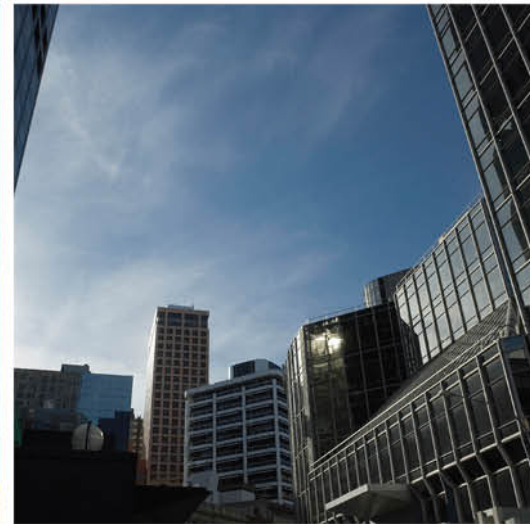


# Environment in Focus

December 2011



Welcome to *Environment in Focus*, Bell Gully's regular update of resource management legal issues, designed to keep you informed on regulatory developments, legislation and cases of interest.

## IN BRIEF

Items in this issue include:

- Phase II Reform to the RMA to include changes to sections 6 and 7
- Draft Development Contribution Policy for Auckland
- National Environmental Standard for Contaminated Soil
- Implementation Guide for the NPS on Renewable Energy Generation
- More guidance for Freshwater Management
- Updated Environment Court Practice Note
- Heritage New Zealand Pouhere Taonga Bill
- Land Information New Zealand's new interim standard for dealing with interests in coastal reclaimed land
- Wellington City Council's quake safe proposal
- Update: A date for the close of submissions on the Exclusive Economic Zone and Extended Continental Shelf (Environmental Effects) Bill should be set soon now that the new government has been confirmed
- Subscribe to our weekly Plan Change summary

## IN BRIEF

### [Phase II Reform to the RMA to include changes to sections 6 and 7](#)

As part of the broader phase II reforms a review is being undertaken to consider amendments to sections 6 and 7 of the RMA to address the risk of natural hazards and recognise major infrastructure and the urban environment. The Government-appointed Technical Advisory Group is set to provide advice to the Minister for the Environment by the end of March 2012.

### [Draft Development Contribution Policy for Auckland](#)

The draft development contribution policy has been approved in principle by Auckland Council's Strategy and Finance Committee. It aims to encourage development in accordance with the Auckland Plan, and be more developer friendly.

### [National Environmental Standard for Contaminated Soil](#)

The NES has a series of activity classifications that seek to minimise the risks of soil contamination on human health at the time of development or land use change. The NES will make it more likely that contaminated land will need to be investigated and remedied. The Regulations take effect from 1 January 2012.

### [Implementation Guide for the NPS on Renewable Energy Generation](#)

The implementation guide is aimed to ensure consistent application of the NPS and provides further examples of how planning instruments are to give effect to the NPS.

### [More guidance for Freshwater Management](#)

The Ministry for the Environment has also published an implementation guide for the NPS for Freshwater Management. The Guide provides local authorities with commentary on the NPS and how to give effect to the NPS while acknowledging implementation methods will need to be determined at a local level.

### [Updated Environment Court Practice Note](#)

The updated practice note came into effect from 1 November 2011. It includes further directions on mediation, costs and expert evidence.

### [Heritage New Zealand Pouhere Taonga Bill](#)

This Bill is to replace the Historic Places Act 1993. The proposed streamlined archaeological consenting process and separate emergency authority process seek to improve the regulatory framework for archaeological heritage. Submissions have not yet been called for.

### [Land Information New Zealand's new interim standard for dealing with interests in coastal reclaimed land](#)

The Marine and Coastal Area (Takutai Moana) Act 2011 provides for a comprehensive new regime for reclamations, and reinstates the ability to obtain freehold title or other interests in reclaimed land. This interim standard has been introduced to ensure that applications for, and the vesting of interests in, reclaimed land are dealt with in a fair and transparent manner.

### [Wellington City Council's quake safe proposal](#)

The Wellington City Council has made a controversial submission to the Royal Commission of Inquiry into Building Failures Caused by the Canterbury Earthquakes on the issue of earthquake prone buildings, and who should pay for strengthening works. At present, significant strengthening costs for at-risk buildings in Wellington are borne almost solely by individual owners, and many have failed to carry out the required work. The Council has submitted that different funding options should be considered.

