NewsLink Case-notes for June 2024 - Prepared 25 May 2024.

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Legal Case-notes June 2024

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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:

- **Sentencing of two companies who had both pleaded guilty to one charge each of using land in Napier a manner that contravened a regional rule under s 9(2) of the RMA 1991.**
- **A successful application under s 86D of the RMA 1991 for a plan change to take effect immediately, before a decision on submissions was made.**
- **Consent order concerned an appeal against a decision by Central Otago District Council**
- **Sentencing of Auckland Contouring & Fill Specialists Ltd ("ACFS") and its sole director and shareholder, who had both pleaded guilty to one charge each of unlawfully carrying out earthworks.**
- **Consent order concerning two appeals on the transportation provisions in the proposed Waikato District Plan ("PDP").**
- **Consent order concerning an appeal by Federated Farmers of New Zealand seeking amendments to various objectives, policies, rules etc.**
- **Consent order concerning an appeal by the operator of Hamilton Airport on the proposed Waikato District Plan ("PDP").**
- **a successful appeal by Royal Forest and Bird Protection Society of New Zealand Inc challenging the approval of the proposed East West Link project, a new four-lane arterial road in Auckland that would connect State Highway 1 to State Highway 20**

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Hawke's Bay Regional Council v Austin Clements (1998) Ltd [2024] NZDC 6681

Keywords: prosecution; earthworks; wetland

This was the sentencing of Austin Clements (1998) Ltd ("ACL") and Kallatahi Crushers Ltd ("Kallatahi"), who had both pleaded guilty to one charge each of using land in Napier a manner that contravened a regional rule under s 9(2) of the RMA 1991. The land was owned by KiwiRail but leased to Kallatahi. ACL was undertaking earthworks on the property through its metal supply and cartage business. In 2022, Hawke's Bay Regional Council ("the council") learned that ACL had installed a culvert, without resource consent, to allow access to a corner of the property, for the purpose of cleaning up broken concrete and debris which had been dumped on the site for approximately 30 years. ACL's work had resulted in a minimal discharge of contaminants (sediment) within 20 metres of a surface water body until the grass grew, in contravention of r 49 of the Hawke's Bay Regional Resource Management Plan.

The impact of the offending was found to be low. The site included a tidal wetland, although this had not been known to any parties associated with the property because the council's wetland inventory programme identifying this site had not been released at the time. The work had been undertaken in summer when there had been no water in the waterway. The amount of sediment discharged was difficult to quantify, although ACL estimated it to be around two wheelbarrow loads. The Court also noted that there had been degradation caused to the site through years of property use (including permanent loss of estuarine wetland), and the damage caused by the culvert would have been a small part. However, the Court said that the offending would have contributed to cumulative loss of wetlands and effects on waterways.

Regarding culpability, the prosecutor and the Court accepted that ACL, with Kallatahi's permission, had naively been attempting to clean up and improve the site. The offending was not deliberate. ACL also explained that it had not been paid for the work it had done over the years to clean up the site, and had not intended to charge for the recent removal of the debris. However, the Court found that if the defendants had contacted the council, they would have been advised that resource consent was required for the installation of the culvert and associated earthworks. Kallatahi should have had better oversight of matters occurring on its property. The defendants had been careless, although this was at the low end of the spectrum.

Starting points of $20,000 for ACL and $15,000 for Kallatahi were adopted. Discounts of 25 per cent were allowed for early guilty pleas. ACL was allowed a further discount of 25 per cent on account of good character; it had now offered to the council to undertake significant remediation works that went beyond what was needed (at a cost of around $15,000), it had already undertaken work to clean up the site from the historical dumping, and it had also willingly helped the council by providing machinery to assist with the Cyclone Gabrielle response. Kallatahi was allowed a discount of 15 per cent for its long-standing good character, remorse, and work it had done to clean up the property over the years. ACL and Kallatahi

were convicted, fined $10,000 and $9,000 respectively, and ordered to pay court and solicitor's costs. Ninety per cent of the fines were to be paid to the council.

Legal Representatives

Decision Date: 27/03/2024 ***YE 16.04.24***

Re: Hastings District Council [2024] NZEnvC 56

Keywords: subdivision; safety

This was a successful application under s 86D of the RMA 1991 for a plan change to take effect immediately, before a decision on submissions was made. Hastings District Council ("the council") had notified Plan Change 6 ("PC6") to the Hastings District Plan as a direct response to Cyclone Gabrielle. PC6 provided a pathway for landowners with "Category 3"-rated properties (ie no longer considered safe for residential occupation) to relocate and subdivide a lifestyle site within their community of interest. Specifically, qualifying landowners who agreed to a voluntary buy-out could apply to undertake a "lifestyle site" subdivision in a Rural or Rural Residential Zone as either a controlled or non-notified restricted discretionary activity. This was effectively an exception to the otherwise limited opportunity for lifestyle subdivision in those zones because qualifying participants would not need to meet the usual minimum net site areas.

