 application"). That application had been heard by the District Court and presided over by Judge Kirkpatrick (see *R v John Turkington Ltd* [2022] NZDC 18392). In that first s 101 application, Judge Kirkpatrick had rejected the defendants' case. Now, the basis for the defendants' objection to the evidence in the present proceedings was the same as in the first s 101 application. The present defendants alleged that the first s 101 application had been wrongly decided. The Court noted that while the questions were the same, they arose in a distinct and separate proceeding involving a defendant ("F") who had not been a party to the first s 101 application. The Court agreed that the present defendants were entitled to have these questions considered afresh, that this Court was not bound by that s 101 decision, and that this Court should not simply adopt the first s 101 decision. However, the Court also noted that it did not have any appellate jurisdiction.

The Court nevertheless came to the same conclusion as Judge Kirkpatrick and for essentially the same reasons. Clause 32A did not apply here. Although s 48 of the LGA 2002 listed "delegations" as one of the activities that had to be carried out in accordance with pt 1 of sch 7 (which included cl 32A), this did not trigger cl 32A where the delegation related to the warranting of enforcement officers under the RMA 1991. The power to issue warrants to enforcement officers under cl 32A was limited to enforcement officers as defined in the LGA 2002, which was in turn limited to offences under the LGA 2002. This did not include other enactments like the RMA 1991. The Court agreed with Judge Kirkpatrick's analysis and conclusion in the first s 101 application that provision was made for appointment of enforcement officers under both s 177 of the LGA 2002 and s 38 of the RMA 1991, and that any appointment under those respective regimes was specific to the Act under which it was authorised. The delegation powers under the two regimes were separate. Therefore, the ability to delegate the power to issue a warrant to an enforcement officer under the RMA 1991 was not reliant on any authority under the LGA 2002. The Court rejected the defendants' case. The Crown's s 101 application for the admission of evidence was granted.

Decision date 24 October 2023 - Your Environment 13 November 2023

~~~~~~

MacFarlane Investments Ltd v Queenstown Lakes District Council - [2023] NZEnvC 223

Keywords: public work; compulsory acquisition; property rights; alternative; designation; road

This matter concerned an objection by MacFarlane Investments Ltd ("MIL") to the taking of its land under the Public Works Act 1981 ("PWA 1981") by Queenstown Lakes District Council ("the council"). In accordance with s 24 of the PWA 1981, the Court had conducted a hearing to inquire into the objection and now delivered a report on its findings. The land to be taken comprised 39m2 of a site at Man St, Christchurch. (*Queenstown? RHL*.) It was currently used as a commercial carpark. The council ostensibly required the land for its major project of building a new arterial road as an alternative route around Queenstown's commercial area, and associated integrated initiatives (such as public realm upgrades and streetscaping, and public transport and active transport modes initiatives). The council had issued two notices of desire to acquire the land under s 18 in December 2020 and September 2021 (with the latter notice revising the size of the land required). In February 2022, the council had then issued a notice of intention to take the land under s 23. MIL then formally objected to that taking of land. Relevantly to these proceedings, in December 2020 the council had also lodged a notice of requirement ("NOR") for a designation. The NOR had attached an "Alternatives Report" authored by consultants. MIL had commented on the NOR at the invitation of the expert consenting panel ("the Panel") that was deciding on the NOR under fast-track consenting legislation in place at that time. MIL had expressed concern about the council's failure to consider alternatives, and to balance the council's desire for a 5m-wide footpath with the implications for MIL's land. MIL identified at least two alternative options for the layout of an intersection that had not been considered by the consultants and that required little or no use of MIL's land. MIL also supplied a review by an expert traffic engineer that questioned the need for this footpath width to achieve the project objectives. The Panel decided to confirm the NOR and considered that adequate consideration had been given to alternative sites.

One of MIL's grounds of objection to the taking of its land was that the council had failed to adequately negotiate with MIL. Under s 18 of the PWA 1981, the council was required, following service of a notice of desire to take land, to make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the land acquisition before taking the land. In this case, the council had made some attempts to communicate with MIL as early as 2019 before the first s 18 notice of desire was served. Consultation then recommenced mid-2020, and the Court heard evidence of emails between MIL and a property and valuation management company engaged by the council to assist with acquisition negotiations. A director of MIL, J Thompson ("T"), explained that he had been effectively stranded in Sydney for two years during the COVID-19 pandemic and had preferred to meet in person in New Zealand, rather than conduct negotiations by phone or video conference, as he said he was not particularly technologically advanced. He was critical of the council's failure to acknowledge this preference. The Court noted that it did not have the power to make a declaration as to the good faith endeavours of an acquiring authority under s 18. However, it could account for any unfairness in the authority's treatment of an objector when the Court was deciding, under s 24(7)(d), whether the taking of the land would be "fair, sound, and reasonably necessary" for achieving the authority's objectives. The Court concluded that there was no evidential basis for a finding of unfairness in the negotiation process. T's
~~~~~~