**Update: A date for the close of submissions on the Exclusive Economic Zone and Extended Continental Shelf (Environmental Effects) Bill should be set soon now that the new government has been confirmed.**

## In the Courts

**Priority** – The High Court has overturned the Environment Court decision in *Christchurch Ready Mix Concrete Limited v Canterbury Regional Council* and held that the prior grant of consent to extract gravel has the effect of allocating the resource and giving priority.

**First grant of security for costs case since reinstatement in RMA** - The Court applied the principles of pre 2003 cases and awarded security for costs as it was highly unlikely that the appellant's case would succeed.

**Reverse sensitivity** – The need for careful integration of activities into their neighbourhood without unreasonably interfering with the use of adjacent land was highlighted in the decision by Palmerston North District Court Judge Nevin Dawson that gave the Brookfields Park Golf Course until 30 November 2011 to “cease operating as a golf course or other golf activity which causes golf balls to land upon the [Farm’s] land”.

**Council change in position** – Independent Commissioners granted resource consent for a commercial entertainment facility in Wanaka, but the Council decided not to support the Commissioners’ decision and sought leave to call evidence against the grant of consent. The Environment Court held that on the facts of the case public confidence would be better maintained if the Council does not call evidence and instead supports its decision or abides the decision of the Court.

## Plan Change Summary

We prepare a weekly summary of proposed plans and plan changes that are open for submission or further submission. The plan change summary for the week of 5 December 2011 can be viewed [here](#). If you would like to subscribe to this weekly publication please [click here](#).

## FULL ARTICLES

### Phase II reform to the RMA to include changes to sections 6 and 7

The Government is now getting on with the phase II reforms to the Resource Management Act 1991 (**RMA**), which has a broader directive and seeks to provide greater central government direction and closer alignment of related legislation. As part of the phase II reform, the Government has announced that changes will be made to sections 6 and 7 of the RMA. This is to address the risk of natural hazards and matters raised by the Technical Advisory Group (**TAG**) reports on infrastructure and urban planning which were reported back to the Minister in 2010.

Under section 6, decision makers are required to recognise and provide for matters of national importance, while section 7 lists other matters to which a decision maker must have particular regard.

The Government-appointed TAG has been asked to undertake a focused review of sections 6 and 7. In particular, they will:

- focus on whether sections 6 and 7 can be improved to give greater attention to managing issues of natural hazards;
- consider the recommendations for changes to sections 6 and 7 from the urban and infrastructure TAGs in a broader context;
- consider changes that would enable the incorporation of the Soil Conservation and Rivers Control Act 1941, River Boards Act 1908 and the Land Drainage Act 1908;
- reflect on the provisions relative to the challenges facing New Zealand 20 years on from the RMA's enactment and promote consistency of interpretation.

The review in respect of natural hazards was prompted by the Christchurch earthquakes and, in particular, a report which revealed that significant areas in Christchurch's eastern suburbs and Kaiapoi were consented for subdivision after 1991 when the liquefaction risk in these areas was clearly identified. The Government intends to give greater weight in the RMA to managing the risks of natural hazards.

The TAG report on Infrastructure recommended a number of significant alterations to the RMA and the Public Works Act 1981 to assist the consenting and timely delivery of major infrastructure projects. The Urban TAG report included a recommendation that built and urban environments be explicitly recognised in the RMA by amendment to section 6. These recommendations will now be considered within the context noted above.

The TAG is chaired by Alan Dormer, and the members are Phil Gurnsey, Paul Majurey, Phil Mitchell, Peter Skelton, Mark St Clair, Rachel Reese and Jenni Vernon.

It has been confirmed that the TAG does not have authority to review or consider any other matters for inclusion in sections 5 and 8 of the Act, which set out the RMA's purpose and obligations under the Treaty of Waitangi. The TAG is to provide advice to the Minister for the Environment by the end of March 2012.

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### Auckland Council – Draft Development Contributions Policy

Auckland Council's Strategy and Finance Committee received and considered the draft contributions policy for the Draft Long-term Plan 2012-2022 (**Draft Contributions Policy**) on 30 November 2011.