PC6 was being advanced through a streamlined process under the Severe Weather Emergency Recovery (Resource Management-Streamlined Planning Process) Order 2023. The council estimated that PC6 would become operative around August 2024. However, it now applied for immediate commencement under s 86D of the RMA 1991. It acknowledged that a request to use s 86D for rules that were more enabling than the existing provisions was unusual. It also acknowledged that in this case, the existing subdivision rules would continue to apply in parallel with the new rules, so it was likely that any applicant would still need to apply for a non-complying subdivision pending the rules becoming operative. Nevertheless, the council saw merit in having the new rules take legal effect now so that they could be taken into account as part of the consent process. PC6 was also a "clear signal" to Category 3 landowners of the intention to provide a lifestyle subdivision pathway.

In terms of scale, there were 165 properties classed as "Category 3". The council estimated that the number of applications that might be received before PC6 became operative would be low, perhaps in the order of 10 applications (as the applicants needed to agree to a buy-out and also locate a suitable site for subdivision). However, the significance of PC6 for those individual landowners would be high. The council noted that Category 3 landowners had already been consulted, and local Māori representatives had indicated in-principle support. The council did not consider, given the limited scope of PC6, that any person would be prejudiced by allowing the rules to take early legal effect. The council also submitted that PC6 was designed to achieve the sustainable management

purpose in s 5 of the RMA 1991 by managing land that was affected by a significant natural hazard, protecting the health and safety of those landowners, and providing for their social, economic and cultural wellbeing. The Court agreed with this assessment, and was also satisfied that PC6 would not "open the gate" in an uncontrolled manner to subdivision applications. There was good reason for the rules to be given immediate effect considering the exceptional circumstances. The Court therefore ordered that the relevant provisions were to take legal effect from the date of this decision.

Decision Date: 26/03/2024 YE 18.04.2024

Wildon Dairy Ltd v Central Otago District Council [2024] NZEnvC 59

Keywords: consent order; subdivision

This consent order concerned an appeal against a decision by Central Otago District Council ("the council") to decline to grant resource consent for a rural subdivision near Omakau. The parties had now reached an agreement on an amended proposal that addressed the council's concerns. Pursuant to s 279(1)(b) of the RMA 1991, the Court ordered, by consent, that the appeal was allowed subject to the amended consent conditions and plans agreed by the parties. There was no order as to costs.

Decision Date: 27/03/2024 YE 19.04.2024

Auckland Council v Bank [2024] NZDC 7350

Keywords: prosecution; earthworks; erosion

This was the sentencing of Auckland Contouring & Fill Specialists Ltd ("ACFS") and its sole director and shareholder, R Bank ("B"), who had both pleaded guilty to one charge each of unlawfully carrying out earthworks at two properties in Pāremoremo, Auckland that did not comply with activity standards under the Auckland Unitary Plan ("AUP"). The properties adjoined the Pāremoremo Reserve and Pāremoremo Creek, with an unnamed tributary of the creek running through the properties. In 2022, Auckland Council ("the council") responded to a complaint and observed that works were being undertaken without erosion and sediment controls installed. Abatement notices were issued, requiring the installation and maintenance of appropriate controls in accordance with the AUP Guidance for Erosion and Sediment Control ("GD05"). B and employees of ACFS then installed a diagonal silt fence across both properties, but a subsequent council inspection found that the controls were not as required and did not comply with GD05. The silt fences were blocking the flow of water downstream, with sediment accumulating where the fences were located. The controls were considered not stable enough to sustain a heavy downpour. Relevantly for sentencing purposes, B and another company of which he was sole director and majority shareholder had previously been convicted

and sentenced for breaching the same rules at the same properties (see Auckland Council v Bank [2021] NZDC 9608).

Regarding effects, the defendants submitted that while there had been some pooling of sediment discharge, there was no evidence of significant environmental damage resulting from these failures. The Court noted that this was perhaps as a result of good luck and not of good management. The potential for adverse effects on waterways was not in doubt. Failure to ensure adequate erosion protection at work sites was inexcusable. The effects were found to be “low-moderate”.

