DLA PIPER

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PUBLIC DECISION MAKING NEWSLETTER

This newsletter summarises recent developments in resource management and local government law in New Zealand that are of particular relevance to local authorities and decision makers.

In this edition, we address recent guidance from the High Court on fixing additional charges for resource consents, and on the application of Part 2 of the Resource Management Act 1991. We discuss recent case law dealing with costs awards in the Environment Court, and the recently passed Fire and Emergency New Zealand Act 2017, as well as the timing of commencement of the Resource Legislation Amendment Act 2017.

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KEEPING BUSY - KING SALMON AND PART 2 IN THE COURTS AGAIN

A recent High Court decision is the latest in the line of judicial comment on the relevance of **Part 2** of the **Resource Management Act 1991** (RMA) to decision making following the 2014 Supreme Court case of *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

Turners & Growers Horticulture Ltd v Far North District Council [2017] NZHC 764 addressed plan provisions in the **Far North District Plan**. Turners & Growers was unsuccessful in the Environment Court. The main ground of appeal was that the Environment Court incorrectly evaluated the plan change proposal under **section 32** of the RMA. Specifically, it asked whether the Environment Court erred in considering Part 2 and **section 31** (the Council's functions of the RMA) as part of that analysis.

The issue in question related to the appropriateness of boundary setback rules. There was no challenge to the related objectives within the District Plan.

Turners & Growers argued that unless the relevant plan is invalid, incomplete or uncertain, (being the three exceptions set out in *King Salmon* to the principle that you cannot look beyond higher policy direction to Part 2 for interpretation purposes) or a higher level document has been promulgated since the relevant plan was made operative, there is no justification for going beyond settled objectives of the relevant District Plan. As the objectives were agreed to be the most appropriate, it submitted that the Environment Court should have only looked at whether the proposed methods were the most appropriate for achieve those objectives. It was not entitled to look to Part 2 or the Council's functions when making that assessment.

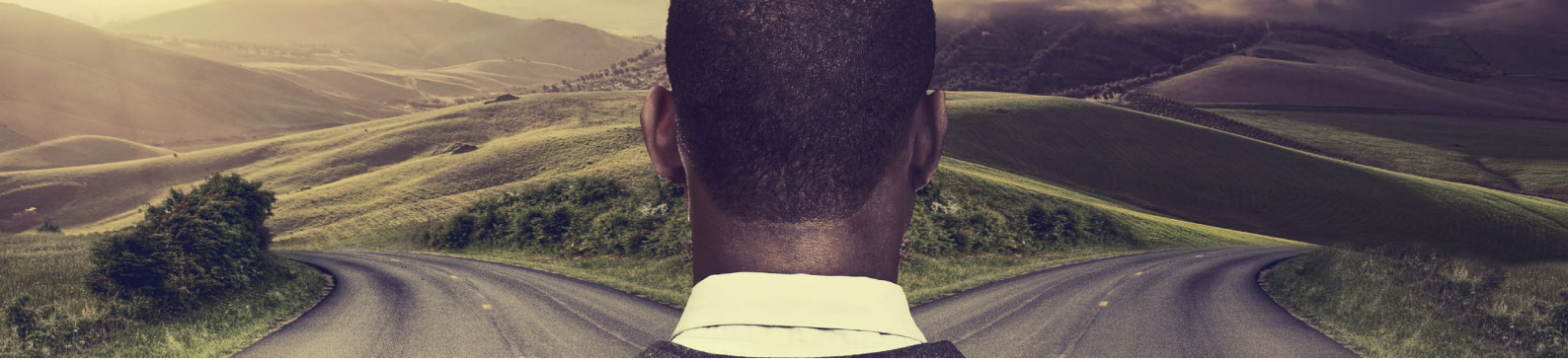
The High Court was critical of this argument in three ways. Firstly, it was opposite to the argument of Turners & Growers in the Environment Court. There its appeal was on the basis that the Council's decision would not achieve the purpose of the RMA, was contrary to Part 2 and was not the most appropriate means of exercising the Council's functions. The Court said that Turners & Growers could not now criticize the Environment Court for addressing the matters it complained the Council did not address in its decision. This is an important point to consider when decisions are being made as to questions of law and grounds of appeal to be pursued.