The Draft Contributions Policy states that the policy intends to present a new approach to the issue of delivering and funding growth infrastructure. It seeks to deliver a new partnership approach between developers, Council and existing and incoming community in order to deliver the vision of making Auckland the world's most liveable city. The Draft Contributions Policy outlines the five stakeholders, which are:

- those undertaking development (the key partner driving the need for additional infrastructure);

- the ratepayer body as a whole (which covers the burden of ongoing operating costs);
- existing residents and businesses expanding or shifting into newly built premises;
- incoming residents and businesses moving into newly built premises (anticipated to make up a large part of contributions); and
- the Council.

The Auckland region has been split into regional and sub-regional “funding areas” i.e. Auckland wide, North, West, Central, South, Rural, Urban, and Hauraki Gulf Islands. The level of contributions required in any funding area will depend on the type of development being carried out. The Draft Contributions Policy incentivises particular types of development by charging lower contributions for activities in certain funding areas (that create efficiency in infrastructure provision and a more compact urban form) and for preferred activities (such as more intensive residential use) which have lower estimated demand factors. For example, subdivision for low, medium, or high rise attached dwelling units only has an estimated demand factor of 0.6 Household Unit Equivalent, in comparison to a subdivision for a single residential allotment which has a 1 Household Unit Equivalent.

In general the central funding area has lower development contribution requirements than the west, north and south funding areas. In comparison to the current development contribution schedules which often specify different rates for particular areas, the new funding areas proportion the costs of development over a wider area and will therefore result in an increase in the current contributions payable for some areas, and reduction in other areas.

Auckland Council acknowledges the effect that early payment of contributions can have on the viability of a development and aims under the policy to require the contribution as late as possible without losing the ability to use statutory enforcement powers. For example, an invoice for development contributions will be issued for a resource consent for subdivision at the time of the application for the section 224(c) certificate, and for a land use consent at the time of notification of commencement or commencement, whichever is the earlier. Council is mindful that a “late as possible” payment profile will delay the income forecast for contributions and increase the overall growth related borrowing cost, but considers that the overall effect of this is not material when compared to the overall price of contributions.

The financial information in the Draft Contributions Policy is indicative and the schedules will be updated once the final budget is determined. The Strategy and Finance Committee approved the general structure and draft content which is to be placed before the Committee again on 23 December 2011 before adoption in February 2012.

Once the Draft Contributions Policy has been adopted, it will replace Auckland Council's interim development contributions policy. The interim development contributions policy as it stands essentially maintains the former district councils' development and financial contributions policies prior to the amalgamation of the Auckland Council. The finalised Contributions Policy will be the first fully integrated contributions policy prepared by the Auckland Council. The public will have an opportunity to be heard on the Auckland Council's Draft Contributions Policy when the Draft Long-term Plan 2012-2022 is formally notified (under the Local Government Act 2002 special consultative procedure) in early 2012.

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## **National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health**

The National Environmental Standard (**NES**) for Assessing and Managing Contaminants in Soil to Protect Human Health Regulations 2011 was made in October by Order in Council, and will come into effect on 1 January 2012. The NES largely mirrors the draft versions of the NES, with a series of activity classifications that seek to minimise the risks of soil contamination on human health at the time of development or land use change. The NES will only apply to land where an activity or industry described in the Hazardous Activities and Industries List (the **HAIL**) is being, or has been, undertaken on it, or where it is more likely than not that an activity or industry described in the HAIL is being or has been undertaken on it.

The NES references the Ministry for the Environment's Methodology for Deriving Standards for Contaminants in Soil to Protect Human Health (**Methodology**) for setting the Soil Contaminant Standards for Human Health

**(SCS(health))** for 12 priority contaminants in five generic land use scenarios. Where the contaminant is not one of the 12, or where the land use falls outside the scenarios provided for, the Methodology provides a framework for deriving the appropriate contaminant standard.

The major change from the Cabinet Paper is that subdivision or a change in land use has been made a permitted activity in the regulations where a preliminary site investigation report has been submitted to Council that concludes that it is 'highly unlikely that there will be a risk to human health'. One example of where this might occur is where a piece of land is on the HAIL because it has been used as an orchard. If this use of the land is relatively recent it is highly unlikely that it would have been sprayed with insecticides such as DDT, which was banned in 1970 and is a highly toxic and persistent chemical. If a preliminary site investigation concludes that a risk to human health from soil contaminants is highly unlikely, the activity will be permitted.

If this is not the case, the activity will default to a controlled activity, and then restricted discretionary if the controlled activity standards are not met. Standards include the production of an 'adequate' detailed site investigation report which shows that SCS(health) are either not exceeded (controlled) or exceeded (restricted discretionary) for the intended land use. If an applicant does not provide the preliminary site investigation report to the consent authority, the disturbance of land subdivision or change in land use will be a discretionary activity.