The Court then found that B was highly culpable. This offending had occurred not long after the previous offending, which had involved largely similar failings regarding erosion and sediment controls at the same properties. B (and ACFS) also had considerable experience in undertaking earthworks. It was difficult to conclude that this conduct was anything other than a deliberate and reckless disregard for the rules and the environment, coupled with a lack of knowledge as to how to undertake earthworks appropriately.

In terms of a starting point, the Court said there was a heightened need for deterrence in this case given the previous offending. The effects of this offending were not as serious as the previous case (although still of concern). The Court adopted a global starting penalty of $45,000 for both defendants. In assessing the aggravating factor of the prior offending, the Court noted that while ACFS had not been a party to that offending, it shared the same sole director and majority shareholding as the other company that had been convicted along with B. Accordingly, the Court found that it was appropriate that the starting point be lifted by 20 per cent. A 25 per cent discount was allowed for the early guilty pleas, and a further five per cent discount was allowed to recognise B’s remorse and the efforts he had recently made to undertake training to upskill himself in knowledge of GD05 standards. The defendants were convicted, fined $40,500, and ordered to pay court and solicitor’s costs. Ninety per cent of the fine was to be paid to the council.

Judgment Date: 05/04/2024 YE 22.04.2024

Surveying Company Ltd v Waikato District Council [2024] NZEnvC 64

Keywords: consent order; district plan proposed; transportation; road

This consent order concerned two appeals on the transportation provisions in the proposed Waikato District Plan (“PDP”). One appellant, a property development consultancy, sought to reduce certain access leg and right of way widths and to remove the need to seal rural accesses. The other appellant, which owned and operated electricity distribution infrastructure in the region, sought the addition of a requirement for a utility corridor in the road reserve free of tree plantings. The parties had now reached agreement on several amendments to resolve many of the appeal points. A s 32AA analysis of the proposed changes was undertaken. Pursuant to s

279(1)(b) of the RMA 1991, the Court ordered, by consent, that the PDP be amended as agreed by the parties. There was no order as to costs.

Decision Date 05.04.2024 YE 24.04.2024

Federated Farmers of New Zealand v Waikato District Council [2024] NZEnvC 66

Keywords: consent order; district plan proposed; tree protection; subdivision

This consent order concerned an appeal by Federated Farmers of New Zealand seeking amendments to various objectives, policies, rules and definitions in the proposed Waikato District Plan ("PDP") to enable its members to operate their businesses in a fair and flexible commercial environment. The parties had now reached agreement on amendments to policies in the TREE chapter (concerning identification of notable trees) and SUB chapter (concerning certain subdivision policies that would now apply only in urban areas). A s 32AA analysis of the proposed changes was undertaken. Pursuant to s 279(1)(b) of the RMA 1991, the Court ordered, by consent, that the PDP be amended as agreed by the parties. There was no order as to costs.

Decision Date: 05/04/2024 YE 25.04.2024

Waikato Regional Airport Ltd v Waikato District Council [2024] NZEnvC 67

Keywords: Consent order; district plan proposed; airfield; reverse sensitivity

This consent order concerned an appeal by the operator of Hamilton Airport on the proposed Waikato District Plan ("PDP"). As well as seeking minor amendments to correctly identify the airport, the appellant also sought amendments to a subdivision policy to ensure that reverse sensitivity effects on Hamilton Airport were explicitly addressed. The parties had now reached agreement on such amendments. A s 32AA analysis of the proposed changes was undertaken. Pursuant to s 279(1)(b) of the RMA 1991, the Court ordered, by consent, that the PDP be amended as agreed by the parties. There was no order as to costs.

Decision Date: 05/04/2024 YE 25.04.2024

Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency [2024] NZSC 26

Keywords: Supreme Court; objectives and policies; New Zealand Coastal Policy Statement; interpretation

This was a successful appeal by Royal Forest and Bird Protection Society of New Zealand Inc challenging the approval of the proposed East West Link project, a new four-lane arterial road in Auckland that would connect State Highway 1 to State Highway 20 and run along the northern shore of the Māngere Inlet. The core issue was how the objectives and policies of the Auckland Unitary Plan ("AUP") and New Zealand Coastal Policy Statement ("NZCPS") navigated the tension between providing for development and infrastructure, and protecting vulnerable elements of the environment. While there was a recognised need to enhance Auckland's road network to meet present and future demands, the Māngere Inlet remained ecologically significant. The primary likely adverse effects of the proposal included permanent loss and compromise of wading bird and shorebird habitats, and permanent loss of, or other adverse impacts on, lava shrubland and raupō. The appeal challenged decisions by a Board of Inquiry ("the Board") that had been appointed to consider the proposal. The Board had decided that the necessary resource consents could be granted and the notices of requirement ("NORs") confirmed.

