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Legal Case-notes April 2024

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

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- Court's final binding decision under s24 of the Public Works Act 1981 ("PWA 1981") concerning the Minister for Land Information's decision to acquire easements for 110kV transmission line.
- A consent order concerned an appeal regarding the zoning of a property in Dunedin under the Dunedin City Second Generation District Plan ("2GP"). Two-thirds of the appellants' land was to be zoned General Residential 1, which was not contested, but the zoning of the remaining third was in dispute.
- A request for the Court to use a s 293 process to achieve an appeal outcome agreed upon by the parties. The appeal concerned the proposed rezoning of land.
- A consent order concerned an appeal against a zoning decision by Waikato District Council in the proposed Waikato District Plan.
- A successful application for costs by an applicant for judicial review who had discontinued its application.
- Sentencing of a company and its director who had pleaded guilty to offences arising from unconsented earthworks relating to a residential subdivision.

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Dromgool v Minister for Land Information [2023] NZEnvC 259

Keywords: compulsory acquisition; public work; utility network; consent order

This was the Court's final binding decision under s24 of the Public Works Act 1981 ("PWA 1981") concerning the Minister for Land Information's decision to acquire easements to enable construction of a 110kV transmission line between Kaikohe and Kaitaia. Several parties had objected to the Minister's s 23 notice, and in 2018 the Court had then issued a report to the Minister on its findings, concluding that it was fair, sound and reasonably necessary to provide for the easements to achieve the objectives identified (subject to the easements being modified to be more directly applicable to the objectives and the individual properties): see *Dromgool v Minister for Land Information* [2018] NZEnvC 108. Following appeals in the higher courts, this Court's report was ultimately confirmed by the Court of Appeal. The Supreme Court determined not to interfere with that decision and remitted the matter back to this Court to finalise the terms of the easements (see *Dromgool v Minister for Land Information* [2022] NZSC 157). The parties had now reached agreement on costs, compensation for the easements over the objectors' land and easement terms, and now sought the Court's endorsement. The Court noted that it had previously reserved the terms of the easements and had been of the view that refinements could be made. However, as the parties had now agreed on easement wording, the Court did not consider it necessary to undertake any fulsome review. The wording appeared to be generally appropriate. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the terms of the easements were endorsed and finalised. This determination was to be read together with the earlier 2018 decision as the Court's final binding report under s 24 of the PWA 1981. There was no order as to costs.

Decision date 13 November 2023 - Your Environment 12 January 2024

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Duffy v Dunedin City Council [2024] NZEnvC 13
Keywords: consent order; zoning

This consent order concerned an appeal regarding the zoning of a property in Dunedin under the Dunedin City Second Generation District Plan ("2GP"). Two-thirds of the appellants' land was to be zoned General Residential 1, which was not contested, but the zoning of the remaining third was in dispute. In the notified 2GP, Dunedin City Council ("the council") had proposed to impose a "transition" overlay that would progress to residential zoning once specific release criteria were met. However, in the decisions version, the council had decided to retain rural residential zoning with no transition overlay zone. The appellants now sought that a transition overlay zone be imposed. Key issues in dispute included geotechnical risks such as slope stability issues, and the effect of clearing indigenous vegetation. Following expert caucusing and two hearings, the parties had now reached an agreement to settle the appeal. This involved the adoption of a transition overlay zone, structure plan mapped area and performance standards. Central to the agreement was the adoption of a geotechnical "no-build" area in which residential buildings were not allowed, and a requirement that applications for earthworks, subdivision activities, and development of residential units include a geotechnical investigation report. Clearance of significant indigenous vegetation would also not occur in certain identified areas.

The parties had prepared a s 32AA evaluation of the agreed amendments. The Court was satisfied that they would achieve the objectives and policies of the 2GP and higher order documents. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the 2GP be amended as agreed by the parties. By consent, there was no order as to costs.

Decision Date 13.02.2024 YourEnvironment 7 March 2024

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Fleming v Waikato District Council [2024] NZEnvC 14

Keywords: **District Plan proposed; zoning; consultation**

This matter concerned a request for the Court to use a s293 process to achieve an appeal outcome agreed upon by the parties. The appeal concerned the proposed rezoning of land at the edge of Ngaaruawaahia under the proposed Waikato District Plan ("PDP"). There were 11 properties within the appeal area, comprising approximately 10.4 ha. The appellants, who owned four properties in the appeal area, were part of a larger group of submitters who had made a joint submission on the PDP requesting that the zoning be changed from Country Living Zone to Village Zone. The intention was to enable further re-subdivision of land, relying on the Village Zone minimum lot size of 3,000m^2. Waikato District Council ("the council") declined the submission and decided to retain Country Living zoning. On appeal, the appellants sought that the area be rezoned as "Settlement Zone", which was now the nearest equivalent National Planning Standards zone to the Village Zone originally sought in the submission. This entailed a minimum lot size of 2,500m^2. However, following discussions with the council, the parties now agreed that the most appropriate zone was General Residential, with a minimum lot size of 400m^2. Since this significantly greater density had not been sought in the submission or appeal, the parties now sought that the Court use its power under s 293 to order this change.

