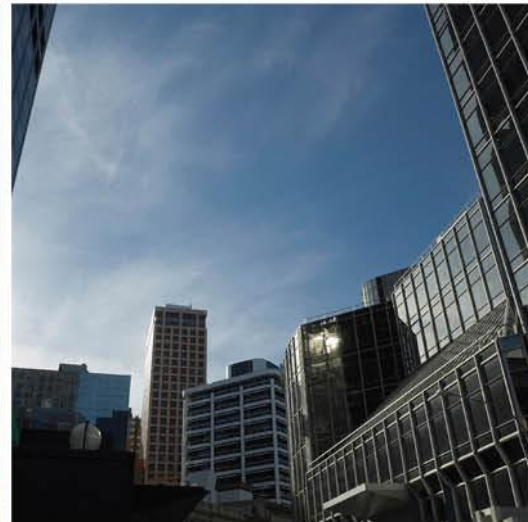


Environment in Focus

September 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:

- Auckland Plans – How to create the world's most liveable city
 - Central City Plan to rebuild Christchurch
 - New EEZ Bill – Seeking to strike a balance between the marine environment and offshore economic development
 - Practice Guide for Commissioners for the conduct of RMA hearings at first instance
 - Will New Zealand live up to its clean, green brand?
 - New strategy to assist Air Quality Management
 - "Old" Incorporated Societies Act to change
 - Hauraki Gulf is experiencing ongoing environmental degradation
 - Watch this space for precedent on the allocation and privatisation of freshwater
 - The latest developments in the Courts
-

IN BRIEF

[Auckland Plans – How to Create the World’s Most Liveable City](#)

The draft Auckland Plan (New Zealand’s first spatial plan), and three key supporting draft plans – the Economic Development Strategy, Auckland City Centre Master Plan, and the Waterfront Plan – have all been notified for submissions. There is a lot to digest and only a short time to do it, with submissions due by **25 October 2011**.

[Central City Plan to rebuild Christchurch](#)

The Central City Plan is being fast tracked under the Canterbury Earthquake Recovery Act.

[New EEZ Bill – Seeking to strike a balance between the marine environment and offshore economic development](#)

The Government has introduced the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill into Parliament. The Bill establishes a new consent regime for activities within the Exclusive Economic Zone and Extended Continental Shelf.

[Practice Guide for Commissioners for the conduct of RMA hearings at first instance](#)

The guide addresses delegations, pre-hearing processes, hearing procedure and decisions. It will be of value not only for Independent Commissioners but for those appearing before them.

[Will New Zealand live up to its clean, green brand?](#)

The Parliamentary Commissioner for the Environment could become responsible for five yearly reports on the state of New Zealand’s environment under a proposed Environmental Reporting Act. Submissions are due by **18 October 2011**.

[New strategy to assist Air Quality Management](#)

The National Air Quality Compliance Strategy 2011, published last month, has been developed to ensure compliance with the National Environmental Standards for Air Quality. It targets Councils who are responsible for managing air quality.

[“Old” Incorporated Societies Act to change](#)

The Law Commission is seeking to revise and update the Incorporated Societies Act. This may have implications for community groups who lodge submissions as incorporated societies. Submissions close **30 September 2011**.

[Hauraki Gulf is experiencing ongoing environmental degradation](#)

The third State of the Environment Report 2011 for the Hauraki Gulf has been released, and we still can’t be proud of the results.

[Watch this space for precedent on the allocation and privatisation of freshwater](#)

The Environment Court hearing on Waikato Regional Council’s proposed Variation 6 to the Waikato Regional Plan relating to the allocation and privatisation of freshwater has closed, with the Court indicating that a decision will be released in November this year.

In the Courts

[Trade Competition](#)

Trade competitors participating in RMA processes can have significant costs awarded against them both pre-and-post 2009 RMA amendments.

[Trade Competition](#)

The Environment Court sorted a trade competition squabble – it declared a submitter to a council hearing to be a trade competitor who was motivated by nothing more than the wish to stifle the opening of a rival store in a given location.