Where the SCS(health) standards are exceeded the resource consent conditions can require remediation, mitigation, monitoring and safe disposal of the contaminated soil.

The adoption of the NES will make it more likely that contaminated sites, including sites with historical contamination, will need to be investigated and remediation undertaken where the land is to be disturbed, subdivided, or a change in land use is to occur. The Regulations take effect from 1 January 2012.

## **NPS for Renewable Electricity Generation 2011: Implementation Guide**

The Implementation Guide for the National Policy Statement for Renewable Electricity Generation (**NPS**) has recently been published by the Ministry for the Environment. It recognises that one of the key reasons why the NPS was developed is that renewable energy projects are being unduly impeded by variable provisions in local authority planning instruments. In light of this it states that the NPS seeks to ensure a more consistent national approach with the benefits being explicitly recognised and renewable energy activities being provided for.

Nevertheless the Guide is clear that it does not resolve tensions between renewable energy activities and other interests such as those under Part 2 of the RMA. The Guide also states that other National Policy Statements must also be considered and given effect to individually. The NPS for Freshwater Management in particular will be relevant, and the Guide outlines that the NPS for renewable energy will inform decisions on planning instruments providing for freshwater allocation and prioritisation.

Interestingly the Guide states that renewable energy activities including their benefits should also be addressed in other relevant sections of planning instruments (for example, landscape) and local authorities should ensure provisions within other sections do not inadvertently impede the intent of the NPS for renewable energy. This is important direction as many local authorities have traditionally adopted a silo approach in only dealing with renewable energy in one chapter and not in the context of other natural resources.

The NPS includes a sole objective; the Guide provides that decision makers will need to give effect to it by recognising that the contribution made by all renewable energy activities to meeting the Government's renewable energy target of 90% is a significant national, regional, and local resource management issue. The Guide states that the subsequent Policy A means that the identified benefits of renewable energy should not be the subject of further case-by-case debate.

The Guide concludes that Policy B recognises that business as usual is unacceptable and that a significant change from the current status quo is required to ensure that existing assets are protected and provision is made for additional renewable energy activities. While the requirement to "have particular regard" to the specified matters imposes an obligation on decision-makers to give genuine attention to the matters in the policy, the Guide clarifies that these are not absolutes. The Guide provides that implementing this policy will require that plan provisions do not result in reductions in generation output from existing renewable energy activities or impose undue constraints on operational capacity and ongoing resource availability.

Policy C1 of the NPS identifies practical constraints relating to renewable energy activities. The Guide states that this policy acknowledges that such constraints can limit their ability to avoid, remedy or mitigate adverse effects. For example, in implementing the policy decision-makers will need to consider that wind turbines require locations with limited turbulence which are often highly visible, and hydroelectric generation may have residual effects on the natural character of the associated water body.

Policy C2 of the NPS relates to offsetting measures and environmental compensation. The Guide provides that it is up to the applicant for a proposed renewable energy activity to volunteer the offsetting or compensation. It expressly notes that an applicant is not obliged to offer such measures, even if the proposed renewable energy activity will create residual effects.

In respect of those policies specifically targeted at various renewable energy activities the Guide states that these policies require an understanding of the renewable energy resources in the region/district, identifying sensitive receiving environments within the region/district where the establishment of renewable energy activities could be provided for subject to a higher threshold, and explicitly and positively providing for renewable energy activities in the balance areas.

The Guide includes examples designed to give effect to each of the various provisions. There is also an emphasis on engagement between electricity generators and local authorities in developing planning instruments. Technical guidance on renewable energy activities is also currently under development by the Energy Efficiency and Conservation Authority and it is likely it will be of assistance in developing appropriate provisions.

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## **NPS for Freshwater Management 2011: Implementation Guide**

The Ministry for the Environment has also published an Implementation Guide for the National Policy Statement for Freshwater Management (**NPS**). This Guide provides background and commentary on the NPS and examples of regional and territorial responses to each objective and policy.

The maintenance and improvement of the quality of fresh water, and the safeguarding of freshwater ecosystems is to be achieved by local bodies by establishing “freshwater objectives” and setting freshwater quality limits. The Guide specifically defines a limit as: “not just the maximum resource use a waterbody can withstand; rather it is the maximum resource use to achieve the identified objective for that waterbody.” The Guide notes that a plan cannot allow for additional resource to be allocated above the maximum limit, even if the objective is still met. Advice on how to set water quality limits is provided under Policy A1.

