Resource Management Law Association of New Zealand Inc.

RMLA (QUEENSTOWN/CENTRAL OTAGO BRANCH) NEWSLETTER
October 2014

Welcome to the latest newsletter from the Queenstown / Central Otago Branch of the Resource Management Law Association.

The purpose of the newsletter is to inform our local members of the latest resource management news from our part of the region, including Environment Court cases, plan changes and reviews, local issues that may be of interest, and upcoming events planned by the RMLA and associated organisations.

If you or your group is planning on holding any newsworthy events or seminars, please get in touch so we can get the word out there.

In this edition, we have news on the RMLA Christmas Function and the forthcoming AGM and information on the next RMLA Road Shows addressing iPad training with the Environment Court and Planning for Resilience.

We also have a summary of the recent Environment Court cases; *H.I.L. Limited v QLDC (2014) NZEnvC 177, Queenstown Airport Corporation Limited v Queenstown Lakes District Council [2014] NZEnvC 93, Queenstown Airport Corporation Limited v Queenstown Lakes District Council [2014] NZEnvC 197 and Skydive Queenstown Limited [2014] NZEnvC 186.*

With thanks,

Anita Vanstone

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News

Christmas Function 2014

The Christmas function will be held on Thursday 11 December 2014. This will be held jointly with NZPI at the Boatshed at Frankton, starting late afternoon. At this stage, we anticipate holding the RMLA AGM at about 4.00pm, rolling into the function to follow soon after. Please note this date in your diaries now. Invitations will follow in due course. This function will include fundraising for Carey Vivian's venture (see below).

RMLA AGM 2014

As noted above, the AGM will be held on 11 December. Reports will be prepared by the Branch Executive ahead of this meeting. The Branch Committee tends to rotate the Executive positions every two to three years to ensure fresh thinking and ideas. Jan Caunter has indicated to the Committee her intention to stand down from the role of Branch Chair, having held that role for two years and prior to that, the role of Branch Secretary for three years. Nominations for the Committee are most welcome. We encourage Committee membership from all RMLA professional disciplines.

Seminar on iPad training with the Environment Court

We have been in discussions with a member of the Environment Court registry staff in Christchurch regarding training for branch members on the Court use of iPads, the applications used, the organisation of documents on the iPad, and the Court's general approach to the use of iPads in the courtroom. At this stage we have scheduled a seminar to be led by Rachell Staunton of the Environment Court in Christchurch on 19 November 2014, from 10.00 until approximately 12.30pm. This is currently proposed to be held at the Events Centre. A flyer for this seminar will follow, once final details are confirmed.

RMLA Road Show – October 2014

Our final roadshow for the year is titled "Planning for Resilience". This is scheduled for 21 October 2014, 4.15 – 6.15 pm at Queenstown Resort College. The seminar flyer reads as follows:

To improve community resilience, the RMA needs to support planning outcomes recognising all hazards, emergency management and the importance of infrastructure. This includes protection of infrastructure on a day to day basis from the effects of adjacent activities, through to the planning implications of ensuring key infrastructure is retained and restored in emergency situations. Local civil defence and emergency management as well as Lifeline utility operators are key to ensuring security of supply for transport, fuel, electricity, telecommunications and water services. The road show will cover linkages of the RMA with emergency management, proposed RMA reforms, local government interests in improved natural hazards management, national infrastructure priorities, the importance of infrastructure resilience, and requirements on lifeline utility operators.

Motor Neurone Cycle Challenge 2015

One of our members, Carey Vivian, is undertaking a momentous challenge in the early part of next year. Carey's father has been diagnosed with motor neurone disease. This is robbing him of the use of his body and eventually he will lose the ability to speak, swallow and breathe and there is no cure.

Carey has decided to go on a fundraising bike ride the length of New Zealand to raise funds for the Motor Neurone Disease Association of New Zealand (MNDANZ). The ride is about 4000km long, he will be unsupported and mainly off road. Carey starts at Cape Reinga on 1 February 2015 and expects to finish in Bluff about six weeks later.

We are encouraging members to support Carey in this enterprise. He is aiming to have $45,000 raised for the Association before the ride begins. Carey has set up a website at http://www.raceagainsttime.co.nz and would appreciate any donations via the secure link http://www.fundraiseonline.co.nz/MotorNeuroneCycleChallenge/. Carey has also set up a Facebook page www.facebook.com/raceagainsttime . Please visit this and like it. The more likes Carey gets the easier it is for him to obtain sponsorship for his ride.