The Court confirmed that the requirement in s 293 that the process follow a "hearing" of the appeal was met in this case by the Court considering the parties' memorandum and responding to it. A formal appeal hearing was not a necessary precursor to the use of s 293. In considering whether to exercise its power, the Court agreed with the parties that there was a nexus between the submission, appeal, and proposed outcome. Each had proposed conversion of the area from a rural lifestyle form of zoning to a more urban residential zoning. The material difference between the appeal relief and the parties' (now) preferred outcome was the density of urban development.

The Court agreed that all non-appellant landowners within the appeal area should be consulted on the proposal. However, it disagreed with the parties' submission that landowners immediately to the east, north and south of the appeal area were not required to be notified. While these landowners had been "largely involved with the appellants as joint submitters" under the original submission and had later elected not to participate in the appeal under s 274, the Court noted that the density now proposed (ie minimum lot size of just 400m^2) was significantly different to the density under the zoning sought previously (3,000m^2(Village Zone)/2,500m^2(Settlement Zone)).
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Case law indicated that the Court's s 293 power should be exercised cautiously and sparingly. Therefore, these other parties were to be notified.

The Court directed a staged approach that would firstly allow the Court and the parties to gauge feedback from the notified parties. The council was directed to notify the relevant parties and to then collate and summarise all of their written feedback. At that point, the next steps could be considered, including whether a more formal process would be needed before accepting or rejecting the parties' proposal.

Decision Date 14.02.2024 YourEnvironment 8 March 2024

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Aarts v Waikato District Council [2024] NZEnvC 17

Keywords: consent order; zoning; soil high value; noise; reverse sensitivity

This consent order concerned an appeal against a zoning decision by Waikato District Council ("the council") in the proposed Waikato District Plan ("PDP"). The appellants' land was zoned Rural Zone in the operative district plan and was proposed to be included in the General Residential Zone ("GRZ") in the notified PDP as a natural extension to the existing Tuakau urban area. However, in the decisions version, an independent hearings panel had decided that it should remain Rural Zone because the land contained high class soils and there were also concerns about potential reverse sensitivity effects of residential development on the nearby Harrisville motocross track. In their appeal, the appellants sought GRZ zoning for the land. Following discussions, the parties had now reached agreement that it would be appropriate to live zone the land to GRZ, and to adopt site-specific noise insulation measures to manage the reverse sensitivity effects on the motocross track. A s 32AA evaluation had been provided by the appellants.

The parties were also in agreement that the land was excluded from the definition of "highly productive land" under cl 3.5(7)(b)(i) of the National Policy Statement for Highly Productive Land because it had been "identified for future urban development", having been identified as such in the Tuakau Structure Plan adopted by the council. It was also excluded under cl 3.5(7)(b)(ii) because, having been rezoned from the Rural Zone in the operative plan to GRZ in the notified PDP, it was subject to "a [c]ouncil initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle". The Court cited prior authority that a notified PDP was a "council-initiated notified plan change". Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the planning maps be amended, and noise provisions be included as agreed by the parties. There was no order as to costs.

Decision Date 19.02.2024 YourEnvironment 14 March 2024

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Botev Trustee Ltd v Auckland Council [2024] NZHC 215

Keywords: costs; judicial review

This was a successful application for costs by an applicant for judicial review who had discontinued its application but now argued that it had been successful. The applicant was one of three owners of a Half Moon Bay property that was divided into three cross-lease titles. In 2021, one of the other owners (known as "T") applied to Auckland Council ("the council") for subdivision resource consent to subdivide the three cross-lease properties. However, the application incorrectly stated that this had been consented to and supported by the other two cross-lease owners. The application also contained other incorrect information regarding the property. The council granted the consent and T then proceeded to seek partition of the cross-lease. When the two other owners (including the applicant) became aware of this, they wrote to the council explaining that they had not consented to, and had not been notified of, the proposal. One month later, the council responded that it had not been able to persuade T to withdraw the consent, and the council said that it would not take any further action because the consent had already been approved. The applicant commenced judicial review proceedings, alleging that the council had wrongly characterised the subdivision consent as a controlled activity when it should have been a fully discretionary activity so that the other two owners should have been notified. However, the applicant then discontinued

proceedings after T voluntarily surrendered the subdivision consent. The applicant now sought costs against T, T's agent (who had filed the consent application), and the council.