The maintenance and improvement of the “overall quality” of water in a region is one objective of the NPS. This objective recognises that some variability in water quality is inevitable (for example, in some cases degraded water bodies may remain in their current state), but requires that the overall water quality in a region is to be maintained or improved.

The Guide gives recommendations on the efficient use and allocation of water. Efficient water use may involve: not wasting water, using the most efficient technology available, reducing the need for water (for example, changing crop varieties to one that requires less irrigation) and changing the timing of water use to better fit with water availability. To allocate water efficiently, a local body may: ensure efficient allocation processes, ensure that scarce water is directed to the highest value uses, take into account various changing environmental, economic, social and cultural interests, clearly define the rights and responsibilities of recipients, and balance the competing needs of certainty, adjustment over time and the provision of opportunities to new water users.

An important objective of the NPS is to provide for the involvement of iwi and hapū, and to ensure that tangata whenua values and interests are identified and reflected in the management of fresh water. The Guide suggests that regional councils engage with iwi and hapū so that both parties can determine together what level of involvement they will have. It is noted that reflecting tangata whenua values and interests requires local authorities to do more than have regard to them, but does not go so far to entail giving effect to them. These values and interests should be considered and taken into account in freshwater management decisions.

The Guide notes that while the NPS gives some direction on the outcomes sought, exactly how to achieve those outcomes is not specified. New approaches are encouraged, and ultimately, it is the role of local authorities and

their communities to determine appropriate local implementation methods for the policy and objectives. The Guide notes that the list of national values in the NPS is not prioritised and this should be decided at a local level.

The Guide also states that other National Policy Statements must also be considered and given effect to individually. In particular, there is overlap with the New Zealand Coastal Policy Statement 2010 which contains policies related to water quality in the coastal environment. Treaty settlement and other regional legislation may also have a bearing on the applicability of the NPS and for example, the Waikato River Authority's Vision and Strategy prevails over any inconsistent provisions in the NPS.

It is recognised that the NPS alone will not achieve the objectives for freshwater management, and that a further work programme has been commissioned to support councils in giving effect to the NPS, and deal with matters outside the scope of the NPS. The Guide will be periodically updated as both good policy and good practice develop.

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### Updated Environment Court Practice Note

The Environment Court has released an updated practice note which replaces all earlier versions. The content is largely the same but there is further direction particularly in respect of mediation, costs, and evidence by expert witnesses.

The practice note requires that if you do not have full authority to settle at mediation you must give express advance notice to the Court and other parties at least seven days before the scheduled mediation date. It also affirms the increasingly common practice that the mediator may set a timeline to ensure that further steps are completed in a timely and sequential way.

In respect of evidentiary requirements, the practice note states that a joint witness statement is to also include identification of primary data, published standards or papers relied upon in coming to their opinions. It also provides that parties should confer and, wherever possible, produce a set of agreed documents, photographs or other similar exhibits (which currently is not often done, particularly for landscape witnesses). This is consistent with recent decisions where the voluminous amount of evidence has been disapproved of by the Court. The need for succinctness and avoidance of repetition is also highlighted. In this regard some divisions of the Court have also been placing page limits to legal submissions and briefs of evidence.

While the new practice note does reiterate that mediation is a voluntary process, it also now notes that a refusal to engage in mediation, or withdrawal from it, may influence the possible award of costs if the dispute goes to a hearing before the Court. The practice note expressly states that costs incurred in the hearing before a Council, or in Court-assisted mediation are not awarded by the Court and should not be claimed. Any application for costs should include invoices or other proof of costs incurred.

The practice note came into effect from 1 November 2011.

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### The Heritage New Zealand Pouhere Taonga Bill

The Heritage New Zealand Pouhere Taonga Bill (**the Bill**) was introduced on 4 October 2011. The Bill will replace the Historic Places Act 1993, and it will clarify the purpose of the Historic Places Trust (**the Trust**), by reforming its governance arrangements, focusing the organisation on its regulatory functions, and re-naming it Heritage New Zealand Pouhere Taonga.

