AHM News

Welcome to Autumn! With the change in seasons it is an opportune time to reflect on the changing resource management landscape. In this newsletter we provide you with an update on some recent cases of importance in the resource management realm. The first two relate to the implications of the Supreme Court's decision in *King Salmon* in terms of the approach to outstanding natural landscape identification, and the ability to have recourse to Part 2 for resource consent applications. The second two cases are High Court decisions relating to the Auckland Unitary Plan appeals.

KING SALMON

Man O'War Station Limited v Auckland Council [2017] NZCA 24

Does the Supreme Court's decision in King Salmon affect the approach to identifying outstanding natural landscapes (ONLs)? The Court of Appeal says a definitive no.

Man O'War Station (MOWS) appealed a proposed change to the Auckland Regional Policy Statement which introduced new policy provisions for ONLs affecting its holdings on Waiheke and Ponui Islands. MOWS was concerned that the ONL designation would inhibit the ongoing use and development of its land. MOWS's appeals to both the Environment Court and High Court were dismissed.

The central issue for the Court of Appeal's consideration was the proper interpretation and application of the word 'outstanding' in s6 (b) RMA, policies 13 and 15 of the New Zealand Coastal Policy Statement and the relevant provisions of the Auckland Regional Policy Statement. MOWS had concerns that the ONLs identified by the Council and the Environment Court were not all outstanding and that *King Salmon's* strict approach to avoid all adverse effects within ONLs would impede the reasonable use and development of its land. This concern led to the question being raised as to where the bar should be set for classifying areas as ONL – outstanding at a national or regional level.

The Court of Appeal held that

> *"We do not consider that King Salmon is a judgment about the threshold to be applied in deciding whether a landscape is outstanding for the purposes of s6(b) of the Act... Overall, there is no language in the (King Salmon) decision that suggests the Court was endeavouring to raise the test or threshold for deciding whether a landscape is outstanding."*

The Court of Appeal also supported the approach taken by the Environment Court that the identification of ONLs involved an assessment that took into account landscapes in the region rather than an assessment on a purely national level.

RJ Davidson Family Trust v Marlborough District Council [2017] NZHC 52

Is there a need to refer back to Part 2 when considering a resource consent application? The High Court has found no.

The R J Davidson Family Trust appealed against a decision of the Environment Court not to grant a non-complying resource consent to establish a mussel farm in the Marlborough Sounds Coastal Marine Zone. The key legal issue for the High Court was whether the Environment Court erred by considering the statutory instruments to the exclusion of Part 2 of the Resource Management Act 1991 (RMA). Such an approach was said to be justified on the basis of the Supreme Court's decision in *King Salmon* which held (in the context of a plan change) that where there is not invalidity, incomplete coverage or uncertainty of meaning in the statutory planning documents, there is no need to look at Part 2. The rationale being that the statutory planning documents have already given substance to the provisions of Part 2.

The High Court upheld the Environment Court decision to refuse the resource consent, and approved the application of the *King Salmon* approach not to refer back to Part 2 (except in cases of invalidity, incomplete coverage or uncertainty of meaning) to resource consent applications. The Court stated:

> *"[I]t would be inconsistent with the scheme of the RMA and King Salmon to allow Regional or District Plans to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications. It could result in decision-makers being more restrained when making district plans, applying the King Salmon approach, than they would when determining resource consent applications."*

This decision has wider significance for public law and planning as it means that the wording of objectives and policies in plans will come under closer scrutiny. Now that it is clear that the ability to refer to Part 2 is limited to situations where the plan provisions are invalid, have incomplete coverage or are uncertain for resource consent applications, the ultimate test will now be whether a resource consent application complies with the relevant plan provisions rather than whether it gives effect to Part 2 of the RMA. In practice, we expect this may also result in a greater number of private plan changes being proposed to facilitate developments – especially where the activity is classified as a non-complying activity.

AUCKLAND UNITARY PLAN

Albany North Landowners v Auckland Council [2016] NZHC 138

Did the Independent Hearings Panel (IHP) correctly identified all recommendations that were outside the scope of submissions, and whether any affected persons were deprived of the right to be heard? The High Court held the IHP had acted lawfully, except in the case of

Parnell and Takanini, in which there were grounds for appeal to the Environment Court.