The Court said that the decision to award costs against T and his agent was "straight-forward". The consent application had contained material errors. There was an inference that T and his agent had either known the information to be false or been negligent as to its accuracy. The Court noted that as soon as judicial review proceedings were issued, T and his agent had surrendered the consent rather than filing a defence. The Court considered that this was a clear case of "success" by the applicant and ordered scale 2B costs of $17,686 plus disbursements of $12,451 against T and his agent jointly and severally.

A more difficult question was whether costs should be awarded against the council. The council did not own the land and did not initiate the consent application. Further, the council submitted that it had limited power under the RMA 1991 to cancel or review an already approved subdivision consent. While the Court had concerns that a responsible council in this situation could be expected to check the legal status of the land when it received a subdivision consent application (ie there did appear to be some initial fault on the part of the council), without further information and a hearing, the Court was unable to make any finding as to whether the council had been negligent. However, the Court took a different approach to the council's actions *after* the inaccuracies in the application had come to its attention. The council had not explained to this Court exactly what it had done to confront T about the inaccuracies or to persuade him to surrender the consent. It had merely offered "bare denials" in its statement of defence, and the Court did not know on what basis the council was claiming a defence. In the Court's view, the council had been too quick to conclude that it should stand by the approved consent and it should have worked much harder to resolve the issue. For these reasons, the Court agreed with the applicant that the normal presumption in r 15.23 of the High Court Rules 2016 – that a plaintiff who discontinues proceedings should pay costs to the defendant – was displaced in this case. Costs were to be awarded against the council. In determining quantum, the Court took into account that this "mess" was primarily of T's (and his agent's) making. The Court determined that 50 per cent liability was fair. After deducting some disputed steps and disbursements, the council was held liable for costs up to $5,377 and disbursements of $5,724.

Decision Date 19.02.2024 - YourEnvironment 5 March 2024

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R v Fugle [2024] NZDC 3674

Keywords: Prosecution; earthworks; abatement notice

This was the sentencing of Aokautere Land Holdings Ltd ("ALHL") and its director, L Fugle ("F"), who had pleaded guilty to offences arising from unconsented earthworks relating to a residential subdivision. F was facing one representative charge of breaching s 9(2) of the RMA 1991 and ALHL of one representative charge of breaching two abatement notices. In 2019, resource consents previously obtained to develop the land in question had expired. However, inspections by Manawatū-Whanganui Regional Council ("the council") in 2020 and 2021 uncovered multiple issues of non-compliance. Over 30,000m^2 of land had been disturbed over the 14-month charging period, in breach of provisions in the Manawatū-Whanganui Regional Plan limiting permitted earthworks to 2,500m^2 annually. This had also breached two abatement notices issued by the council in 2019 relating to the earthworks and resulted in discharges of sediment to land in the vicinity of a waterway.

Regarding the unconsented earthworks, the Court noted that while the Crown had no evidence of any actual environmental effects, this was not an element of the offence. Evidence of effects was relevant to an assessment of gravity, but other aspects of the offending could be a sufficient foundation for a penalty. There was an element of wilful blindness in this offending because F had been aware of the rules in the regional plan. Failing to extend the prior consents that had lapsed or apply for fresh consents showed intentional non-compliance with the consenting system. F argued that he had not sought an extension of the consents as he believed that the work was nearly completed, but over a year was needed to complete the subdivision and he should have obtained an extension regardless of how much work was left to complete. F was at least highly careless to the point of acting recklessly. A starting point of $90,000 was adopted, with a discount of 20 per cent allowed for an early (but not the earliest) guilty plea. Regarding ALHL's breach of
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the abatement notices, no efforts had been made to comply with them for over a year. A starting point of $40,000 was adopted, with a discount of 25 per cent allowed for an early guilty plea and five per cent for no previous convictions of ALHL. F and ALHL were convicted, fined $72,000 and $28,000 respectively, and ordered to pay solicitor's and court costs. Ninety per cent of the fines were to be paid to the council.