unwillingness to negotiate virtually from Sydney had been unreasonable; during the pandemic, business had been conducted virtually by much of the New Zealand population out of necessity.

A second ground of objection was that the council had not given sufficient consideration of alternative sites, routes and other methods of achieving its objectives (per s 24(7)(b)). The Court noted that the onus lay with the council to identify alternatives. It had been obliged to address this through the NOR process. The Court found that the council had not been required to undertake the analysis of alternatives in the current s 24(7)(b) context (ie the Court's inquiry into the objection) when the council was exercising its power of acquisition in the s 23 context. However, in hearing this PWA 1981 objection, the Court was entitled to take into account the consideration given to alternatives in that NOR process. Turning to the Panel's consideration of those matters in the NOR process, the Court found that the consideration of alternative routes and methods had been focussed on alternative arterial routes and not to the intersection design nor to any aspect of the streetscape upgrade project. As to the council's prior consideration of alternatives, these had been explained in the consultant's reports. On that basis, the Court was unable to find that this demonstrated adequate consideration.

The Court acknowledged that the council's obligation did not extend to identifying all possible alternatives. However, it cited authority from a designation case also involving private land that, provided an alternative was not merely "suppositious or hypothetical", the Court had to have regard to whether it was adequately considered. The Court agreed that there was nothing suppositious or hypothetical about an option that reduced a pathway to 4m in front of MIL's land, which had not been considered by the council. Another relevant fact was that recent construction of "interim" works associated with the streetscape's upgrade had been completed, and changes had been made to the design of the intended works (because of unforeseen excavation issues) at the corner immediately adjacent to MIL's land. This construction had not required any of MIL's land. While the future of this interim "as-built" design was uncertain (as it was unclear if it would be altered in future), it had not been reflected in any of the options identified in the consultant's reports to the council.
In deciding the "fair, sound, and reasonably necessary" question in s 24(7)(d), the Court cited authority that a NOR that will derogate from private property rights calls for "closer scrutiny" when considering the threshold of what is "reasonably necessary". The Court noted that the objective relating to the streetscaping was now "taken off the table" as a justification for taking MIL's land as a consequence of the recent design change, with the Court having received scant evidence as to whether it was likely that those as-built works would be reconsidered in future. That left the objective of the new arterial road as potentially justifying the taking of land. As the council had not given adequate consideration to alternative designs for the intersection operating as an arterial (and the design process for the road to operate as an arterial had not yet been carried out) the Court could not be satisfied that, at this time, the taking of land would be fair, sound, or reasonably necessary in achieving the council's objectives. The Court upheld MIL's objection. Costs were reserved.

Decision date 25 October 2023 - Your Environment 5 November 2023

~~~~~~

Sound (Save Onerahi from Undue Noise Disturbance) Inc v Whangarei District Council - [2023] NZHC 2988

Keywords: High Court; judicial review; council procedures; consultation; noise; airfield

This application for judicial review challenged two decisions by Whangarei District Council ("the council") to support the relocation of the Northland Emergency Services Trust ("Nest") to Whangarei Airport. Nest's sole purpose was to provide an air ambulance and emergency rescue helicopter service for the people of Northland. It had been forced to relocate from its Kensington base because of issues with that site. In 2021, Nest approached the council to discuss relocating to the airport. The airport, which was located in the suburb of Onerahi and surrounded by homes, was operated by the council. At a meeting in November 2021, the council decided to support Nest's relocation "in principle" ("the First Decision") and authorised its staff to negotiate with Nest about the terms of a lease. In May 2022, a meeting was held at the airport to hear community concerns. In September 2022, after receiving recommendations from an airport noise management committee that had reviewed noise modelling, the council confirmed its support for Nest's relocation ("the Second Decision"). These judicial review proceedings were brought by Save
~~~~~~