As the proposal was assessed as a non-complying activity, and because the parties accepted that the adverse effects would be more than minor, the proposal first needed to meet the "gateway" test in s 104D(1)(b) that it would "not be contrary to the objectives and policies" of the AUP. A majority of the Court observed that the NZCPS could not be ignored here; lower-order plans had to give effect to the NZCPS, and if the NZCPS could not be reconciled with the AUP, that raised the prospect that the AUP might be unlawful to that extent. Therefore, the s 104D(1)(b) gateway had to be analysed "with one eye on the NZCPS". Further, if the gateway was met, s 104(1)(b)(iv) (concerning resource consents) and 171(1)(a)(ii) (concerning NORs) would make relevant provisions of the NZCPS mandatory relevant considerations.

The majority considered the relevant provisions of both the AUP and NZCPS, including the strong "avoid" language in policies that required certain identified adverse effects in the coastal environment to be "avoided". It concluded that large-scale infrastructure located in the coastal environment was not, by definition, prohibited by the objectives and policies of the AUP or the NZCPS, nor was it inevitably contrary to the objectives and policies of the AUP for the purposes of the s 104D(1)(b) gateway, nor necessarily inconsistent with the NZCPS or AUP for the purposes of ss 104 and 171. In reaching this conclusion, the majority addressed the decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, noting that *King Salmon* had dealt with a very different scenario to the one before the Court in this case. A strict *King Salmon* approach, whereby softer standards of "recognising" and "providing" for infrastructure (as was stated in the AUP) would always give way to the directive to "avoid" adverse effects, was "too rigid to be applied to the AUP policies and the challenges of the Auckland environment". The underlying drivers in Auckland were very different, given the pressures of population growth and the fact that 71.5 per cent of Auckland's urban area abutted a Significant Ecological Area ("SEA") marine overlay; the majority said it should not be surprising that necessary infrastructure, even at scale, that was unable to locate anywhere but in overlays, would not necessarily be contrary to the objectives and policies of the AUP. It noted that infrastructure was a public good, and was relevant to the sustainable management purposes in s 5 of the RMA 1991. Infrastructure policies in the AUP were also cross-recognised in the avoidance policies themselves. Additionally, unlike the plan change in *King Salmon*, the AUP did not just choose development over avoidance, "thumbing its nose" at the

NZCPS avoid policies; rather, the circumstances in the AUP where an exception might be made were carefully circumscribed and narrow.

The majority then described the narrow AUP "exceptions pathway" that could enable significant infrastructure requiring reclamation in an SEA. This entailed three requirements under the AUP: that the proposal was a necessary (and not just a desirable) solution by reference to functional or operational need, the regional or national benefit obtained, and the absence of any practicable alternative locations or solutions; that adverse effects that could not be avoided were remedied or mitigated to a standard that corresponded with the significance of the environment; and that the benefits of the solution justified the environmental cost. If a proposal met these requirements, the majority considered that it would have successfully "threaded the needle" to be a genuine exception to NZCPS avoidance policies without subverting NZCPS objectives. It clarified that this narrow exception was not a regression to the "overall judgment" approach (whereby activities conflicting with "avoidance" policies were balanced against other policy considerations) that had been rejected in *King Salmon*. It emphasised that these exceptions would be rare and require rigorous analysis.

However, the majority found that the Board had erred in its approach in this respect. The Board had failed to properly understand just how narrow the pathway to approval was intended to be. Instead, it had taken an impermissible "overall judgment" approach. It had also misapplied the requirements to "have regard to" the NZCPS in ss 104 and 171, which were not merely requirements to give genuine attention to directive policies, only to then refuse to apply them. The majority identified several other errors, including that the Board had conflated s 171 standards in relation to NORs, including whether "adequate consideration" had been given to alternatives, with the stricter AUP policies requiring an actual absence of practicable alternatives. This meant that the Board had not appropriately formed a view as to the absence of practicable alternatives for AUP purposes. In terms of the High Court appeal that followed the Board's decision (see *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390), the majority found that the High Court's analysis had been more correct than the Board's. However, the High Court had also misapplied the "have regard to" requirements in ss 104 and 171. For these reasons, the majority allowed the appeal and remitted the matter back to the Board for reconsideration.