[Reopening a Hearing](#)

Further submissions may be allowed after the close of a hearing but before the decision provided there is no significant prejudice.

[Priority](#)

Resource consent holders intending to operate under an existing expired resource consent whilst applying for a new resource consent should be aware that the Environment Court has found that only resource consents relating to “allocatable” resources such as water, heat or energy are capable of relying on these sections in the RMA.

FULL ARTICLES

Auckland Plans – How to Create the World’s Most Liveable City

The draft Auckland Plan was notified on Tuesday 20 September 2011. The Auckland Plan is going to be the guiding planning document and set a blueprint for development in Auckland over the next 30 years. It is different from other planning documents in that it aligns both land use and infrastructure needs. Mayor Len Brown’s goal is to make Auckland the world’s most liveable city by 2040.

A number of supporting planning documents are also being prepared by Auckland Council. The Economic Development Strategy, the Auckland City Centre Master Plan, and the Waterfront Plan provide further detail to support the outcomes sought by the Auckland Plan. These plans have also been notified for submissions. Submissions are due on all four plans by 4pm on Tuesday 25 October 2011.

There is a tight time frame for submissions and hearings on the Auckland Plan so that it can be adopted by February next year. The momentum for the Auckland Plan to be finalised quickly is so that it can inform the Long Term Plan 2012-2022 which will set out funding sources and expenditure, and the Unitary Plan which will replace the current district and regional plans.

Draft Auckland Plan

Key issues facing Auckland are growth and intensification. With population density the need to have a comprehensive and efficient public transport system also comes into play.

A high growth scenario of an extra 1 million people living in Auckland in 30 years (to our current population of 1.5 million), means an additional 400,000 dwellings will be required. The draft plan has set a clear line in the sand that we cannot continue to sprawl onto rural land, and we will need to adapt to compact city life. This is not however to be at the expense of good urban design for the built environment and public spaces.

Key proposals for growth, intensification, public transport and urban design are:

- The Rural Urban Boundary (RUB) is to replace the previous metropolitan urban limits. The RUB will define the limits of long term growth for at least the next 30 years, and no urban development will be allowed outside the RUB except for the release of limited and staged greenfields land in specific locations.
- Intensification is to be encouraged by up-zoning land in development areas to allow greater densities. Infrastructure and amenities are to be provided at the right place and the right time to support development. Targeted reductions in development contributions and other financial incentives to encourage intensification are to be investigated.
- An integrated public transport system is to be planned, developed and operated as one network, to provide effective connections within Auckland. Public transport trips are targeted to increase by provision of infrastructure projects (the City Centre Rail Loop, rail to the airport, additional harbour crossing, busways and bus feeder services), land use planning, intensification in rail corridors, and effective travel demand management.
- To improve the quality of urban living across Auckland. A development design compendium is to be developed to sit alongside the Unitary Plan. Council property is to be used as a catalyst for change. The Council will work with private and third party sectors, and have dedicated consent account managers and cross-council assessment teams.

Other Draft Plans

Draft Economic Development Strategy – provides more detail and action points to achieve the goal of increasing Auckland’s annual average regional exports, real GDP and productivity to improve our economy by 20 places in 20 years in current OECD GDP per capita rankings.

Draft Auckland City Centre Masterplan – outlines eight strategic changes to set the city on the path of becoming an international city centre.

Draft Waterfront Plan – details how to add to the vibrancy and charm of Auckland's waterfront and harbour.

Submissions and Hearing Process for the Draft Auckland Plan

The submission process for the Draft Auckland Plan is under the special consultative procedure in the Local Government Act 2002, which means there is only one chance to make a submission, and no right of appeal on the merits.

Submitters will be heard by the Council in November. The committee responsible for the Auckland Plan is the Auckland Future Vision Committee, which is a committee of all Councillors led by Mayor Len Brown. It is likely that submitters will only be given 5-10 minutes to speak to their submissions and answer questions from the committee. It will therefore be important that submissions are clear and direct on the outcomes required.

Bell Gully can assist you with understanding how these plans may provide opportunities or impact on your business, and to prepare and present submissions.