Onerahi from Undue Noise Disturbance Inc ("Sound"), a group representing more than 100 Onerahi residents who were concerned about the noise effects.

As a preliminary issue, the Court addressed Sound's contention that both decisions had not been "in principle" and had instead been tantamount to "final" decisions. The Court disagreed and found that both decisions made Nest's relocation to the airport a *possibility*. Both decisions had been subject to significant conditions (eg that Nest would be responsible for meeting all statutory and regulatory requirements, and that a stand-alone agreement to be made by the council and Nest to address noise would include an approved airport noise management plan that had to comply with the legislation, district plan, and council policies). Further, no lease existed at the time of either decision (and no lease had yet been entered subsequently). If a lease could not be negotiated, or if Nest could not meet its legal obligations in relation to noise, it would not relocate. Therefore, neither decision was to be treated as determinative of Nest's relocation.

Sound's first ground of review was that the council made "fundamental errors of law". It claimed that the council had misunderstood or failed to consider ss 16 and 17 of the RMA 1991 (which provided that every occupier of land was to adopt the best practicable option to ensure that the emission of noise did not exceed a reasonable level, and that every person had a duty to avoid, remedy, or mitigate adverse effects of activities they carried on). Sound also alleged that the council had wrongly identified the applicable noise rule under the district plan. The Court disagreed that there had been errors of law. The council had been acting as a prospective landlord in relation to airport land, and as an airport authority under the airport authorities legislation. It had not been making a planning decision. A decision by a landlord to grant a lease to a tenant would not ordinarily require an understanding of the RMA 1991. It was open to the council to make its support for Nest's relocation contingent on Nest meeting all statutory and regulatory requirements. Therefore, the council had been entitled to assume that Nest could conduct its operations at the airport lawfully. Further, ss 16 and 17 of the RMA 1991 applied to the occupier of land (here, Nest) not the owner (the council). It was also not necessary for the Court to decide which rule in the district plan was the applicable rule. In reaching this conclusion, the Court distinguished this case from *Hugh Green Ltd v Auckland Council* [2018] NZHC 2916, where the Court had found that when a decision-making body was deciding whether to acquire land identified in an underlying plan as public open space, it needed to take into account the provisions and policies of that underlying plan. In that case the authority had been making a decision more akin to a planning decision, whereas in this case the council had been acting primarily as an airport authority.

The Court also rejected Sound's second ground that the council had failed to consider various "mandatory" considerations. It cited authority that considerations were not mandatory if the statute did not expressly or impliedly identify that the considerations were required to be taken into account. It was not enough that the considerations would be treated as "relevant", even by many people. Sound had not identified the source of the requirement to consider the matters that it claimed were mandatory. While they could be described as relevant, they were not mandatory.

The Court also disagreed that the council had contravened the Local Government Act 2002 ("LGA 2002"). Sound argued that the council had wrongly determined that Nest's relocation to the airport was not a "significant" decision in accordance with its significance and engagement policy, as required under the LGA 2002. The Court considered the council's policy and noted that it had determined that this particular matter did not meet the policy criterion of having a "major" level of public impact and/or interest. It had been open to the council to conclude that these were not significant decisions, despite their importance to the Onerahi community. Sound also contended that the two decisions had failed to promote compliance with ss 77 and 78 of the LGA 2002 (ie identifying all reasonably practicable options, assessing advantages and disadvantages, and giving consideration to the views and preferences of persons likely to be affected or to have an interest). The Court said that decisions of this nature "should not be approached as if they were decisions of a Court, in which everything is carefully balanced and weighed". Though these had not been "model" decisions, the council was right to emphasise the nature and significance of the decisions (ie "in principle" and not significant). Again, it had also been open to the council to assume that Nest could operate lawfully at the airport. Further, s 79 recognised that a local authority had discretion in deciding how ss 77 and 78 were discharged. Regarding Sound's claim that the council had not consulted the community, the Court cited authority that there was no general obligation on a council to consult under the LGA 2002. The council was obliged under s 78 to consider the views of persons likely to be affected or to have an interest, but the Court found that it had clearly done so.

