DLA PIPER

AUTUMN EDITION 2016

PUBLIC DECISION MAKING NEWSLETTER

This newsletter summarises recent developments in resource management and local government law that are of particular relevance to local authorities and decision makers. In this edition, we address the role of the expert planner in deciding the ultimate issue, the scope of a territorial authority's duty to recognise and protect matters of national importance in its district plan, the required scope of assessment for the notification of restricted discretionary activities, the Privacy and Online Property Information Report 2016, the liability for project managers carrying out building work without a building consent and the next steps for freshwater management.

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ROLE OF THE EXPERT PLANNER IN DECIDING THE ULTIMATE ISSUE

Following the release of the Environment Court (**Court**) decision of *Tram Lease Limited v Auckland City Council,*[1] the Resource Management Law Association (**RMLA**) and New Zealand Planning Institute (**NZPI**) have joined forces to release a paper for expert planning witnesses titled ***'The Role of Expert Planning Witnesses'***.

In the *Tram Lease* case, Judge Smith went into some detail on the role and limitations of expert witnesses, including planning witness, when giving evidence. Judge Smith expressed concern that one of the planning witnesses was straying into determining the 'ultimate issue' in a manner that was contrary to the **Environment Court Practice Note 2014**, observing that determining the ultimate issue should be left to the decision maker.[2]

It is common knowledge that there is a fine line between the role of an expert planner expressing a view and the role of the decision maker in deciding the ultimate issue in resource management cases which generally determine planning issues. On that basis, RMLA and NZPI have sought to clarify the role of the planning witness and to provide some 'good practice' tips to assist the profession. These views have been endorsed by Principal Environment Court Judge Newhook following discussions with members of his Bench and the authors of the paper.

The key conclusions from the paper are that the expert planner has a unique role that is distinct from other experts (such as traffic, noise, landscape, etc). A planning witness can synthesise the views of other experts and provide their expert opinion on the overall broad judgment that the decision maker is required to make under **Part 2** of the **Resource Management Act 1991** (**RMA**) (ie the ultimate issue in the proceeding), provided the evidence is:

- presented in a manner that provides 'substantial help' to the decision maker;
- well-reasoned and developed by reference to all of the other expert evidence presented and relevant planning instruments, and in a manner that meets the planning witness' professional obligations;
- expressed in a manner and in language that is neither seen nor intended to supplant the role of the court/ consent authority; and
- expressed conditionally upon the court's acceptance of both the evidence of the expert witness(es) on whom the planner relies and the planner's identification, analysis and weighing of all the relevant considerations.

We consider the paper provides useful guidance to planning witnesses and reflects standard practice. If you have any concerns as to the scope of your role, or that of your witnesses, we are happy to assist.

SCOPE OF A TERRITORIAL AUTHORITY'S DUTY TO RECOGNISE AND PROTECT MATTERS OF NATIONAL IMPORTANCE IN ITS DISTRICT PLAN

The Environment Court (**Court**) decision in *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council* was released on 17 December 2015.[3] In this case, the Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**) sought a declaration and an enforcement order, under the **Resource Management Act 1991** (**RMA**), against New Plymouth District Council (**Council**). Forest and Bird alleged that Council, through the New Plymouth District Plan (**District Plan**), contravened the RMA (in particular sections **6(c)** and **31(1)(b)(iii)**) because it failed to recognise and protect areas of 'significant indigenous vegetation and habitats of indigenous fauna' - a matter of national importance under the RMA. Similarly, the District Plan did not give effect to higher order planning documents, including the **New Zealand Coastal Policy Statement 2010** or the **Taranaki Regional Policy Statement 2010**. Forest and Bird contemporaneously sought an enforcement order to require Council to notify a plan change or review of the District Plan to include identified significant natural areas (**SNAs**) of indigenous flora and vegetation. Forest and Bird claimed there were 361 additional SNAs which should be included in the District Plan (based on a report which Council had commissioned).