Draft Central City Plan – Christchurch

The Government enacted The Canterbury Earthquake Recovery Act 2011 (**CER Act**) after the 22 February 2011 earthquake to fast track the rebuild of Christchurch. Pursuant to this Act, the Christchurch City Council has prepared a Central City Plan, a draft recovery plan for the Central Business District where about 50% of the buildings in the red zone need to be demolished. The Central City Plan is to guide how the Central City will be redeveloped and rebuilt.

The Central City Plan was published for feedback on 16 August 2011. Submissions on the plan closed on Friday, 16 September 2011. Following this feedback the plan will be finalised by the Council and then presented to the Minister for Earthquake Recovery and Chief Executive of the Canterbury Earthquake Recovery Authority in December 2011 for approval. Once approved, the Central City Plan will be given legislative status by Order in Council. The plan is not required to follow the normal consultative procedure for preparation of a regional or district plan under the RMA, there is no right to make submissions, or subsequently appeal to the Environment Court. Once approved, all persons exercising functions under the RMA must not make a decision or recommendation that is inconsistent with the Central City Plan in relation to resource consent applications, notice of requirements, and the preparation of RMA documents including the regional policy statement, regional or district plans.

The Central City Plan is intended to enable the redevelopment of the Central City over the next 10 to 20 years. In summary, the key provisions of the Plan provide for:

- Widening the banks of the Avon River/Ōtakaro and providing boardwalks and green spaces;
- Re-locating shops and offices into a smaller, defined, low rise, and concentrated CBD area, bounded by Lichfield, Manchester and Kilmore streets and the Avon River/Ōtakaro (retail and commercial businesses will still be able to operate outside this area);
- A short-term light rail system route to be developed from the University to the Central City, with the strategic long-term goal being a shared regional priority to establish a light rail system linking settlements in Greater Christchurch, including Lyttelton, Rolleston and Rangiora to the Central City and key attractions;
- A new sports hub, including a state-of-the art aquatic centre, indoor stadium, a health and fitness centre and elite performance training facilities will be built in the south-eastern corner of the Central City;
- Redevelopment of Christchurch Hospital;
- Retention of Cathedral Square;
- A new central library and convention centre;
- A new transport network designed to walk, cycle, use public transport or drive and park with ease;

- A network of neighbourhood parks and gardens spread throughout the Central City to provide inner city residential and mixed use neighbourhoods with a variety of green spaces to enjoy a healthy, active lifestyle;
- 11 precincts, five neighbourhood centres and three transition areas within the central city. The regulatory framework will be tailored to ensure decisions on land use and urban design support the development of precincts and neighbourhoods;
- Framework to support the retention of key heritage buildings in the Central City, the retrieval of key features (such as facades) and appropriate reuse of material that is salvaged from demolished buildings;
- Potentially controversial minimum and maximum height limits with additional floors as an incentive where good urban design and green technologies are employed. Heights will vary from the Core with a maximum of seven storeys (29m) to the Edge with a four storey maximum (14m) (the cathedral is noted at 63m high); and
- Design standards and guidelines to promote high-quality rebuilding.

The Central City Plan also sets out how the Council will work with CERA, Environment Canterbury and Ngāi Tahu, as well as central government, private investors, developers, businesses and the community to rebuild and redevelop the Central City in line with what the community identify as critical to make Christchurch a lively city.

A key issue is the funding for the rebuild. It is anticipated that the private sector will invest up to 10 times more than central and local government. Financial and other incentives will be offered to encourage and direct new developments which support the recovery plan for the Central City, as will Public Private Partnerships.

Exclusive Economic Zone and Extended Continental Shelf (Environmental Effects) Bill

The Exclusive Economic Zone and Extended Continental Shelf (Environmental Effects) Bill has been introduced to Parliament. Its purpose is to achieve a balance between the protection of the environment and economic development in relation to activities in the Exclusive Economic Zone (EEZ) and the Extended Continental Shelf (ECS). Although New Zealand's EEZ and ECS are nearly 20 times our land area (our EEZ is one of the largest in the world) there has been no clear framework for environmental assessment and regulation of activities which parties seek to establish in the EEZ or ECS.