Finally, the Court rejected Sound's claim that the decisions were unreasonable in the *Wednesbury* sense. Decisions to support the relocation of an emergency helicopter service to the airport - which were "in principle" and not subject to the mandatory considerations claimed by Sound - could not be described as "irrational or perverse" in the sense understood by the law. The judicial review application failed. The council and Nest were presumptively entitled to costs.

Decision date 27 October 2023 - Your Environment 16 November 2023

~~~~~~

Olive Leaf Centre Trust v Queenstown Lakes District Council - [2023] NZEnvC 225

Keywords: church; activity non-complying; heritage value; character; objectives and policies

This matter concerned an appeal against a decision of Queenstown Lakes District Council ("the council") to decline an application, largely on heritage grounds, for consent for a proposed new facility at the site of the existing heritage-listed St Patrick's Church in Arrowtown. The applicant, The Olive Leaf Centre Trust ("the Trust"), saw the proposal as the parish's vision for sustaining itself, its buildings and the community into the future. With declining congregations, the Trust considered that the existing historic church setting was poorly suited to engaging with the community in a modern way. The proposal entailed construction of a new contemporary two-level, multi-purpose building next to the existing church building. This would be used 365 days a year, primarily for church activities but also some non-church related events. The building would be "submerged" with the lower part of the building dug into the ground. Landscaping within the setting, and the construction of new gates and walls, was also proposed. While no works were proposed to the listed buildings on site, consent was required for development within the setting of the scheduled heritage buildings. Overall, the proposal was treated as a non-complying activity because of a predicted night-time noise rule breach with function attendees leaving the site after 8 pm. The council declined consent as it considered that the proposal failed both limbs of s 104D of the RMA 1991 (ie the effects would be both more than minor and contrary to district plan objectives and policies). This was on heritage and other grounds. The Trust now appealed that decision.

The Court saw the two core issues as historic heritage and urban design. Both the church building and a separate cottage were listed in the proposed district plan ("PDP") as Category 2 Heritage Features. The site was zoned Arrowtown Residential Historic Management Zone ("ARHMZ"). Key PDP provisions included Chapter 10 (provisions applying to the ARHMZ) and Chapter 26 (Historic Heritage).

A key question was whether, in accordance with Chapter 10 objectives for the zone, the proposal retained or enhanced the historic character and amenity values of the ARHMZ. There was no definitive statement as to what the "historic character" of the zone was, but certain "Design Guidelines 2016" referenced in Chapter 10 were generally relevant in informing what the historic character and amenity values were. The Design Guidelines specifically addressed "Churches and Church Grounds", which included a key guideline to "[t]ry to protect/retain the visual primacy of Churches, their plantings and the simplicity and sense of spaciousness". While the design guidelines were primarily aimed at *residential* development, the Court found that, because Chapter 10 policies required buildings to be located and designed in a manner that complemented the character of the area, guidance as to that character could be found in the design guidelines read as a whole. Regarding Chapter 26 (which applied specifically to heritage-listed items and settings), the Court clarified the extent of the historic heritage "setting", which was not defined in Chapter 26. The Court agreed with the High Court's approach in a 2015 decision endorsing the view that s 6(f) of the RMA 1991 (protection of historic heritage as a matter of national importance) was relevant beyond the listed heritage features. The Court recognised that heritage values must be seen in context and not limited to the area and buildings within the site boundaries.

In reviewing the urban design evidence, the Court preferred the evidence of the council's expert in terms of building location and scale, streetscape character and views, relationship between the existing church and the proposal (including primacy of the church and maintaining spaciousness), and built form character. Overall, it found that the design and materials would contrast so greatly with the church that it would significantly reduce its primacy. This was due to the complexity of its form and the materials used, and scale. Regarding the roof (which would be less than half the height of the church), the Court did not accept that the form and sculptural shaping (in the design of an olive leaf) and its depressed profile made the proposal subservient to the church. Regarding "spiritual, cultural and community" benefits, the Court found that even if these came to fruition, they
~~~~~~