The issue arose from a Memorandum of Understanding (**MOU**) between Council and Forest and Bird, in which Council agreed to review the SNAs in its District Plan with a view to adding sites (along with a number of other measures) within 24 months by way of a notified plan change (by May 2007). While Council conformed to some

1 [2015] NZEnvC 133 and [2015] NZEnvC 137.
2 We analysed this case in more detail in our Public Decision Making Newsletter - Spring Edition 2015.
3 [2015] NZEnvC 219.

of the obligations in the MOU (such as undertaking a review which identified additional SNAs) it did not undertake a plan change to add SNAs within the required timeframes, as it had previously committed.

The Court considered what methods territorial authorities are required to use in order to protect matters of national importance to give effect to their duty under **section 6**. The Court concluded that:

- 'Protection' of a matter of national importance (in this case **section 6(c)**) means that *adequate* protection is required.
- A council is not necessarily obliged to achieve 'protection' by incorporating rules in its District Plan. However, the nature of the protection required to meet the duty is one to be determined by the council when reviewing its District Plan.
- Non-regulatory methods could be validly used as part of the 'palette of measures' used to protect SNAs.
- Landowner or community attitude, or the existence of other preferable methods of protection (such as QEII covenants), did not remove the obligation for methods and rules employed by the District Plan to apply to the sites to which they were intended (being SNAs identified through the assessment criteria).
- Council was required to adequately identify SNAs in order to recognise and provide for them, through the full 'palette of methods' in the District Plan.

The Court held that if the District Plan's assessment criteria for identifying SNAs were correctly applied (as had been done in the review undertaken by a consultant for Council) there would be some 326 to 361 further SNAs identified. Accordingly, the Court declared that Council's failure to include SNAs in the District Plan was a breach of its duty under **section 6(c)**.

Forest and Bird sought enforcement orders to require a notified plan change or a review of the plan which would include all of the 361 SNAs identified, and rules relating to the protection of SNAs, and that Council be directed to undertake further work to identify and include SNAs.

The Court held that it could not order Council to notify a plan change, as that would fetter Council's discretion under **Schedule 1** of the RMA. However, the Court left the door open for an enforcement order requiring a plan review to be granted. A plan review was not ordered in this case mainly because review of the District Plan was already underway (pursuant to **section 79** of the RMA).

REQUIRED SCOPE OF ASSESSMENT FOR THE NOTIFICATION OF RESTRICTED DISCRETIONARY ACTIVITIES

The Court of Appeal (**Court**) decision in *Wendco (NZ) Limited v Auckland Council* involved an application for judicial review by Wendco (NZ) Limited (**Wendy's**) seeking an order to quash a resource consent issued by Auckland Council (**Council**) to Wiri Licencing Trust (**Trust**) on a non-notified basis.[4] Wendy's' application was dismissed in the High Court. However, the Court of Appeal overturned the High Court decision and held that the application for review was successful due to an error of law.