Secondly, the High Court considered the Environment Court followed the decision making process that Turners & Growers was promoting on appeal to the High Court. The Environment Court approached its analysis on the basis that the critical enquiry was whether the methods proposed were the most appropriate way of achieving the objectives of the District Plan.

Finally, the High Court stated that it was not wrong to consider the purpose and principles of Part 2 or the Council's functions when evaluating the rules of the District Plan. Instead, it is specifically required to consider those matters under **section 74** of the RMA. The Supreme Court in *King Salmon* did not undermine, but instead emphasized, the importance of Part 2 to RMA decision making. It repeated the Supreme Court's statement that: *section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA*. What the Supreme Court did say was that it was a mandatory requirement for lower order documents to give effect to higher order planning documents. It identified three situations where a decision maker could resort to Part 2 to interpret the policies of higher order planning documents – where there is an allegation of invalidity, incomplete coverage or uncertainty of meaning.

In the *Turners & Growers* case, unlike *King Salmon*, there was no higher order constraint to which the Council was required to give effect. The High Court concluded on the issue by stating that *King Salmon* did not prevent reversion to Part 2 where the decision maker was faced with options as to the most appropriate provisions. This could be seen to add to the Supreme Court's three exemptions, but it needs to be remembered that in *King Salmon* there was no choice available as to how the directive policy in the NZCPS was to be given effect to.

With multiple High Court decisions taking different approaches to *King Salmon* across a range of plan change, resource consent and notice of requirement appeals, this is not the end of the matter. There is, however, a potential light at the end of the tunnel with some certainty as to approach to potentially eventuate with the Court of Appeal to hear an appeal on the specific *King Salmon* approach to Part 2 issue later this year with respect to resource consents (refer to the Court of Appeal's decision granting leave in *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194). The question to be considered by the Court of Appeal is whether, in the context of a resource consent application, the High Court



erred in holding that the Environment Court was not able or required to consider Part 2 of the RMA directly and was bound by its expression in the relevant planning documents.

FIXING FEES AND CHARGES - HIGH COURT GUIDANCE

In the recent decision of *Porirua City Council v Ellis* [2017] NZHC 784, the High Court upheld the Environment Court's decision on appeal in relation to the fixing of additional changes under **section 36** of the RMA. The Environment Court's decision reduced the costs payable for the processing of the appellant's resource consent charged by the Council by $27,891.89 (approximately 35%). This was only the second time that the issue of setting additional changes under section 36 of the RMA has been considered by the High Court.

The High Court followed the established legal steps for fixing additional charges under section 36(4) of the RMA, as confirmed by the High Court previously in *Hill Country Corp Ltd v Hastings District Council* [2010] NZRMA 539. The Council alleged that the Environment Court had relied on irrelevant considerations, made factual positive finding which were not available on the evidence, and failed to properly consider and apply the statutory power of Councils to recover their actual and reasonable costs, which was not accepted by the High Court.

The High Court emphasised that the key to fixing changes under section 36(4) was that they amount to reasonable costs incurred in processing - not only actual costs. This included consideration of the following matters (in the circumstances of that case):

- The reasonableness of applying a professional planners hourly charge out rate, rather than a lesser rate for tasks of an administrative nature (even where the charge out rate was set by the Council's Fees Schedule).
- The time spent on writing the section 42A report, including the analysis of submissions and conducting site visits, which the Court considered in this case was too high.
- The cost of Council's external experts costs (which was too high) with comparative reference to the costs of the applicant's experts.
- The Commissioner's costs, considering the length of the hearing (two and a half days), which were too high and unreasonable.
- Whether the Council has reviewed the charges and considered whether on the whole they are reasonable or whether some portion of the charge should be remitted under section 36(5).
- The level of costs was not commensurate with the scale and effects of the proposal. The Court considered that "*The Council must ensure that the costs are reasonable and reflect a commensurate fee for the size and extent of the benefit obtained by the applicant*".
- Communication with the applicant could be relevant. The Court considered that it would have been fair for the Council to have alerted and kept the applicant up to date at major steps in the resource consent process as to the actual costs as well as providing an estimate of future costs.