The activities proposed to be covered by the new legislation include those activities that may cause environmental effects such as redistribution of sediment, damage to seabed or ecosystems (for e.g. seabed mining, energy generation, carbon capture and storage, marine farming and some aspects of petroleum exploration and extraction).

The Bill provides for the following:

- The Environmental Protection Authority to be responsible for consenting, monitoring and enforcement;
- Activities to be classified as either permitted, discretionary (requiring a consent) or prohibited;
- Public notification and consultation required for all regulations and consents;
- An environmental impact assessment on all consents;
- A general duty to avoid, remedy or mitigate adverse environmental effects;
- A joint application process where activities span the EEZ and the territorial sea; and
- Enforcement penalties aligned with the Maritime Transport and Resource Management Acts.

The Bill will proceed through the normal legislative process, although no date has been set yet for the close of submissions.

For more information see Bell Gully's article by David Coull and Andrew Beatson – [Unlocking New Zealand's Resources Potential](#).

Practice Guide for RMA Commissioners

In early 2009 a group of senior, independent RMA hearing Commissioners created a forum to discuss issues of common concern around decision making processes at first instance. The forum has now produced a practice guide for the conduct of RMA hearings, with its recommendations categorised as either 'Best Practice', 'Preferred Practice', or 'Discretionary Practice'.

A 'Best Practice' recommendation means that the Forum considers that the guide should be adopted for all but exceptional cases, and 'Preferred Practice' that the guide should usually be adopted. 'Discretionary Practice' means that the Forum considers that whether or not any particular guide is adopted by an independent commissioner is a matter of discretion on the part of that commissioner. For example, the issue of whether an interim decision is appropriate is considered a discretionary practice, whereas the guide gives 'Best Practice' recommendations for delegations of functions or powers from local authorities.

The guide addresses procedural matters under the four general headings of Delegations, Pre-hearing Processes, Hearing Procedure and Decisions, and represents the views of the forum at the stated dates. The guide will be discussed further at the session on 'Best Practice for RMA hearings and Decision-making' at the RMLA conference in Hamilton this October, with copies of the guide having been recently circulated to RMLA members. The practice guide will be of interest not only to independent commissioners but also those appearing before them. If you would like to see a copy of the guide, please contact us.

Environmental Reporting on the state of New Zealand's Environment

The Parliamentary Commissioner for the Environment will become responsible for five yearly reports on the state of New Zealand's environment under a proposed Environmental Reporting Act.

In a discussion paper published by the Ministry for the Environment ([Measuring Up: Environmental Reporting](#)) the Government states that New Zealand is in a "poor position to provide hard evidence that its clean, green brand is justified", and that it is one of only a few OECD countries without a legislative basis for national state of the environment reporting.

It is intended that the improved environmental reporting will provide a strong evidence base within the Ministry to support policy-making and international reporting obligations. Regulation making power in the RMA is also proposed to be expanded to improve the consistency of the state of the environment monitoring statistics at the local level.

Submissions on the discussion document are due by **18 October 2011**.

National Air Quality Compliance Strategy 2011

A National Air Quality Compliance Strategy 2011 (the **Strategy**) was published last month with the purpose of supporting and ensuring compliance with the air quality targets in the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 (**Regulations**). The Strategy targets regional councils who are responsible for managing air quality under the RMA.

Many areas in New Zealand experience poor air quality, largely as a result of solid fuel (wood and coal) used for home heating and exhaust emissions from motor vehicles.

The Strategy does not seek to address contaminants covered by other regulations such as carbon monoxide, nitrogen dioxide, ozone, sulphur dioxide, dioxins and other toxics or landfill gas.

The Strategy outlines practices that regional councils can implement to meet the minimum requirements for ambient air quality standards, including the PM₁₀ (particulate matter less than 10 micrometres) 24-hour standard, set by the Regulations. Councils will report to their communities and stakeholders, who in turn will be required to comply with any rules, conditions and bylaws later set by the relevant councils to achieve the standard.