All money raised will go directly to MNDANZ.

Court Cases of Note

SKYDIVE QUEENSTOWN LIMITED [2014] NZENVC 186

The Environment Court recently released the decision *Skydive Queenstown Limited* [2014] NZEnvC 186 outlining the liability of parties for costs in direct referral hearings.[1]

Skydive Queenstown Limited (**"Skydive"**) sought a replacement resource consent to operate a leased grass airstrip at the foot of the Remarkables Mountains, near Queenstown. The proceedings were directly referred to the Environment Court under s87G of the Resource Management Act 1991 (**"RMA"**). In a decision dated 16 May 2014[2], the Environment Court refused the replacement resource consent. Queenstown Lakes District Council ("**QLDC**") and section 274 parties Jacks Point Residents and Owners Association Incorporated and Jacks Point Zone[3] ("**Jacks Point parties**"), subsequently lodged a costs application.

QLDC sought an award of 100% of costs incurred, on the basis that the costs were reasonable, and there is a statutory presumption that an applicant in a direct referral will pay the costs of the consent authority.

The Jacks Point parties sought an award of 50% of costs incurred, on the basis that they were obliged to present a full case before the Environment Court, including rebuttal statements, caucusing and full cross examination, since the decision was final save for an appeal on a point of law, and the fact this was a first instance hearing should not disentitle a successful party from receiving a costs award. The Jacks Point parties also advanced points regarding steps they took to keep costs down, and the weight given to their evidence in the decision where the Court preferred their case over Skydive's.

His Honour Judge Jackson outlined the general approach to cost awards in the Environment Court under section 285 of the RMA (the Court may order any party to proceedings to pay any other party the costs and expenses (including witness expenses) incurred by the other party that the court considers reasonable) which also applies to direct referrals. His Honour also noted that s285(5)(b) requires the Court to have regard to the fact that the proceedings are at first instance as a result of

[1] The question of whether the Court's costs should be paid by the applicant, as the statutory presumption in section 285(5) RMA requires, was not decided, it was reserved.
[2] [2014] NZEnvC 108.
[3] Jacks Point Zone is made up of the following interest groups: Jacks Point Land Holdings Limited, Jacks Point Land Limited, Jacks Point Land No. 2 Limited, Jacks Point Golf Course Limited, Jacks Point Clubhouse Limited, Henley Downs Farm Limited, Resort Concepts Limited.

the direct referral. This statutory directive makes the fact that there is only one hearing of the substantive merits a very important consideration when assessing costs. "This suggests [the Court] should be slow to order costs, especially on applications for land use because land occupiers or owners are entitled to test the applicable rules which restrict their property rights".[4]

Judge Jackson identified that costs awards fall within three bands:

> a) normal/frequently awarded costs (usually between 25% and 33% of reasonable costs sought);
> b) higher than normal costs (where factors outlined in *DFC NZ Limited v Bielby* [1991] 1 NZLR 587 are present, for instance abuse of court process, arguments being advanced without substance etc);
> c) indemnity costs (which are awarded rarely and in exceptional circumstances).

The Environment Court concluded that the general costs principles which have developed under s285 continue to apply to direct referrals (there is no general rule that costs should follow the event even if a party is successful, and costs are not to be awarded as a penalty but in the interests of compensation where that is just) with one modification: the Court's discretion is "largely unbounded", with the principal statutory criterion remaining that any award be reasonable, but having regard to the fact that the Court's hearing is the first hearing. In the Environment Court's view this fact tended to reduce the likelihood and/or quantum of a costs order in a direct referral.

As Skydive did not oppose, and case law[5] supported Councils recovering 100% of costs since they had a duty to assist the Court, especially in the product of the s87F report, the Environment Court awarded QLDC the full amount sought - $111,910.05.

The Environment Court considered a costs award in favour of the Jacks Point parties was justified, given that Skydive's evidence was lacking in detail and failed to fully consider available alternatives. This caused the Jacks Point parties to incur further costs as issues were unable to be refined. However, any extra (*Bielby*) weight given to inadequacies in Skydive's evidence was more than cancelled out by the fact that the substantive hearing was the first and only hearing and this would have resulted in costs savings. The Environment Court determined that a 25% award of the reduced total[6] was appropriate compensation i.e. costs within the normal costs band. Accordingly, the Jacks Point parties were awarded $70,577.00.