would not outweigh the Court's findings on other adverse effects.
The Court ultimately agreed with the findings of the first instance decision on historic heritage. It did not accept that the church building would remain the dominant building on the site because of the bulk, form and size of the whole proposal, nor that the church would retain "primacy". The proposal was likely to have significant adverse effects on the characteristics of openness and spaciousness that supported the heritage values of the church and site. The proposal was also contrary to key objectives and policies in Chapters 10 and 26. The appeal was dismissed. Costs were reserved, although applications were discouraged.

Decision date 30 October 2023 – Your Environment 20 November 2023

~~~~~~

Woodgate Ltd v Palmerston North City Council - [2023] NZEnvC 252

Keywords: information required

This appeal concerned a decision by Palmerston North City Council ("the council") to return an application for resource consent as incomplete, and a subsequent decision by an independent commissioner to dismiss an objection to that earlier decision. Woodgate Ltd had applied for subdivision and land use consents to construct, maintain and operate a retirement village at Palmerston North City. The council determined the application to be incomplete under s 88(3) of the RMA 1991. Woodgate then lodged a notice of objection under s 357. The independent commissioner hearing the objection upheld the decision and outlined, in full, the matters identified by the council as being insufficiently detailed. This included both minor and major deficiencies. The more significant shortcomings included: information about large-scale earthworks requiring a high standard of geotechnical compliance, which the council could not adequately assess and for which there was no natural hazards assessment; and stormwater management planning. On appeal to this Court under s 358, Woodgate argued that the commissioner had misdirected himself as to the data threshold to be met under s 88(3), and as to the appropriateness of aggregating minor deficiencies. Woodgate argued that it ought to have been afforded the opportunity to address those deficiencies via a s 92 process, rather than having the application returned under s 88(3).

The Court firstly addressed the scope of appeals under s 358. It cited authority that in most (but not all) circumstances, a full de novo assessment was not required; rather, in most cases a "fair and reasonable" assessment was all that was required. The parties in this case identified that a "fair and reasonable" assessment of the commissioner's decision was required and the Court therefore proceeded on that basis.

Regarding the argument that Woodgate should have been allowed to address the deficiencies, the Court agreed with the commissioner that the council was not obliged to proactively pursue information inadequacies. If an application did not contain the fundamental information, it was not appropriate to fill the gaps with a request for further information. The Court agreed that the gaps here were fundamental. The commissioner's decision had therefore been fair and reasonable.

The Court did, however, comment on weaknesses in the council's original letter advising that the application was incomplete. The letter had listed all matters of concern detected by the council, which meant it contained not only matters that rendered the application incomplete under s 88, but also matters that could be resolved by an information request under s 92 and matters which went to whether consent should be granted under s 104. As such, it was difficult, if not impossible, to discern the relevant s 88 considerations. While the commissioner's later objection decision had clarified the major deficiencies, the council's initial letter had not done so. The Court emphasised that a determination under s 88(3) should refer clearly to the matters on which that determination has been made because there was no place, in the s 88 completeness assessment, for secondary inquiry into whether the council had adequate information to make its decision whether to refuse or grant the application. The council was invited to reflect on this for future decisions. The appeal was refused and the decision of the council to return the application as incomplete was upheld. Costs were reserved.

Decision date 21 November 2023 – Your Environment 18 December 2023