Reforming the Incorporated Societies Act

Community organizations play an important role in New Zealand society. In the RMA context, it is common for a group of individuals to enter into a process under the RMA as a group of potentially and commonly affected parties set up as an incorporated society.

Membership of a society does not of itself impose on the members any liability in respect of any contract, debt, or other obligation made or incurred by the society. Incorporated societies tend to be used for the sharing of resources, but also (and perhaps more often) for shielding individual members from an award of costs in the Environment Court. The risk of costs can be a significant factor in discouraging vexatious appeals or those with little merit. Establishing an incorporated society essentially avoids that risk. A respondent to an appeal has the ability to request an order securing costs before allowing an appeal to be heard, to ensure the person bringing the appeal has sufficient financial resources to pay costs should their appeal be unsuccessful. The Environment Court only very rarely grants security for costs (despite the recent re-enactment of the Security for Cost provisions in the RMA) – citing the importance of public participation.

Currently societies are able to incorporate under the Incorporated Societies Act 1908. This statute is over 100 years old, and does not provide for contemporary concerns such as modern governance structures or modern dispute resolution mechanisms. The Law Commission is seeking to update and revise this Act and has released an Issues Paper.

Relevant to the RMA context, the paper poses questions for discussion, such as:

- Do you agree that a review of the legal structure for incorporation of non-profits, and the requirements on those running such societies, would be a useful step in strengthening the non-profit sector?
- Is the current limitation of liability sufficient? (i.e. section 13 prescribes that “a membership of a society shall not of itself impose on the members any liability in respect of any contract, debt, or other obligation made or incurred by the society”).
- Do you think that for some purposes it might be advisable to divide societies between members’ benefit and public benefit societies? If so, in what circumstances?
- Should a society require a minimum number of members, to be incorporated? If yes, what minimum numbers of members do you consider would be appropriate? The current number of members is 15, Australian statutes require 5.
- Is the current limitation of liability sufficient?
- Should there be a provision for mergers of societies?

Submissions close on **30 September 2011**.

Hauraki Gulf Forum – State of the Environment Report 2011

The Hauraki Gulf Marine Park Act 2000 requires the Hauraki Gulf Forum to prepare and publish, once every three years, a report on the state of the Hauraki Gulf environment.

Most of the indicators examined in this third report (State of the Environment Report 2011) suggest that the Gulf is experiencing ongoing environmental degradation, and that resources are continuing to be lost or suppressed at environmentally low levels. The report states there was not enough information to adequately characterise the impact that some activities are having, although it is suggested that the effects from commercial and recreational fishing effects are likely to be among the most significant in the Gulf. On a brighter note, it is clear that island and marine conservation efforts are clearly producing positive outcomes.

The full report is available from www.haurakigulfforum.org.nz

Allocation and Privatisation of Freshwater: Waikato Regional Council's proposed Variation 6

The Environment Court hearing on Waikato Regional Council's proposed Variation 6 to the Waikato Regional Plan has closed, with the Court indicating that a decision will be released in November this year.

Variation 6 seeks to strike a balance between managing the adverse effects of ground and surface water use while maintaining reasonable access to, and maximising the sustainable use of, those resources. Variation 6 is to provide guidance on appropriate allocation in catchments where there is increased demand, and which has led to direct competition between those wanting water for domestic and municipal water supply, electricity generation, agricultural development and other uses.

In the face of legal challenges from a number of parties, the Council (earlier on) decided to abandon policies which prioritised activities, and also the common expiry date management approach.

Variation 6 proposes to protect the existing generation of electricity from the Waikato Hydro Scheme and the taking of cooling water for the Huntly Power Station. There was concern from some parties that Variation 6 does not afford sufficient priority to existing agricultural and industrial users.

It was argued that accommodating pastoral irrigation would have economic benefits that vastly outweigh any small loss to electricity production, which could be made up by generators elsewhere.

The Environment Court's decision is likely to have wider implications for other regions also struggling with competing users for water resources.

In the Courts

Trade Competition: Costs against trade competitors can be significant for pre-2009 RMA appeals

The Resource Management Act 1991 post-2009 amendment is clear that costs will be borne by a trade competitor involved in anti-competitive behaviour. Recent case law confirms that there is also a higher likelihood of a costs award for unsuccessful appeals by a trade competitor filed prior to the 2009 amendment.