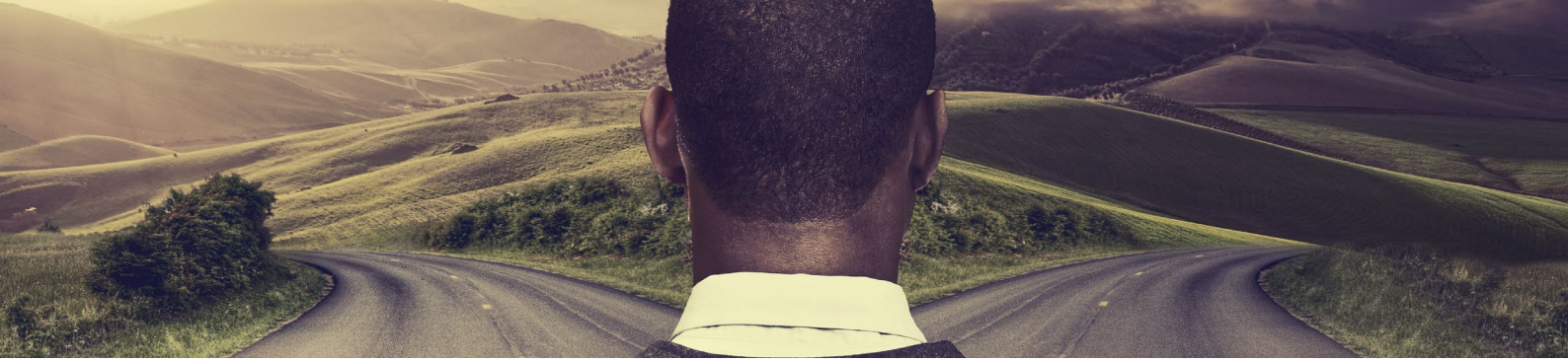
Resource consent was required because the planned redevelopment of the site by Trust (to replace the existing Mobil service station with a new fast food business together with a three-unit retail building) entailed a modification of two vehicle access points onto a primary road. The activity required resource consent as a restricted discretionary activity. Wendy's' fast food business was also undertaken on the same site.

Wendy's' claim was that changes to the entry and exit points from the site, and to the internal carpark layout adversely affected its business. Wendy's' position was that the modifying of the access points and the associated alterations to site circulation and parking should have been examined by Council for any adverse effects on its use of the site. In other words, it should have been notified of the application as an affected person.

One of the matters over which the plan reserved discretion is internal circulation on the site, and whether the internal circulation will cause congestion on the adjoining road.

The Court found that when deciding who is affected that **section 95E(2)(b)** of the **Resource Management Act 1991** (**RMA**) functions as a qualification of the mandatory consideration required by **section 95E(1)**. That is, Council must disregard an adverse effect of the activity on a person that does not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion.

4 [2015] NZCA 617.



Council's position was that its discretion under **section 95E** of the RMA was limited to only those effects on Great South Road. The Court disagreed. It stated that if Council was right, there would never be any consideration by Council of effects on any person (except the public generally as road users) as distinct from the effects on the operation of the primary road. The relevant link is that the adverse effects on the person must relate to a matter for which a rule or national environmental standard reserves control or restricts discretion.

The Court found that if there are adverse effects to Wendy's by reason of the circulation of vehicular traffic over its land, and internal circulation and parking, those adverse effects on Wendy's will necessarily connect or relate to the matters over which discretion was reserved, as the access/circulation was designed to avoid conflict that may result in congestion on a primary road.

It terms of the meaning of 'relate to' the Court stated that the word 'relate' is used in the RMA in the sense of 'connect'.

As Council did not inquire as to whether any person would suffer effects (as it only considered the effects on Great South Road), the Court found that Council had erred in law. It needed to consider whether the site circulation affected any party, and what that level of effect was, in accordance with the RMA.

This decision has implications for notification decisions for restricted discretionary activities. It broadens the consideration of effects from a strict consideration of the matters for discretion to a more general consideration of the effects related, or connected, to those matters for discretion.

PRIVACY AND ONLINE PROPERTY INFORMATION REPORT 2016

The Office of the Privacy Commissioner recently released a report providing guidance to local authorities on how to balance providing wide access to online property and building records held by councils with the desire for some degree of privacy in those records.

The ***Privacy and Online Property Information Report 2016***, released on 10 March 2016, confirms that the publication of council-held online property and building records are a new development which have the potential to infringe on the privacy of members of the public. The Privacy Commissioner has received over 100 complaints and inquiries about the privacy implications of local government property and building information. The risks associated with the online provision of this information include:

- the ability for third parties to bulk collect individuals' information for unrelated purposes (ie spam);
- exposing people to danger (in cases of those fleeing domestic violence); and
- the use of the information for identity theft or fraud.

