
ENVIRONMENT/
RESOURCE
MANAGEMENT

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PROPOSED BYLAW ON CONTAMINATED
LAND - A PITFALL FOR THE UNWARY



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**New controls on
contaminated land**

Auckland City Council has recently notified changes to its consolidated bylaw, including to Part 13.3 Contaminated Land and Refuse Landfill Development Control, which seeks to require the approval of a council officer for any works undertaken on contaminated land – an additional requirement which is likely to further add to the burden of the owner or occupier that is merely seeking to undertake permitted activities .

The key provision in the new draft bylaw reads:

- i) 13.3 Contaminated Land and Refuse Landfill Development Control

13.3.1

No person shall undertake any development, construction, remediation or earthworks on contaminated land or a closed landfill other than in accordance with the provisions of the district plan and any applicable land use consent, or otherwise without the written approval of an authorised officer.

In practice

The effect of the provision appears to be to

require written approvals of council officers to be obtained even where works do not “contravene” a rule in the plan for the purposes of section 9 of the Resource Management Act (RMA). Such a requirement would greatly increase the obligation on the responsible occupier who seeks to undertake any works on contaminated land or a closed landfill – in addition to those obligations which already exist under legislation.

Contaminated sites and closed landfills are often difficult to sell and/or develop at the best of times, and will be even more so if this bylaw is passed.

This is yet another interesting example of the use of the bylaw-making power to supplement the provisions of the relevant district plan (and notably one of many in the recently notified changes to the Auckland City Council Consolidated Bylaw). The fairness or appropriateness of this practice was of course a key concern in relation to the controversial proposal to introduce changes to the signs and billboards bylaws in Auckland last year (and in particular to undermine the existing use rights regime under the RMA).

This highlights the fact that bylaws often create “pitfalls for the unwary” where the relevant district plan is relied on as



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providing the last word on consenting requirements. It certainly pays to be familiar with the scope of bylaws and to check whether any approvals are required under them before commencing new activities.

Submissions

Submissions on the bylaw close on 16 May 2008. We would be happy to assist in preparing submissions. For a copy of the proposed bylaw please click on the following link:

<http://www.aucklandcity.govt.nz/council/documents/bylaw/part13new.asp>

Competing applications for consent – Part II matters

In March the Court of Appeal released its decision in *Central Plains Water Trust v Ngai Tahu Properties Limited* [2008] NZCA 71 relating to the issue of how competing applications for resource consent should be prioritised by consent authorities.

The Central Plains decision opens the door to consideration of a much wider range of factors than have been dealt with previously by the courts, in that it indicates that Part II matters, such as the benefits which will ultimately flow from the implementation of the consents sought, may be relevant. This could lead to a fundamental change in the approach taken to applications for priority. This issue has been the subject of a number of important decisions and related commentary over the past several years. It arises mainly over finite resources, such as water, or the occupation of space for marine farming activities.

The applications

The decision involved two applications to take water from the Waimakariri River by Central Plains Water Trust and Ngai Tahu Properties Limited.

The Central Plains application was the first to be lodged, in 2001. The application did not spell out the full extent of the applicant's plans, and was summarised by the court as having been intended to, "pave the way for further planning and subsequent applications for use of the water." The consent authority, Canterbury Regional Council, took the view that the application was notifiable, but decided to exercise its jurisdiction under section 91 of the Resource Management Act to delay notification until Central Plains' "contemplated use applications" were filed (because it considered that all the applications required to implement the proposal should be considered together to ensure a better understanding of the effects by all involved). This did not occur until November 2005.

In the meantime, Ngai Tahu had applied for resource consents to take and use water from the river between January and July 2005.

Ngai Tahu subsequently obtained a declaration from the Environment Court that its application was entitled to priority over the Central Plains application.

In the Court of Appeal, Central Plains sought a declaration that:

"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."

What the Court of Appeal said

The Court of Appeal noted that while previous decisions on the issues of priority had determined that priority is to be

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accorded on a “first come first served” basis, they did not specify at what stage in the consenting process priority is achieved.

It went on to record that the reason why Central Plains’ 2001 application had not detailed the use of the water was that the applicant had “considered it imprudent to commit public funds to support all of these activities [including detailed geological, environmental and survey investigations and design of the scheme components] without first being satisfied of access to a sustainable take of water from the Rakaia and Waimakariri rivers”. The 2001 application was therefore designed to provide certainty on that score before further expenditure was incurred.

The Court of Appeal then stated:

“There is an obvious public interest that the law should not frustrate a proposed development in the course of undergoing the statutory processes. At least where the whole resource being sought is the subject of an application, there should be no risk of a major development being trumped or significantly interfered with by a later, smaller, simpler and consistent proposals that are able to be made comprehensively without needing to proceed in stages.”

It was also said that it was significant that Ngai Tahu had been aware of the Central Plains application, and that in those circumstances “Its Application should not receive priority unless [Central Plains] could be said to be disqualified by unreasonable delay.”

In the end, the Central Plains application was granted priority.

New considerations

Of perhaps wider significance than the result itself was the Court of Appeal’s suggestion that in some cases Part II matters may be relevant to priority applications. It

indicated that issues relating to the applicants and the purpose of the proposals in issue may be taken into account in future cases.

It was noted that the leading decision of *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 dealt with the situation where both of the applicants were commercial competitors, “seeking access to the same resource for the same purpose.” By contrast, applications for priority made on behalf of Ngai Tahu might raise issues under section 6 of the Act, requiring that the courts recognise as of national importance the relationship of Māori with their ancestral lands, water and other taonga. Likewise, the role and purpose of Central Plains, which is a public body and charitable trust whose purposes include facilitating sustainable development, may come into play.

The Court of Appeal’s comments raise the spectre of a much more wide-ranging approach to applications for priority, and will undoubtedly lead to some interesting developments in the case law in future.

Introducing Andrew Beatson

Bell Gully is pleased to announce the appointment of resource management and environmental law specialist Andrew Beatson.

He joins Bell Gully in Wellington from Harbour Chambers where, as a barrister, he built up a prominent resource management practice. Andrew has been providing strategic advice on all aspects of the Resource Management Act and related law for well over a decade.

He advises on significant projects including subdivisions, land development, retail and infrastructure developments. He regularly acts for developers and applicants, as well as local authorities, regulatory bodies and objectors.

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