All of these factors might be relevant for a Council to consider when fixing additional charges, depending on the facts of the case, with the key emphasis being that the Council's charges must be reasonable in the context of each case.

COSTS AWARD TO AN INTERESTED PARTY

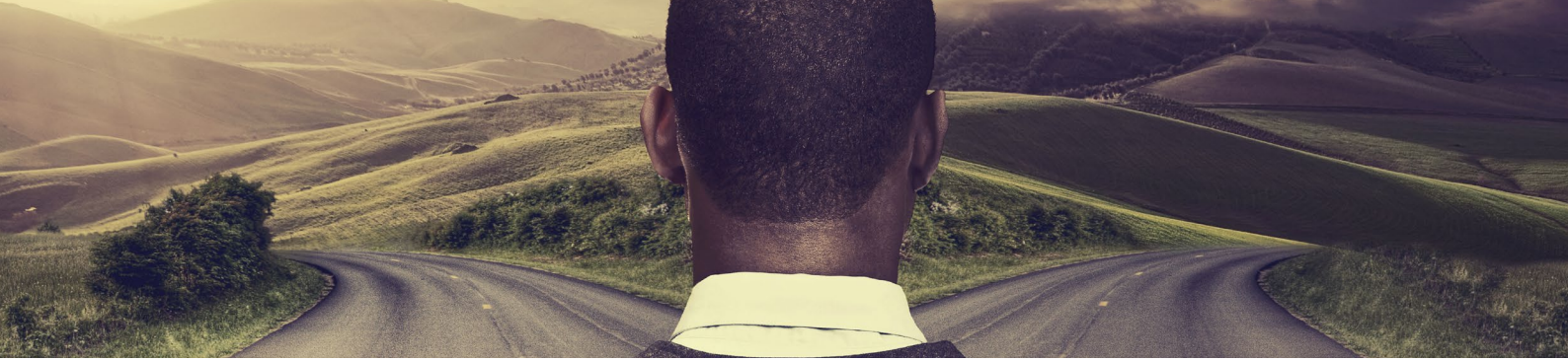
The decision of *Envirofume v Bay of Plenty Regional Council* [2017] NZEnvC 49 concerns the award of costs to a **section 274** interested party involved in an Environment Court appeal.

Envirofume sought consent to discharge methyl bromide from the Bay of Plenty Regional Council. A Council Commissioner refused consent. That decision was appealed by Envirofume who sought the grant of consent. On appeal, and after extensive mediation, the Council altered its position and supported an amended grant of consent and conditions of consent.

This left the section 274 parties supporting the original Commissioner's decision and opposing the grant of consent. They were successful, as the Court refused consent and supported the Commissioner's decision.

Application for costs

The Court considered applications for costs by section 274 parties. One of the section 274 parties sought costs of $12,674 for three expert witnesses that he called. The application was made on the basis that given the Council's position, it was necessary for the section 274 party to call expert evidence against Envirofume.



The Court declined to award costs against the Council. It could see nothing blameworthy in the Council's conduct. Its change in position was based on a change to the ventilation system proposed and independent expert advice following extensive mediation and caucusing that the ventilation system was satisfactory.

The Court found Envirofume liable for $8,000 for three reasons: the section 274 parties were left to support the original Council decision, there were important health issues raised by the case, and the matters were complex.

This case highlights that a Council may not be penalised for changing its position during the course of an appeal where that change of position was considered reasonable.

COMMENCEMENT OF AMENDMENTS TO THE RMA

The **Resource Legislation Amendment Act** (**RLAA**) received royal assent on 18 April 2017. The commencement of the RLAA is staggered, with amendments to the RMA commencing either the day after royal assent (19 April 2017), six months after the royal assent (18 October 2017) or in 5 years' time (18 April 2022). Commencement is complicated, and all the changes to one provision are not necessarily in the same place. Careful checking is required to ensure that there is a clear understanding of which amendments have commenced, and which have not.