The Privacy Commissioner considered it is not for his office to direct councils on how to design efficient and user-friendly online property and building record systems. In particular, there are a number of different statutes which might apply to information held by councils, and councils have considerable discretion and authority as to how best to meet their community's needs.

However, the report sets guidelines which detail what legally compliant online property and building information records must do, including:

- informing individuals how information is protected, used and stored;
- supressing publication of information about victims of domestic violence; and
- having appropriate technical safeguards in place for the nature of the information.

A number of non-mandatory guidelines are also provided for systems, which include preventing bulk downloads of information, and providing the option for people to opt-out of online publication of personal information.

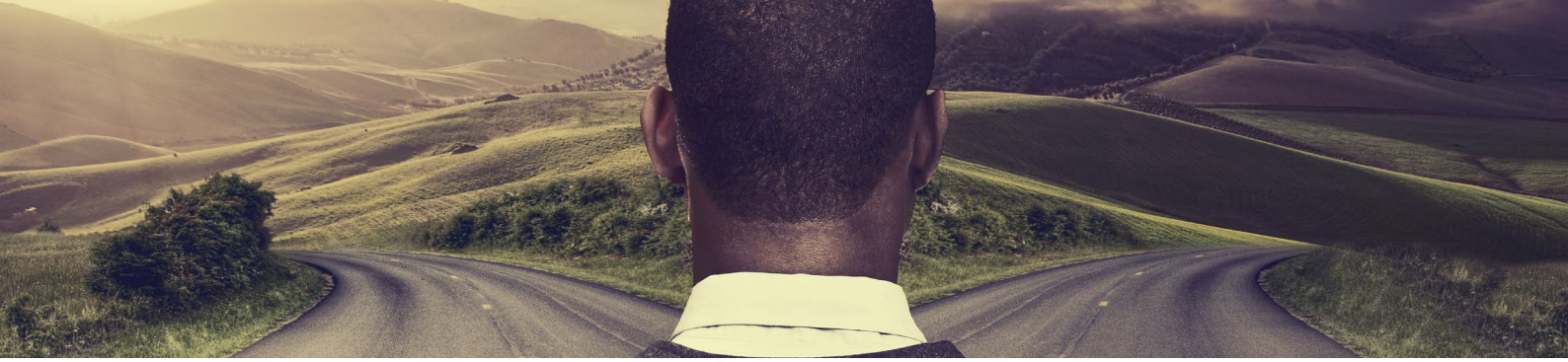
To read more, please view the **report** and the **background paper**.

LIABILITY FOR PROJECT MANAGERS CARRYING OUT BUILDING WORK WITHOUT A BUILDING CONSENT

In *Tan v Auckland Council*, the High Court considered whether a project manager could be charged for carrying out building work without a building consent, contrary to **section 40** of the **Building Act 2004** (**Act**).[5]

The appellant, Mr Tan, was the project manager of a property that he knew was being built without the requisite building consent having been obtained. Mr Tan was charged by Auckland Council for breaching **section**

5 [2015] NZHC 3299.



40 of the Act. He argued that he could not be charged under **section 40** as he had not himself 'carried out' any building work. This argument was made on the basis that he had not physically done any of the building work and that his involvement had been limited to instructing and supervising builders.

The parties sought a pre-trial determination from the District Court on the interpretation of 'carry out' in **section 40**, which is not defined in the Act. Judge Thorburn ruled that 'carry out' included the supervision and instruction of people who do the physical building work and upheld the charge against Mr Tan.

Mr Tan appealed that decision. In the High Court, Brewer J affirmed Judge Thorburn's interpretation, agreeing that it would be nonsensical and 'savagely unfair' on those 'wielding the hammers and shovels' to expose them, and not those who supervise or instruct them, to prosecution.

In reaching this decision, Brewer J considered the legislative purpose of the Act. The purpose of the Act is to ensure that building work meets certain standards in order to achieve the goals of public health, safety and wellbeing, and sustainable development. The Act makes owners, designers, builders and authorities responsible for ensuring that this purpose is met. Brewer J held that the prosecution's wider interpretation was more consistent with the purpose of the Act. He also considered the scheme of the Act and how the **Resource Management Act 1991** deals with similar offences.