In particular, the High Court confirmed that the IHP did not misinterpret its duties on the issue of scope in either the statutory requirement to identify all recommendations that are outside the scope of submissions or in the issue of fairness and whether affected persons have been deprived of the right to be heard. Therefore the Council acted lawfully in accepting IHP recommendations.

The outcome of this decision is significant, in that the decision settles 51 out of the total 106 appeals and judicial review applications on the PAUP, and does not create a channel for Environment Court appeals.

The decision has been welcomed as permitting greater intensification and ensuring the Unitary Plan paves the way for a more affordable Auckland, but also condemned by various groups for not permitting robust participation by those people affected by the changes, and for compromising Auckland's heritage element without consideration for the future.

Transpower New Zealand Ltd v Auckland Council [2017] NZHC 281

Is providing an inadequate width and reduced protection for the operation of the national grid corridor area actionable errors of law? The High Court held they were in the context of Transpower's unitary plan appeal.

Transpower had sought recognition of and provision for the national grid in the Auckland Unitary Plan, and had sought restrictions on sensitive and non-sensitive activities in the National Grid Yard in un-developed urban and rural areas. The IHP made a number of recommendations in relation to the national grid provisions, including the proposed width of the corridor. The Council did not accept the IHP's recommendations in relation to the width of the national grid corridor; however the Council accepted the IHP's recommendations in all other respects.

Transpower argued the policies had been adopted in error, that they mistakenly focused on zoning rather than the potential impacts on the national grid by incompatible development, and that the policies failed to implement the National Policy Statement on Electricity Transmission 2008, the Regional Policy Statement and the proposed overlay.

The Court considered Transpower's arguments, and held that there were various errors of law in the Council's conduct as the Council, in accepting the IHP's recommendations failed to apply the statutory hierarchy of planning documents mandated by the RMA and the Council had accepted IHP recommendations where this decision could not reasonably have been made on the evidence. The Court held those errors of law were material as the relevant provisions had the potential to compromise the national grid and its operation, maintenance, development and potential for upgrade – all of which are matters of national significance which the Judge commented generally must not be compromised.

The Court allowed the appeal. The Court's preliminary view as to relief is that the impugned provisions should be remitted back to the Council for reconsideration, where the Council will be able to consider the extent to which substitute policies/rules are appropriate and what those should be. The Court noted that it is not a planning authority and does not have the mandate, materials or expertise to undertake a planning role.

OVERALL IMPRESSIONS

When *King Salmon* was decided it was clear to many parties involved in the Resource Management field that the consequences would be long lasting and wide ranging. *Davidson* and *Man O'War* are a reminder of the fact that the implications from *King Salmon* are still being refined, applied and felt in a wide range of applications throughout the resource management field.

Appeals on the Auckland Unitary Plan while limited by the legislation itself were always expected. The two High Court decisions released thus far demonstrate the focused nature of the appeals and the priority the High Court is giving to ensuring these appeals are dealt with as efficiently as possible.

RESOURCE LEGISLATION AMENDMENT BILL – HOT OFF THE PRESS

As well as case law developments we note that on Monday 6 March 2017 the Select Committee released its report on the Resource Legislation Amendment Bill. The Committee has recommended a number of changes to the Bill to address issues raised in submissions. While some of the more controversial changes have been dialled back, such as Ministerial powers in relation to plan change processes, the proposed new streamlined plan change process is retained. Some key changes retained in the Bill are as follows:

- National planning standards
- Streamlined planning process and a separate collaborative planning process
- Discretion for councils to exempt an activity from consents
- Provisions to manage natural hazard risks
- A ten day consent category for minor activities
- Requirements to ensure land is available for housing
- Provisions enabling the exclusion of stock from waterways
- A requirement for decommissioning plans for offshore platforms
- Changes to compensation for land required for public works
- Changes intended to better align with other legislation – including the Conservation Act, Reserves Act and EEZ Act
- Changes intended to facilitate better Maori participation

The Bill goes to Parliament for its second reading today, and we will report further on the Bill in our next newsletter.

Questions, comments and further information

If you have any questions, comments or would like any further information on any of the matters in this newsletter, please contact the authors:

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