The amendments which have already commenced include:

- The amendment to **section 6**, to include reference to the management of significant risks from natural hazards
- The new procedural principles in section **18A** and **35** that set out the obligations of every person exercising powers and performing functions under the RMA
- Amendments to territorial authority and regional council functions (**section 30** and **31**)

The major changes to the RMA come into effect on 18 October 2017. Being aware of what these changes are will be critical, as will amending processes to ensure compliance with the new obligations. In terms of resource consent applications, the changes that come into effect on 18 October include the amended notification provisions, the fast track processes for certain activities, and the standards for a "deemed" permitted activity.

The amendments which commence in 5 years' time include the removal of the ability to impose financial contributions through resource consent conditions

In addition, there are transitional provisions which govern how resource consents and plan changes, and other instruments which are already in progress should be managed. The transitional provisions provide that where a consent application was lodged prior to the commencement of an amendment to the RMA, that amendment does not apply to that particular application. For example, this means that any consent application lodged prior to 18 October 2017 notification will be determined against the prior version of the RMA, not the amended version. The transitional provisions also apply to proposed policy statements and plans. Where a proposed plan is publicly notified prior to the commencement of an amendment, the proposed Plan does not need to be assessed against that amendment.

FIRE AND EMERGENCY NEW ZEALAND BILL PASSES

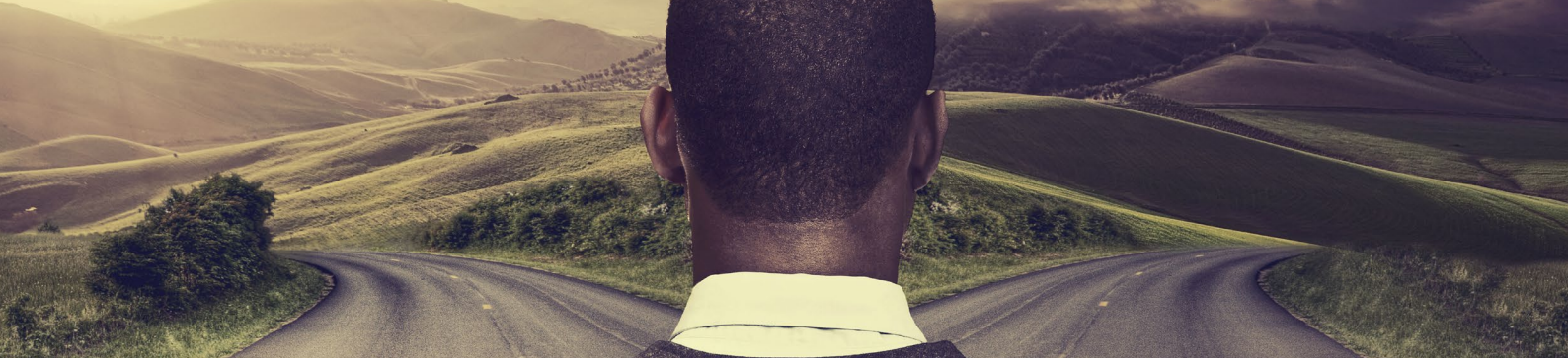
The Fire and Emergency New Zealand (**FENZ**) Bill passed its third reading on 4 May 2017 and received royal assent on 11 May 2017. The majority of the **Fire and Emergency New Zealand Act** (**FENZ Act**) comes into force on 1 July 2017. Limited provisions will come into force at a later date.

The FENZ Act marks the most significant reform of New Zealand's fire legislation in 70 years. It creates a single fire organisation – Fire and Emergency New Zealand – amalgamating 40 different entities and bringing New Zealand's rural, urban, career and volunteer firefighters together for the first time. Other changes made by the FENZ Act include broadening the organisation's functions, changing the way funding is obtained via an insurance levy, and providing more support to volunteers.

The new organisation will be led by former Chief of the Defence Force, Rhys Jones, who became Chief Executive of FENZ on 1 July 2017.

How will this affect local government?