~~~~~~

Auckland Council v Ma - [2023] NZDC 24012

Keywords: prosecution; earthworks; soil; hazardous substance; erosion

This was the sentencing of T Ma ("M") and a company of which he was a director, Mender Construction Ltd ("MCL"), who had both pleaded guilty to undertaking land disturbance activities in breach of the Auckland Unitary Plan ("AUP"). The site where the offending took place was located in Albany, Auckland ("the Property") and subject to a Significant Ecological Area ("SEA") overlay. In 2021, Auckland Council ("the council") became aware that unconsented land disturbance and vegetation removal had been carried out at the Property, in breach of AUP rules that imposed restricted discretionary status on land disturbances in the overlay exceeding 5 square metres or 5 cubic metres. A large amount of aggregate had also been brought to the Property. These activities had been carried out by MCL, a company that provided building and construction services. A related company that provided aggregates, clean fill tipping and truck hire services was also charged in relation to this offending, but was not part of this sentencing. M had also personally been involved in carrying out the works. The Property's owner had agreed to allow the defendants to deliver the soil to the Property. The defendants later confirmed that they made money by getting rid of soil from other sites, and that it was cheaper to take such soil to the Property than to take it to a commercial waste facility that would charge a fee per truckload. The Property owner did not charge, nor pay, any money for the soil deliveries. The defendants suggested that they had been doing the Property owner a "favour" because the Property had cracks and the foundation was sinking. However, after the owner asked M to stop delivering soil, the defendants had not complied and continued to deliver several more truckloads.

In terms of effects, the Court recognised two separate issues. The first was the land disturbance illegally undertaken in an SEA overlay, which had led to a bank slipping and silt entering a small stream on a neighbour's property. As well as potentially affecting macroinvertebrate habitats and their ability to recolonise, some fill material had swamped vegetation at the base of a slope, compromising its survival. Although "actual" damage had not been quantified, the Court stressed that it was clear that inadequate sediment control measures had been put in place in a situation that involved significant earthworks close to a waterway. The Court concluded that the effects were serious. The second matter was the fill brought to the Property, which had been contaminated with fragments of asbestos-containing materials at concentrations that exceeded applicable guidelines. M had admitted to bringing around 20 truckloads to the Property. This raised the effects of the offending to "significant".

Regarding culpability, M had acknowledged that he knew his actions were unlawful. When council officers inspected the Property, M at first provided a false name and contact details. He later admitted responsibility and said that he had panicked at the time because he did not want another RMA 1991 conviction. The Court said the lack of adequate sediment or silt controls was concerning given M's specialist role in the construction industry. It was particularly concerning that M had eventually told the council that he believed that responsibility for sediment controls was with the owner of a property. The culpability of both MCL and M (who was both the "brain" and the "hands" of the operation) was high.

The Court set a global starting penalty of $55,000, apportioned as $36,500 for M and $18,500 for MCL. As the defendants each had previous RMA 1991 convictions that were both recent and of a similar nature, the Court applied an uplift of 10 per cent. Additionally, M's deceptive conduct in misleading a council officer with false information was a further aggravating factor and the Court applied a further 10 per cent uplift for M. A discount of 25 per cent for an early guilty plea was allowed for each defendant. M and MCL were both convicted, fined $34,675 and $15,725 respectively, and ordered to pay court and solicitor's costs. Ninety per cent of the fines were to be paid to the council. The Registrar was directed to consider allowing M extra time to pay his fine or to pay in instalments.

Decision date 9 November 2023 – Your Environment 29 November 2023

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

~~~~~~

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

~~~~~~

OTHER NEWS ITEMS

~~~~~~

The Resource Management (Natural and Built Environment and Spatial Planning Repeal and Interim Fast-track Consenting) Act 2023 (2023 No 68) passed by Parliament

The government has repealed the Natural and Built Environment and Spatial Planning Acts

	Introduction	First Reading	Select Committee Report	Second Reading	AP No	Committee of the whole House	Third Reading
House of Representatives	18/12/2023	19/12/2023		19/12/2023	4	19/12/2023	19/12/2023

Royal assent was granted on 22 December 2023

~~~~~~

Beehive: Electric vehicles to pay road user charges

Transport Minister Simeon Brown has announced that the coalition Government is confirming that the exemption from road user charges (RUC) for owners of light electric vehicles (EVs) and plug-in hybrids will end from 1 April.