The Environment Court in *Envirowaste Services Ltd v Auckland Council* [2011] NZEnvC 209 confirmed the decision of the Auckland Council to grant consent to Winstone Aggregates (**Winstone**) for a quarry at Three Kings, Auckland. The Council and Winstone made an application for costs against Envirowaste Services Limited (ESL).

The Court noted that:

- While there was an unfettered right for a trade competitor to appear before the Court, it must bring with it a duty to act responsibly, and in particular, not to raise competition matters even in another guise;
- There was an unmeritorious technical argument that was re-litigated from the first instance hearing, and supported by an expert witness which was considered an advocate of the appellant;
- ESL had accepted it was a trade competitor; and
- There was no guarantee a hearing would have been avoided if ESL were not involved, as various local interest groups also pursued the matter to hearing.

The Court considered there were grounds for increasing the award of costs in favour of Winstone (\$200,000 granted of the \$700,000 sought) and the Council (\$37,000 granted of the \$115,000 sought).

The award did not reimburse even a majority of the costs incurred, but was a significant sum and gave a clear signal for caution in cases of trade competition and where witnesses are closely linked to the party being advised.

Trade Competition: Court declaration that a submitter is a trade competitor at a Council Hearing

The Environment Court has given a clear message that it has jurisdiction to make a declaration that a would-be submitter is acting contrary to the new trade competition provisions in the RMA through its involvement in a Council hearing.

A would-be submitter, if challenged, is required to demonstrate that it is directly affected by an adverse effect on the environment created by the proposal, and that the adverse effect does not relate (i.e. has no connection with) trade competition or its effects.

In *General Distributors Limited (GDL) v Foodstuffs Properties (Wellington) Ltd* [2011] NZEnvC 212, an application was made by GDL for a declaration that Foodstuffs was in breach of the trade competition sections 96 and 308B of the RMA by making a submission to the Council opposing an application for resource consent for the construction of a supermarket. The Court granted the order sought.

The RMA does not define the terms 'trade competitor' or 'trade competition'. The Court referred to the relevant definitions in the Concise Oxford dictionary and concluded that "if we have two or more organisations striving to establish superiority over the other(s) in the buying and selling of (in this case) goods, then we have *trade competition*, and those organisations are *trade competitors*." Foodstuffs had tried to argue that it was not a trade competitor with GDL as it did not engage in retail trading and only leased supermarket sites to franchisees. The Court rejected the argument noting that exactly what structure or form a would-be competitor chooses to adopt is irrelevant and that Foodstuffs is clearly a competitor of GDL in the supermarket trade.

The Court saw no reason in principle why an asserted breach of section 96(2) should not be regarded as within the power to make a declaration, and there is good reason why it should. The motivation for the inclusion of

trade competition sections in the RMA was the frustration of seeing developments being bogged down in seemingly endless RMA litigation that was motivated by nothing more than the wish to stifle the opening of a rival store in a given location. The Court considered that to confine the power to do something about that until the litigation is concluded in the Environment Court would make no sense.

It held that, while the purpose of the section 308G procedure is to enable substantial penalties to be imposed on a party who has pursued a trade competition purpose through the appeal process, it should not be understood as impliedly prohibiting an application for a declaration at an earlier stage.

Procedure: Re-opening a hearing after it is closed

The Environment Court confirmed that it has jurisdiction (through section 269 of the RMA) to allow further submissions after the close of a hearing but before the decision, but it declined to allow it in *Britten v Auckland Council* [2011] NZEnvC 205.

The Court commented that leave should be granted sparingly, and there should be no significant prejudice. One party should not be permitted to effectively reopen the debate after the evidence and submissions have concluded without there being very compelling reasons to do so, and without reason for the failure to raise it during the hearing being explained.

The Court noted that leave is unlikely to be granted in many cases as the case management proceedings in the Court allow the parties plenty of time before a hearing to outline the nature of their cases and to consider the legal principles that might apply.