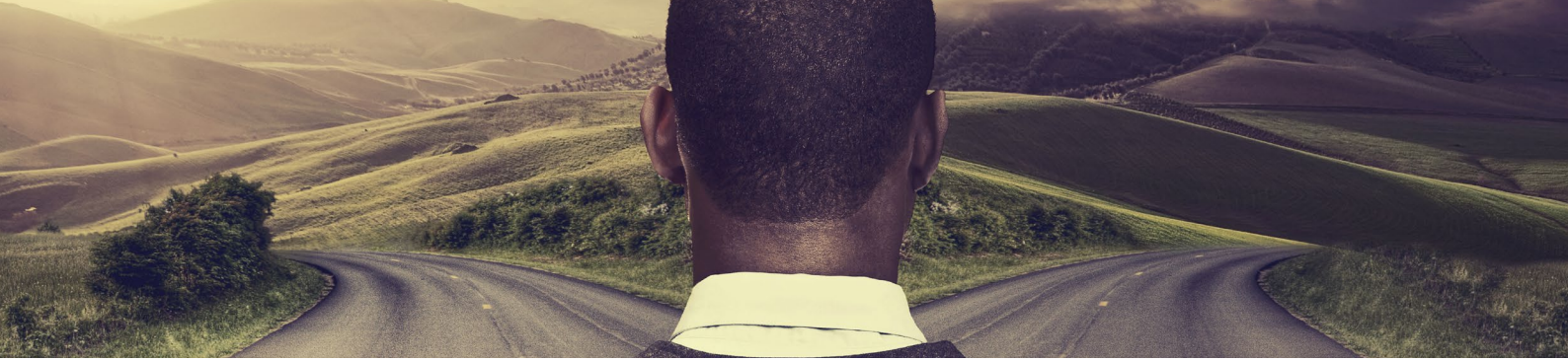
The Transition Project Team is working closely with the 50 territorial authorities (**TAs**) who currently have responsibility for fire services, to transition these to



FENZ. Due to the scale of the amalgamation, not all rural fire services and support provided by TAs will be transferred on 1 July 2017, so transitional agreements with local government are being developed. The Project Team is also liaising with local government on the use of fire response assets and fire permitting.

The FENZ Act repeals TAs' specific bylaw making power for preventing the spread of fires involving vegetation under section **146(c)** of the **Local Government Act 2002** (**LGA**). It also contains provisions requiring TAs to amend or revoke "relevant fire bylaws" that are inconsistent with FENZ's new responsibilities (including lighting of fires in open air and setting of fire seasons).

If you have any questions, or require further information regarding any aspect of this newsletter, please contact us.



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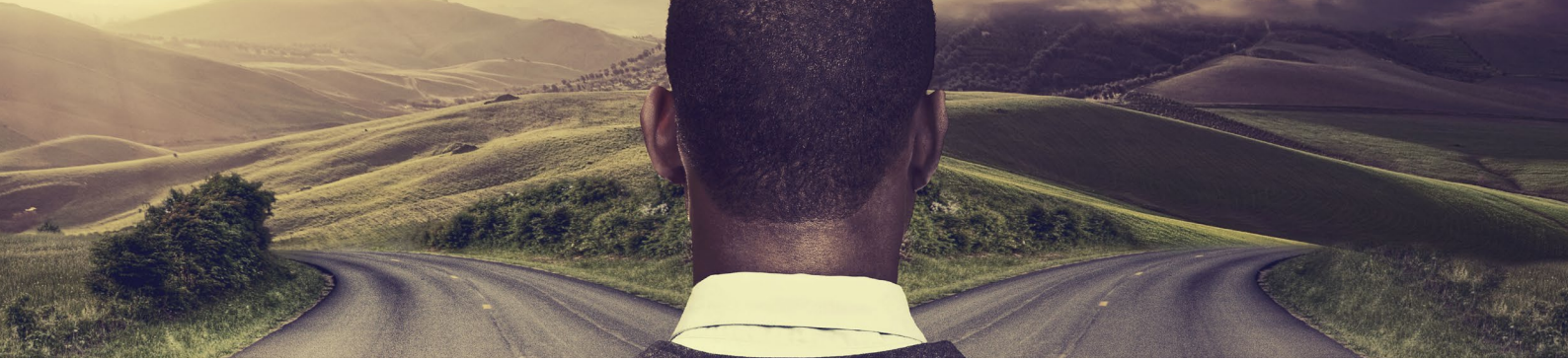

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