In light of these factors, Brewer J dismissed Mr Tan's appeal, concluding that the term 'carry out any building work' in section 40 of the Act is not limited to the physical carrying out of building work but includes the supervision or instruction of those who physically carry out building work.

This is important for those involved in building works, and also councils, when they are considering matters of liability and prosecution.

NEXT STEPS FOR FRESHWATER

On 20 February 2016, the Ministry for the Environment released a consultation document titled ***'Next steps for freshwater'***. The consultation document provides 23 proposed initiatives to improve the management of rivers, lakes, aquifers and wetlands in New Zealand.

The Minister for the Environment, Dr Nick Smith, and the Minister for Primary Industries, Nathan Guy, considers that 'New Zealand has an abundance of freshwater but changes are needed to better manage water quality and improve efficiency of use'.

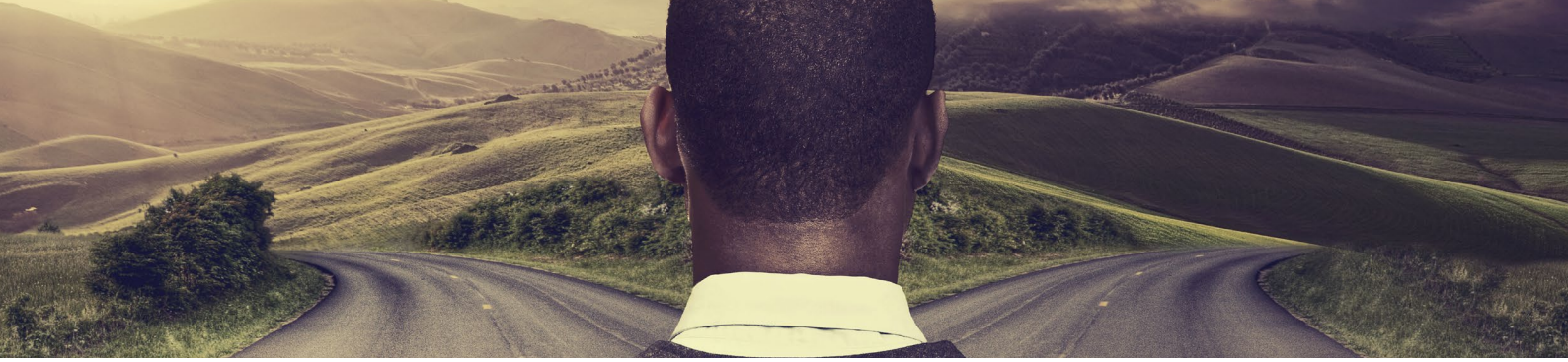
One of the key initiatives is to amend the **National Policy Statement for Freshwater Management 2014** to increase national direction, including narrowing the requirement to improve water quality in a region from an overall-region based approach to a more focused freshwater management unit approach. Another key proposal is to exclude stock from water bodies through regulation (which would be possible if the amendments sought in the **Resource Legislation Amendment Bill 2015** are passed). A further proposal includes improved processes for iwi to be involved in the development of council water plans and water conservation orders.

As part of the package of reforms in this area, an additional $100 million of funding has also been proposed to improve water quality in lakes, rivers and aquifers in New Zealand.

To read more, please view the **consultation document**.

Submissions close at 5pm on Friday, 22 April 2016, and can be made **online** or in hardcopy. Following submissions, it is anticipated that a more formal way forward will be pursued.

If you have any questions, or require further information regarding any aspect of this newsletter, please contact us.



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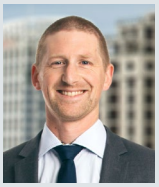

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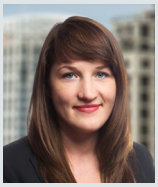

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