Decision date: 23/02/2024 - YourEnvironment 13 March 2024 NZ

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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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Change of navigation reference heading from Magnetic to True North.

Extract from Coordinates E-Zine Feb 2024

The global industry is preparing to change its navigational heading reference from Magnetic North to True North. This article examines the issues involved, and provides an update on the progress of research into options for managing the transition process.

Read the article here: https://mycoordinates.org/spin-axis/

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Govt announces new fast-track consenting regime

Building and Construction, Land, Local Government, YourEnvironment 8 March 2024 NZ

RNZ reports that the Government has announced a new "one-stop shop" to fast-track consents for major infrastructure projects. The plan will add some projects directly into new ...

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Wellington City Council votes for big changes to increase housing supply

Building and Construction, Land, Local Government, YourEnvironment 19 March 2024 NZ

Stuff reports that the Wellington City Council has voted in a "generational" change in an effort to increase housing, including slashing the city's character zones by more ...

...Building and Construction Land Local Government YourEnvironment News New Zealand 20240319020000 240318CA-9773 2024-03-16-00:00 240318CA-9773 Wellington

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Environmental groups call Govt's proposed 'fast track' consents "a war on nature"

Building and Construction, Land, Local Government, YourEnvironment 12 February 2024 NZ

The New Zealand Herald reports that environmental groups WWF-New Zealand, Greenpeace Aotearoa, Forest & Bird and Environmental Defence Society say the Government's proposed ...

...Building and Construction Land Local Government YourEnvironment News New Zealand 20240212060000 240212CA-3347 2024-01-11-00:00 240212CA-3347 Environmental...

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Govt says new building consent system will make building more affordable

Building and Construction, Land, Local Government 16 February 2024 NZ

RNZ reports that Building and Construction minister Chris Penk said the Government's plans to reform the building consent system will make building homes more affordable and ...

...affordable Building and Construction Land Local Government News New Zealand 20240216020000 240215CA-3935 2024-02-15-00:00 240215CA-3935 Govt...

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Residents take legal action against council over Blockhouse Bay land dispute

Local Government, YourEnvironment 20 February 2024 NZ

Radio New Zealand reports that Blockhouse Bay residents are taking legal action against Auckland Council over a dispute involving land originally gifted for pensioners and a ...

...Blockhouse Bay land dispute Local Government YourEnvironment News New Zealand 20240220000000 240222CA-2955 2024-02-20-00:00 240222CA-2955 Residents...

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Large Flaxmere development gets fast-track approval

Building and Construction, Land, YourEnvironment 23 February 2024 NZ

Stuff reports that a 450-home development in Flaxmere was given fast-track approval by Heretaunga Tamatea Pou Tahuaand, the commercial arm of Tamatea Pōkai Whenua Trust, on ...

...track approval Building and Construction Land YourEnvironment News New Zealand 20240223074000 240223CA-5349 2024-02-22-00:00 240223CA-5349 Large...

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Developer selling off 18 West Auckland townhouses in bulk sale

Land 26 February 2024 NZ

OneRoof reports that a developer struggling with high interest rates is selling 18 completed townhouses in West Auckland in a bulk sale. The marketing for the homes at 106 ...

...West Auckland townhouses in bulk sale Land News New Zealand 20240226000000 240226CA-8163 2024-02-26- 00:00 240226CA-8163 Developer...

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Whangārei road project to unlock land for 3000 new homes

Land, Local Government 12 March 2024 NZ

The New Zealand Herald reports that the Whangārei District Council is progressing with the $23 million Springs Flat roundabout project, which will unlock 160ha of land for the ...

...for 3000 new homes Land Local Government News New Zealand 20240312020000 240311CA-3039 2024-03-11-00:00 240311CA-3039 Whangārei...

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Mt Maunganui residents fighting development of high rise buildings

Building and Construction, Land, Local Government 14 March 2024 NZ

Stuff reports that Mt Maunganui residents are fighting the development of a three tower, six storey retirement complex in a residential area and say they fear the Government's ...

...buildings Building and Construction Land Local Government News New Zealand 20240314020000 240313CA-9255 2024-03-13-00:00 240313CA-9255 Mt...

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Associate Environment Minister: Significant Natural Areas requirement to be suspended

Legislation and Government 14 March 2024 NZ

Associate Environment Minister Andrew Hoggard has announced that the Government has agreed to suspend the requirement for councils to comply with the Significant Natural Areas ...

...requirement to be suspended Legislation and Government News New Zealand 20240314000000 240314CA-3032 2024- 03-14-00:00 240314CA-3032 Associate...