In a minority judgment, Glazebrook J disagreed with the majority's reasons. Her Honour pointed to the applicability of *King Salmon* to resource consent cases, recognising avoidance policies as environmental bottom lines. As well as being contrary to *King Salmon*, Glazebrook J considered that the majority's decision also was contrary to the structured analytical process outlined in *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112. Her Honour concluded that there was no conflict between the infrastructure and avoidance policies in the present case, disagreeing with the majority's recognition of a "tension" in the specific AUP avoidance policies, which she found to be directive and unable to be displaced. There was no window, narrow or otherwise, that allowed infrastructure to breach the environmental bottom lines in the NZCPS and the AUP. While Glazebrook J agreed that the Board had erred and the appeal should be allowed, she noted that the Board itself had concluded that the project did not meet the criterion that there be a functional

need for the proposal in that coastal environment, meaning there would be little point in remitting the matter back to the Board for consideration as to whether the measures proposed brought the harm down to levels that met the avoidance policies. In a separate minority judgment, William Young J would have dismissed the appeal. His Honour saw no error in the Board's approach. He did not agree that the Board had failed to properly form a view as to the absence of practicable alternatives for AUP purposes. He also saw the "avoid" policies as less controlling than the majority, and did not accept that the requirements in ss 104 and 171 to "have regard to" the NZCPS could be construed as requirements to "give effect to" it. In his view, the Board had properly "had regard to" the relevant policies. The appeal was allowed and the matter was remitted back to the Board for reconsideration. Costs were reserved.

Judgment Date: 11/04/2024 YE 27.04.2024

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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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Local Government, YourEnvironment 16 April 2024 NZ

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RNZ reports that Resource Minister Shane Jones has announced the Government plans to reduce barriers to coal extraction and will introduce legislation next month. The move ...

...for coal mining Land Local Government YourEnvironment News New Zealand

Govt gives owners of earthquake-prone buildings four extra years to comply

Building and Construction, Land, Local Government, YourEnvironment 18 April 2024 NZ

RNZ reports that the Government has given owners of earthquake-prone buildings four extra years to complete strengthening work. Minister for Building and Construction Chris

...Building and Construction Land Local Government YourEnvironment News New Zealand 20240418000000 240418CA-1198 2024-04-18-00:00 240418CA-1198 Govt...

Govt plans to extend port permits for 20 more years

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...for 20 more years Local Government YourEnvironment News New Zealand

Regional and District Plans

YourEnvironment 18 April 2024 NZ

North Island Auckland Council has notified that it has made its decision on submissions to Proposed Plan Change 88 (Private): Beachlands South to the Auckland Unitary Plan. ...

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Beehive: Earthquake-prone buildings review brought forward

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

Building and Construction Minister Chris Penk has announced that the Government is bringing the earthquake-prone building review forward, with work to start immediately, and ...

...Building and Construction Land Local Government YourEnvironment News New Zealand

Transmission Gully review still underway two years after opening

Local Government, YourEnvironment 19 April 2024 NZ

RNZ reports that the government-ordered review of Transmission Gully by Infrastructure Commission Te Waihanga remains ongoing two years after the motorway opened near ...

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Beehive: Minister releases Fast-track stakeholder list

Building and Construction, Land, Local Government, YourEnvironment 22 April 2024 NZ

RMA Reform Minister Chris Bishop has announced that the Government has released a list of organisations who received letters about the Fast-track applications process.

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Beehive: $41m to support clean energy in South East Asia

YourEnvironment 23 April 2024 NZ

Prime Minister Christopher Luxon and Climate Change Minister Simon Watts have announced that New Zealand is demonstrating its commitment to reducing global greenhouse ...

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Beehive: Urgent changes to system through first RMA Amendment Bill

Building and Construction, Commercial, Land, Local Government, YourEnvironment 24 April 2024 NZ

RMA Reform Minister Chris Bishop, Agriculture Minister Todd McClay, and Associate Environment Minister Andrew Hoggard have announced that the Government is delivering on its ...

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Govt watchdogs recommend curbing ministers' powers in "Fast-Track" bill

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RNZ reports that two government watchdogs, the Parliamentary Commissioner for the Environment and the Auditor-General, in separate reports, have recommended to the select ...

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First changes to RMA released by Govt

Land, Local Government, YourEnvironment 25 April 2024 NZ

RNZ reports that the Government has announced its first changes to the Resource Management Act, which are to be introduced in legislation in May and passed by the end of the ...

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Local Government, YourEnvironment 26 April 2024

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