"Petrol tax and distance-based RUC are paid by road users to contribute to the costs of maintaining our roads, but EVs and plug-in hybrids have been exempted from RUC. Transitioning EVs and plug-in hybrids to RUC is the first step in delivering on the National-ACT coalition commitment to bring all vehicles into the RUC system," Simeon Brown said.

"Plug-in hybrids are powered by electricity and petrol and have had to pay petrol tax, but not to the same level as petrol equivalent vehicles. To ensure that plug-in hybrids avoid paying twice through both fuel excise duty and RUCs, these vehicles will pay a reduced rate RUC.

"The previous National Government exempted EVs from paying RUC to encourage their uptake. This exemption was always intended to end when EVs hit around two per cent of the light vehicle fleet and we're now at that point.

"With the increasing uptake of EVs and plug-in hybrids being brought into the RUC system, this means that these vehicles will now be contributing towards the maintenance and upkeep of our roading system like all other road users and will support the Government's priority of building and maintaining our roading network," Simeon Brown said.

Owners of light EVs and plug-in hybrids will need to buy a RUC licence from 1 April. There will be a two-month transition period to allow time for people to get registered in the RUC system without being penalised for unpaid RUC.

From 11.59pm, Sunday 31 March 2024:

- *Legislation will be passed before 1 April to enable the reduced RUC rate for plug-in hybrid vehicles.*
- *Owners of light EVs will pay $76 per 1000 kilometres, in line with equivalent diesel-powered vehicles.*
- *Owners of plug-in hybrid vehicles will pay a reduced rate of $53 per 1000 kilometres so that they are not double taxed when paying Fuel Excise Duty. The partial rate of $53 per 1,000*

kilometres assumes that on average, a plug-in hybrid will consume petrol at a rate of just under 3 litres per 100 kilometres.

- *NZTA will be informing EV and plug-in hybrid owners about the transition to RUCs and what it will mean for them.*
- *As part of this outreach, each EV and plug-in hybrid owner will receive a letter prior to 1 April that will explain the RUC process. The first time an EV owner buys their RUC licence they need to give their odometer reading.*
- *Whenever a warrant of fitness is undertaken, a vehicle's odometer will be reviewed. If the odometer exceeds the RUCs purchased by the vehicle's owner, they will be invoiced for any difference.*

Please click on the link for full statement - Media release

~~~~~~

Compensation awarded after Council admits wrongdoing

The Otago Daily Times reported on 20 December 2023 that a legal stoush between the **Central Otago District Council** (CODC) and an Oturehua couple had been settled in the High Court with the council admitting wrongdoing. $40k compo was awarded.

In 2021, Alistair Broad and Hilary Calvert — a former Dunedin city councillor — applied for resource consent to subdivide land in Oturehua to create five titles from what had been four to allow separate lots for themselves and their three daughters. The remaining title will continue to be leased to the Presbyterian church. The dispute centred on an access road to neighbouring Inverlair Lodge, part of which was formed across a corner of their land about 15 years ago.

~~~~~~

Wellington moves to water restrictions while number of leaks remain high

Stuff reports that Wellington will move to level 2 water restrictions from Wednesday, while decaying pipes continue to cause hundreds of leaks that waste millions of litres of water. Wellington Water reported it fixed 552 leaks in December and has repaired almost 4200 leaks since July 1, 2023. The agency said it will cost $7.6 billion over the next decade to fix the pipe problems.

Read the full story here.

~~~~~~

Kāinga Ora: Auckland council flood buyouts will not include state homes

RNZ reports that Kāinga Ora has said Auckland Council has informed the agency that state homes will not be eligible for flood buyouts. Over 2000 state homes were damaged in the flooding. Kāinga Ora acting deputy chief executive for Auckland and Northland, Paul Commons said "We are continuing our assessment of those properties to determine whether steps can be taken to allow them to continue to be used for public housing".

Read the full story here.

~~~~~~

Miramar Peninsula is now predator-free after years of effort

Newshub reports that after years of work, including a large volunteer effort from 20,000 locals, Wellington's Miramar Peninsula is now predator-free. Predator Free Wellington project director James Willcocks said "It's been a long time coming, but today we are at zero". Phase two of the project will focus on Island Bay to the CBD.