H.I.L. LIMITED v QUEENSTOWN LAKES DISTRICT COUNCIL [2014] NZEnvC 177

HIL appealed against Queenstown Lakes District Council ("QLDC") refusal to grant consent to a five lot subdivision at Hansen Road, Queenstown partly in the Rural Lifestyle Zone and partly in the Rural General Zone. The application required consent as a non-complying activity.

The first issue was to determine whether the site was within an Outstanding Natural Landscape ("ONL") or within the less sensitive Visual Amenity Landscape ("VAL"). The Court adopted the ONL/VAL boundary proposed by QLDC's landscape architect, which resulted in the area of the site being developed falling partly within an ONL and partly within a VAL.

Having established the location of the boundary the Court measured the proposal against the assessment matters which applied to each landscape category. For the ONL the Court found there

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[4] At paragraph 24.
[5] *MainPower New Zealand Limited v Hurunui District Council* [2012] NZEnvC 56.
[6] The Court reduced the total quantum claimed from $286,357.31 to $282,308.17.

would be significant adverse effects on the openness of the landscape and visibility of the site. Furthermore, existing development had reached the threshold of the area's ability to accept further subdivision and development. For the VAL the development would compromise the natural or arcadian pastoral character of the site and would have adverse impacts on rural amenities that in some instances would be significantly adverse.

In terms of section 104D the Court found that the proposal could not pass through either of the "gateways" and even if it did, would not merit consent under Section 104. The subdivision and development was determined to be inappropriate under Section 6(b) and did not represent sustainable management under Section 5. Accordingly, the application was declined and costs reserved.

QUEENSTOWN AIRPORT CORPORATION LIMITED V QUEENSTOWN LAKES DISTRICT COUNCIL [2014] NZENVC 93

This was the Third Interim Decision issued by the Court on 28 April 2014 relating to the long running case on Plan Change 19 ("PC19") involving largely undeveloped land located to the north of Queenstown airport runway. The Court in this decision settled most of the "higher order provisions" (objectives and policies) with the "lower order provisions" ("the rules") be settled later.

One issue arose which has broader significance beyond Queenstown Lakes District. PC19 included a requirement that before any development take place within the C1, C2 and E2 "activity areas" (subzones), an application for consent to an Outline Development Plan ("ODP") had to be lodged and approved. This process is not uncommon and is to be found in other areas, not just in Queenstown Lakes District, but elsewhere in New Zealand.

The principal issue facing the Court was whether an ODP is in fact an "activity" in itself capable of being applied for and consented to. The Court decided that it is not.

The second issue was that the rules in PC19 relating to ODPs resulted in the land use classification of activities changing from permitted to non-complying in the event that prior approval to an ODP was not obtained. The Court decided that it was not permissible for the status of an activity to be determined by a prior grant of consent because the plan did not convey in clear and ambiguous terms the use to which the land could be put.

QUEENSTOWN AIRPORT CORPORATION LIMITED V QUEENSTOWN LAKES DISTRICT COUNCIL [2014] NZENVC 197

The Final Decision setting the "lower order provisions" for PC19 was issued on 18 September 2014.

In the Third Interim Decision (discussed previously) the Court had concluded that the use of Outline Development Plans ("ODPs") in the manner originally proposed by PC19 was not authorised by the Act and the parties had to consider alternatives.

The solution proposed collectively by the parties was to replace ODPs with Spatial Layout Plans ("SLPs"), Travel Plans and Site Context and Design Statements ("the plans").

In contrast to ODPs the plans are not activities for which consent is required. These plans are to be submitted in conjunction with applications for subdivision and building consents in the C1 and C2 Activity Areas (they are not required in E2) within Activity Areas C1 and C2, all subdivision and buildings are restricted discretionary activities.

The purpose of the plans is to provide information relevant to the development of the whole of the Activity Area and they will be relied upon to inform matters over which the Council has reserved its discretion. Successive applicants for resource consents may rely on an SLP filed with an earlier application or may submit a revised plan for consideration.

The Court emphasised that SLPs were not to be "approved" but constituted "information accompanying an application for resource consent and not an activity for which consent is (or indeed can be) sought."

[Authors note
This same issue has arisen in the context PC39 (a proposed extension to urban area of Arrowtown) and PC45 (the "Northlake" subdivision proposed for Wanaka). In each case, although in slightly different ways, the requestors are proposing that ODPs be "rolled into" the first stage of a subdivision or development proposal rather than remaining as a "stand alone" process. It will be interesting to see how these amendments are viewed by a different division of the Court.]