The Trust's governance structure currently consists of a Board, the Māori Heritage Council, and Branch Committees comprising fee-paying members. This governance arrangement can give rise to tensions within the Trust that compromises its ability to perform its statutory functions effectively. As a result the Bill disestablishes the branch committees, and provides for the Minister to appoint the eight board members, three of which must be qualified on Māori world view, protocol and culture. The Bill also continues the Māori Heritage Council, and expands its role so that it is consulted on all applications for archaeological authorities that affect sites of interest to Māori.

The Bill reforms the archaeological consenting process by simplifying the application process for proposals that only have a minor effect on archaeology, and combining the two existing archaeological authority processes to form a single process to obtain consent where archaeological sites may be harmed. This is to reduce the maximum time frames for Heritage New Zealand to process applications for authorities and aligns them with the relevant time frames for resource consents under the Resource Management Act 1991. A separate emergency authority process has also been provided for which will apply in the event of natural disasters (like the Canterbury earthquakes) that cause, or are likely to cause, loss of life, injury or serious damage to property.

The direction to streamline the archaeological authority process is welcomed. However, there are some proposed changes which should be subject to further scrutiny. In particular, the Historic Places Act 1993 applies to archaeological sites associated with human activity that occurred before 1900, while the Bill widens the definition of archaeological site to also include sites after 1900 where the site is declared on reasonable grounds by the Trust to be an archaeological site.

The fines for destruction to a heritage place have also increased to \$150,000 for a natural person and \$300,000 for a person other than a natural person, and if a heritage place is modified or altered the maximum fines are \$60,000 for a natural person and \$120,000 for a person other than a natural person.

Submissions on the Bill have not yet been called for.

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### **LINZS15004: Interim standard for providing for interests in coastal reclaimed land**

Land Information New Zealand (**LINZ**) has recently published a new interim standard for dealing with coastal reclaimed land. The standard has been effective since 3 October 2011.

The Marine and Coastal Area (Takutai Moana) Act 2011 (**MCA**) allows applicants to seek an interest in reclaimed land, ranging from fee simple (freehold) title to leases, licences or other rights to occupy. This is a significant departure from the provisions under the repealed Foreshore and Seabed Act 2004 which provided that fee simple titles could not be obtained for reclamations of the foreshore and seabed. The MCA has also introduced a right of first refusal for reclaimed land in favour of the Crown and then iwi.

Under Part 2, Subpart 3 of the MCA, the Minister can make decisions on the status of reclaimed land, applications for an interest in reclaimed land, and rights of first refusal on offers of reclaimed land. This interim standard aims to ensure that applications for, and the vesting of interests in, reclaimed land are dealt with in a fair and transparent manner. The standard helps applicants to identify essential information that has to be included in an application, and usefully describes the processes that LINZ undertakes to prepare information and provide that to the Minister for a determination.

A copy of the interim standard can be found at: [LINZS15004 - Interim Standard for dealing with coastal reclaimed land](#).

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### **Wellington Quake Safe proposal**

Wellington City Council has made a controversial submission to the Royal Commission of Inquiry into Building Failures Caused by the Canterbury Earthquakes on the issue of earthquake-prone buildings, and who should pay for strengthening works. The Council submitted that although on a macro level there is an overwhelming benefit to cost ratio supporting the earthquake strengthening of buildings, the costs of strengthening fall almost exclusively upon building owners which has resulted in many failing to carry out the required work. It was noted that the benefits of safe buildings are enjoyed by the community, and most of the costs of building failure are also experienced by the wider community.

The Council submitted that arrangements other than the building owner solely funding strengthening works should be considered so that the cost of catastrophic failure to the community and taxpayer at a future point could be avoided. Options suggested included "insurance arrangements, taxation (deductibility), the role of EQC in preventative interventions and government incentives". Wellington's mayor, Celia Wade-Brown, presented the

submission to the Commission on 14 November 2011, and called for financial assistance from the Government for the strengthening work.

The Council submission asks the Commission to make recommendations around the legal threshold for an earthquake-prone building and the fair allocation of strengthening costs. The Council seeks a clear threshold for councils to require buildings to be strengthened to, and for the Commission to consider whether earthquake strengthening regulations are adequate to protect heritage.

The Inquiry is continuing into next year and following the hearings the Commission will report on the cause of building failure as a result of the Canterbury earthquakes and legal and best practice requirements for buildings in New Zealand central business districts.