Read the full story here.

~~~~~~

Fonterra says it will be 30% greener in 7 years

Stuff reports that Fonterra has pledged that the co-op will be 30 per cent greener by 2030 by encouraging farmers to plant trees, introduce methane-cutting tools and treat cow pats. The company said the 30 per cent goal covers all agricultural greenhouse gases: methane, carbon dioxide and nitrous oxide.
~~~~~~

Read the full story here.

~~~~~~

New housing development in Napier deemed unsafe for habitation

Stuff reports that property owners at a new coastal housing development, Tangoio settlement, in Napier learned on Monday that the entire community has been deemed a provisional Category 3 area, which is considered unsafe for habitation. Hastings District Council granted resource consent for the community in April 2019, with construction was completed in 2022.

~~~~~~

MPI: New biosecurity protections for all Te Arawa lakes

New biosecurity protections against the spread of the freshwater gold clam come into effect for Te Arawa lakes at midday on Friday 10 November 2023, including special measures to protect Lake Ōkataina.

Please click on the link for full statement - Media release

~~~~~~

West Coast Regional Council backs locally generated hydroelectricity

Radio New Zealand reports that West Coast Regional Council is calling for the Government to back locally generated hydroelectricity. The council has submitted on the Government's discussion documents - Advancing New Zealand's Energy Transition - on its local power needs.

Read the full story here.

~~~~~~

Auckland could have congestion charge by 2026

Stuff reports that motorists in Auckland could be paying congestion charges from 2026 under a new timeline being pursued by Auckland council and its agency Auckland Transport. Motorists could be charged $3.50 at peak times to drive into the city centre.

Read the full story here.

~~~~~~

Wellington cycleway developers reprimanded after deaths of penguins

RNZ reports that the Department of Conservation (DOC) has issued a formal warning to developers of the Wellington-Petone cycleway over the deaths of several little blue penguins, or kororā. The DOC investigation found the deaths were not intentional or malicious, but were the result of required site checks that were not completed.

Read the full story here.

~~~~~~

Occupation on Karikari Peninsula ends as landowner agrees to hapū demands on sand dunes

RNZ reports that a four-week occupation on the Far North's Karikari Peninsula has come to an end after a landowner agreed to hapū demands to permanently protect sand dunes regarded as a wāhi tapu (sacred place). The landowner had been given permission by the Far North District Council to use a digger to widen an accessway through the dunes.

Read the full story here.

~~~~~~

Govt scraps $16bn Lake Onslow battery project

RNZ reports that the Government has announced it has scrapped the $16 billion Lake Onslow battery project, which was intended to be a potential solution to the country's dry year problem. Energy Minister Simeon Brown said it was a " hugely wasteful project" and called off work at the project on Friday.

Read the full story here.
~~~~~~

~~~~~~

Frustrated homeowner graffitis fence: "Stop flooding our homes"

Stuff reports that a homeowner, frustrated and angry over repeated flooding on her property, decided to graffiti the shared fence with "Stop flooding our homes". Paula McClure said she made numerous complaints to council and to construction staff on site, but nothing has been done to remedy the issue, which was allegedly caused by a developer next door raising the ground level of its site.

Read the full story here.

~~~~~~

Partially treated wastewater spills into Queenstown swamp

RNZ reports that partially treated wastewater has spilled over the top of an oxidation pond at the Shotover Wastewater Treatment Plant into a Queenstown natural swamp. Crews are working to clean up the spill and determine the cause. Acting property and infrastructure general manager Simon Mason said it is believed no contamination has reached the Shotover River.

Read the full story here.

~~~~~~

Forest & Bird urging local councils to restrict vehicles on beaches

Newsroom reports that Forest & Bird has sent an open letter to local councils urging the restriction of vehicles on beaches to protect resting marine mammals, resting and feeding seabirds and recovering vegetation and sand dunes. An investigation by the conservation organisation shows that 73 per cent of councils have inadequate bylaws, monitoring, and compliance for vehicles on beaches.

Read the full story here.

~~~~~~