Bell Gully also observes that at a Council level, Hearing Commissioners have the same powers as the District Court with regard to regulating and conducting a hearing (see section 41(1)(a) of the RMA; and section 4(1) of the Commissions of Inquiry Act 1908) and that they can also re-open a hearing (after closing but before decision) pursuant to the District Court Rules (i.e. DCR 12.6.6 which applies HCR 10.10).

Priority of applications: References to sections 12 and 13 in sections 124B and 124C of the RMA have been (reluctantly) held to be a mistake, with the Court finding they do not apply as they do not relate to an “allocatable” resource under the RMA.

There are a number of decisions relating to the problem of priority of applications when there are two applicants competing for the same resource. *Fleetwing Farms Limited v Marlborough DC* established a “first come, first served” principle. This principle has been qualified over time. The Court of Appeal decision in *Central Plains Water Trust v Canterbury Regional Council*, stated (at Order B):

An application for resource consent to take water which is not disqualified by unreasonable delay and which, although recognising the need for subsequent use applications could not as filed be rejected as a nullity, takes priority over an application which relates to the same resource and which, although complete in itself, was filed later by a party with knowledge of the earlier application.

Parliament amended the RMA in 2005 (aware of the *Central Plains Water Trust* facts) for the situation where a person applies for a resource consent for an activity covered by “any of sections 12, 13, 14 or 15” and there is an existing consent that has more than three months to expire in respect of the same resource – i.e. preference to an existing consent holder if certain circumstances apply.

In a recent declaration proceeding, *Christchurch Ready Mix Concrete Limited v Canterbury Regional Council* [2011] NZEnvC 195, the Court looked at whether sections 124A to 124C of the RMA apply in order to establish whether Fulton Hogan Limited (FHL) or Christchurch Ready Mix Concrete Limited (Ready Mix) has the priority to be heard by the Canterbury Regional Council on applications for the excavation of gravel.

The question was important to Ready Mix and others because if a “first come/first served” or “first ready for notification/first heard” principle applied then FHL’s application would have to be heard first before any of the “renewal” applications filed later by Ready Mix and other existing consent holders.

The Court considered that section 124A(1) appears to require:

- (1) An application for a resource consent for an activity referred to in one of sections 12, 13, 14, and 15;
- (2) Where the application is “affected by section 124”, that is it meets the conditions in section 124, in particular:
 - A resource consent is due to expire; and
 - The holder of the consent applies for a new consent for the same activity; and
 - The application is made to the appropriate consent authority; and
 - The application is made at least 6 months before the expiry of the existing consent; and
- (3) The relevant (regional) plan “... has not allocated any of the natural resources used for the activity”.

The Court considered that “allocated” in (3) above has a narrow meaning, so that it refers only to defined allocations in rules made pursuant to section 30(1)(fa), i.e. water, heat or energy; and does not apply to resources not allocatable under the RMA.

The Court decided that river bed gravel is not an allocatable resource because the taking or removal of gravel, as opposed to its excavation, is a matter of property rights. Therefore existing consents for its excavation (such as that held by Ready Mix) do not come within section 124A(1), and therefore neither section 124B nor section 124C apply. Ready Mix did not have priority over the new application by FHL.

Judge Jackson considered that the references to sections 12 and 13 in sections 124B and 124C are a mistake, as they do not apply to allocatable resources. He considered that to make sections 124A to 124C work, they are for establishing priorities when a new application is made in respect of an activity and resource controlled under sections 14 and 15.

This is likely to have significant implications for Ready Mix’s “renewal” application as the gravel in the relevant area of the river was apparently “fully allocated”. Further, the consent was cited as being critically important to Ready Mix’s operations and Ready Mix had been using that area of the riverbed as a source of aggregate since the establishment of the company in 1963.

The decision is of relevance to existing users of resources in the coastal marine area and beds of lakes and rivers. It means that existing users of resources may not have priority over competing users for the same area. This may have consequences for investment in related infrastructure and commercial certainty about ongoing operations. We note the decision has been appealed to the High Court.

NEED MORE INFORMATION?

Contact us

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