## In the Courts

### **Priority: Christchurch Ready Mix Concrete Limited v Canterbury Regional Council (High Court CIV 2011-409-1501, 29/9/2011, Fogarty J)**

In our September issue of *Environment in Focus*, we reported on the Environment Court decision in *Christchurch Ready Mix Concrete Limited v Canterbury Regional Council* [2011] NZEnvC 195 which held that references to sections 12 and 13 in sections 124B and 124C of the RMA had been (reluctantly) a mistake, and that they do not apply to an "allocatable" resource under the RMA. This decision was material to Ready Mix as it meant that its renewal application to extract gravel, which was filed after a new application for extraction by Fulton Hogan in the same location, would not have priority.

The High Court has determined that the Environment Court was incorrect to conclude that the reference to section 13 in sections 124B and 124C is a mistake in the legislation.

The High Court considered the term "allocate" is not confined by its use in sections 30(1)(fa) and (fb), and that as "allocate" in section 124A need not be confined to allocation by rules then there is a practical explanation for the inclusion of section 13. It is therefore no longer possible to argue that section 124A is incoherent.

The High Court determined that where there is competition for the resource, the prior grant of a land use consent can have the effect of allocating the resource. In this case because the relevant plan has not expressly allocated any of the gravels, sections 124B and 124C apply, and the existing consent holder has priority.

The High Court also noted that it is simply not possible for a Court to find that a statutory provision in whole or in part is a mistake. It was noted that the starting point for analysis is Parliamentary sovereignty. Parliament makes law and the Court applies it, whether the Court thinks it is sensible or not. It is not for the Court to evaluate whether statute law is good policy.

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### **Case Update: Security for Costs granted – *Tipene v Northland Regional Council* [2011] NZEnvC 304**

*Tipene v Northland Regional Council* is the first decision to grant an application for security for costs since the Court's power to make such an order under section 278(1) of the RMA was reinstated on 1 October 2009.

The appellant contested Northland Regional Council's decision to grant Affco variations to existing consents for water take and discharge permits, and new consents for the disposal of treated waste water to land and discharge of contaminants to air. Affco consequently pursued an application for security for costs against the appellant.

In outlining the existing law, Judge Dwyer referred to the principles and criteria against which the Court's discretion might be exercised, as set out in *Bell-Booth Group Ltd v Attorney General* (1986) PRNZ 457. This confirms that despite the absence of the Court's statutory power to order security for costs during the period August 2003 - 1 October 2009, the applicable case law has not changed.

In exercising his discretion, Judge Dwyer considered that the appellant's ability to meet a costs award, and the merits and bona fides of the appellant's case were particularly relevant. The appellant advised that he would be unable to withstand any costs, and Judge Dwyer was of the opinion that it was highly unlikely that the appellant's

case, “based on entirely his own unsubstantiated opinion”, would succeed. The appellant had acted on his own behalf in filing the appeal.

Judge Dwyer noted that some of the matters raised by the appellant arose from aspects of particular concern to tangata whenua. However, even weighting this factor as highly as possible, it still could not present a challenge to the main findings of fact made by the Council which would be likely to be determinative in the outcome of the proceedings.

Attention was drawn to the fact that an unsuccessful appeal does not automatically result in an award of costs, and that awards are made based on a range of factors, including the merits and reasonableness of the case advanced and the manner in which proceedings were conducted. It was found that there was a real risk that costs would be awarded against the appellant should he not succeed, based on “the absence of any evidence to substantiate his uncorroborated opinions”.

Judge Dwyer held that it was appropriate the appellant be required to provide security for costs. The sum was set at \$20,000, which was less than one quarter of Affco’s potential costs of an appeal hearing.

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### **Golf Course ordered to close**

A recent case highlights the need for careful integration of activities into their neighbourhood without unreasonably interfering with the use of adjacent land.

The Tait-Jamiesons had been farming their land organically since 1976. The land was adjacent to the longstanding Brookfields Park Golf Course – a narrow and long course, that at its narrowest was approximately 20m across – making it virtually inevitable that golf balls, even those that were well struck, would at times transgress the property boundary. The Tait-Jamiesons had raised concerns about the operation of the golf course (without success) for many years. The Finlaysons bought the golf course in 2001, they said without notice of their neighbours’ concerns. In 2003, the Tait-Jamiesons issued proceedings to prevent stray golf balls and golfers from unreasonably interfering with their land.

Judge Dawson found the plaintiff had established that since 2002, more than 20,000 balls had been hit into the organic farm. Additionally, bottles, cans and rubbish were deposited on the farm, and on occasion golfers would cross onto the Tait-Jamieson’s land to relieve themselves. The Court accepted that the accumulation of these factors lowered the farm’s organic rating and constituted an actionable nuisance.

Consequently, Dawson J held that Brookfields must cease any activity that would allow golf balls onto the farm by 30 November, 2011 or close. The idea of netting, costing \$1.6 million and requiring resource consent, was raised at the hearing to ameliorate the interference.

An agreement was then reached between the parties for the Organic Farm Company to buy Brookfields on April 1 2012 and close it. Until then, golfing will continue, however the Finlaysons must take all practicable steps to minimise the problems which caused the dispute.

New Zealand Golf chief executive Dean Murphy has made a statement that he was confident the court ordered closure of the golf course would not impact on other courses, as “the Brookfield situation was unique”.

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### **Council change in position – *Stufenberg Family Trust No.2 v Queenstown Lakes District Council* [2011] NZEnvC 383**

Independent Commissioners granted resource consent for a commercial entertainment facility near Wanaka. The decision was then appealed to the Environment Court by two of the submitters. The “Strategy Committee” of the Queenstown Lakes District Council resolved that the decision of the Commissioners was not supported. The Council then sought leave from the Court to call evidence from council officers to oppose the grant of consent.

Following a review of other relevant decisions, the Environment Court held that whether it is permissible for a council to call evidence that does not support its decision is a discretionary issue, which depends on the circumstances of the case. The key factors that needed to be considered were:

- a) Fairness – This is in terms of procedural fairness, which can usually be satisfied by applying for leave in good time, and if the evidence to be brought is not new.
- b) A change in circumstances – Where a proposal has been changed it requires consideration of whether that change justifies a change in position by a council.
- c) Public confidence in the process – Where a council has made a decision, unless it is obviously wrong at law, the public is entitled to believe that the decision will be supported before the Environment Court. This is reinforced by the requirement to have regard to the council's decision under section 290A of the RMA. There is however a balance to be struck to ensure that the Court has all relevant evidence before it.
- d) Integrity of the RMA – That the purpose and principles of the RMA will be achieved. In particular, this may arise where matters of national importance are at issue reinforcing the need to ensure that the Court has all relevant evidence before it.

On the facts, Judge Jackson was satisfied that in terms of fairness the case was neutral because the Council had given early notice and if the request was refused the other appellants could call the council officers, and that the integrity of the district plan and RMA would be maintained if the Council calls evidence as the Court would be better informed. However, the more important factor was held to be public confidence in the process. It was considered that appropriate weight may not be given to the Commissioners' decision if that decision was ignored or contradicted by the Council's witnesses. Public confidence would be better maintained if the Council does not call evidence but instead supports the decision by the Independent Commissioners or abides the decision of the Court.

Leave for the Council to call evidence opposing the grant of consent was refused.

**Plan Change Summary – Week of Monday 5 December 2011**

**North Island**

**1. The Masterton, Carterton and South Wairarapa District Councils - Proposed Plan Change 3 to the Combined Wairarapa District Plan - Submissions close 10/02/12**

The Masterton, Carterton and South Wairarapa District Councils have prepared Proposed Plan Change 3 (Municipal Wastewater Treatment Plant and Dwelling Setback Standards-Rule 4.5.2) to the Combined Wairarapa District Plan. The plan change addresses dwelling setback requirements for new residences in the rural zone, and develops new rules that reciprocally address the establishment or expansion of MWWTP's and associated disposal areas.

Submissions close 10/02/12.

**2. Waikato Regional Council - Draft Regional Land Transport Programme 2012-15 for the Waikato region - Submissions close 20/02/12**

The Waikato Regional Council has prepared a Draft Regional Land Transport Programme 2012-15 for the Waikato region. The Programme is a statutory document prepared under the Land Transport Management Act 2003. The primary purpose of this document is to collate and prioritise land transport activities in the Waikato region for funding from the national land transport fund.

Submissions close 20/02/12.

**South Island**

**3. Waimakariri District Council - Proposed Plan Changes 29, 32, 34 and 35 to the District Plan - Submissions close 21/02/12.**

Waimakariri District Council has prepared Proposed Plan Changes 29, 32, 34 and 35 to the District Plan. These Plan Changes relate to:

Signage;  
Mandeville North Growth Management;  
Kaiapoi Town Centre Urban Design; and  
Rangiora Town Centre Urban Design.

Submissions close 21/02/12.

## NEED MORE INFORMATION?

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