Legal Update

Local Authority Property Association
Paihia, November 2023

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Today we will cover…

- *Whanarua Beachfront Property Owners Group Inc Society v Ōpōtiki District Council (Reserves Act 1977 and Legitimate Expectation)*
- *Wanaka Stakeholders Group v Queenstown Lakes District Council (Local Government Act 2002 and decision making)*
- *Young v Attorney General (Measured Duty of Care (Risk of rock fall))*
- *Changes expected in Local Authority space with change of Govt*

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Whanarua Beachfront Property Owners Group Inc Society v Ōpōtiki District Council

[2022] NZHC 2589

'What about us?' Treaty settlement leaves home owners fearing they will lose access

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14 minutes to read

By **Jane Phare**
Senior journalist

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Boundary outlines
Road
Lot 80
Lot 66

[2022] NZHC 2589

Council statements

- “It has long been accepted by Council that there is a need for some property owners to use the track through recreation reserve (Lot 66) to obtain access to their properties…”(2002)

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“As Chief Executive I can assure you that there has never been any consideration by Council to restrict property owners access through Lot 66. …Until this matter is resolved I cannot see Council ever restricting the use of the track subject to the following qualification:

- Physical capability and safety of the track
- Reserve management plan prepared pursuant to the Reserves Act
- Any Council decision concerning the area at Whanarua Bay”

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- Council's solicitors in 2002 noted that a right of way easement across a reserve may be created under s 48 of the Reserves Act 1977 and that "appropriate mechanism" to formalise the access arrangement was to "commence the preparation of a reserve management plan for Lots 66 and 80, and at the same time to establish a right of way easement across part of Lot 66".

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- The draft Reserve Management Plan will include provision for the continued vehicle access through Lot 66 (recreation reserve owned by the Opotiki District Council) for the ‘lower bach owners’. While we cannot predetermine the outcome of the final version of the plan, which will be subject to public consultation, we consider that the continued use of this access in this way contributes to a favourable resolution of the access issue (2006)

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- “Options to formalise access right over lot 66 for ‘lower’ Whanarua Bay house owners will be explored by Council and; implemented where practicable” (Coastal Reserves Management Plan 2012)

2021 Statement of Proposal

- Proposal: to vest seven lots in Te Whānau ā Apanui Implementing…subject to the Council first being satisfied as to how any existing encroachments are addressed prior to the land being transferred
- Called for submissions

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Owners' Claim

- (a) their legitimate expectations of continuity of access were not properly considered or given effect through the consultation and decision;
- (b) the consultation process was procedurally unfair; and
- (c) the Council failed to take into account relevant considerations and took into account irrelevant considerations.

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Did Council breach Owners' legitimate expectations?

1"that a formal easement would be granted in their favour".

2 "they would be properly consulted before any decision was made that meant the Council could not guarantee access"

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Tests for Legitimate Expectation (1)

- In *Green v Racing Integrity Unit Ltd,* an applicant:
- "… must establish three elements if they are to succeed on a claim for breach of a legitimate expectation, in the administrative law context: (1) **a promise or commitment**, in this case by the adoption of a settled practice or policy, **to act in a certain way**; (2) **their legitimate or reasonable reliance on the promise or commitment**; and (3) the **appropriate remedy** if any that should be granted."

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Tests for Legitimate Expectation (2)

- In *Oosterveen v Ministry of Business, Innovation and Employment:* 1) a public authority has given a clear and unambiguous undertaking;
- (2) the undertaking was reasonably understood to mean what the applicant claims;
- (3) the decision-maker knew of the representation and chose to act contrary to it;
- (4) the applicant has suffered some detriment by relying on the representation; and
- (5) the decision-maker's conduct cannot be objectively justified as being in the public interest and a proportionate response to the circumstances of the case;

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Judge's view

- Given the difficulty of proving a claim in substantive legitimate expectation, the Court often bypasses the issue of whether the doctrine exists in New Zealand, and instead dismisses the claim on the ground that it would not succeed.
- "Court has danced with the doctrine for a long time, but seldom taken it home."
- Judge: First two limbs of *Green* test were not met

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Clear and Unambiguous promise or commitment?

- Distinction between Council and its officers not “of particular significance” – statements were attributable to the Council
- Statements and practices did create expectation but no clear and unambiguous commitment to grant easement – wording had caveats in it

  “subject to public consultation”

  “Reserve Management Plan will focus on *resolving* access arrangements”

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Property Owners' reliance or expectation must be reasonable or legitimate

- s48 Reserves Act - Council can grant easement without consultation where reserve "is not likely to be materially altered or permanently damaged"
- Evidence from Mana Whenua that access was damaging Waahi Tapu
- No clear and unambiguous commitment
- Claim of Legitimate Expectation fails

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Was the consultation process prior to the Decision procedurally unfair?

- Council changed the terms of the consultation by deferring resolution of the access arrangement - effectively rejecting potential outcomes in advance

- Council wrongfully provided additional opportunities for Te Whānau ā Apanui to respond to matters raised without advising the Property Owners or providing a right of response

- Resolution discussions were poisoned by a biased member of the Council

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Changing terms of consultation

- ***Implementing this part of the proposal would be subject to the Council first being satisfied as to how any existing encroachments are addressed prior to the land being transferred*.**
- What the Council is actually saying is that it must be satisfied as to *how* the encroachments will be addressed prior to the land being transferred. This involves the Council satisfying itself that it has a plan in place to address those encroachments. It is not saying that the existing encroachments must actually be addressed prior to the transfer.

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Did Council wrongfully provide additional opportunities for Te Whānau ā Apanui to respond to matters raised without advising the Property Owners or providing a right of response?

- Where the local authority adopts a special consultative procedure, it may request comment, advice or views on the proposal from any person
- Entirely understandable for Council to meet with Te Arawhiti and Te Whānau ā Apanui – entitled to request further info

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Were the resolution discussions poisoned by a member of the Council who belatedly declared a conflict of interest and was biased?

- One Councillor whakapapa to Te Whānau ā Apanui
- Excluded from actual decision but attended earlier meeting with Te Arawhiti and Te Whānau ā Apanui where staff report was changed
- Did not poison or improperly influence decision making process

Did the Council fail to take into account relevant considerations or take into account irrelevant considerations when making the Decision?

- Did take into account the impact of decision on ability for owners to access – received submissions on very point and became focus of management plan
- Reference to “illegal” in staff report unfortunate but did not prejudice decision – questionable status of accessway is important and relevant

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Wanaka Stakeholders Group v Queenstown Lakes District Council

[2021] NZEnvC 852

[2021] NZHC 852

Context: Wanaka Airport

- QLDC owns 75.01% of the shares in the Queenstown Airport Company (**QAC**).
- QLDC owns the land on which Wanaka Airport is located.
- QAC operated Wanaka Airport on behalf of QLDC.

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[2021] NZHC 852

Consultation by QLDC

- Proposal: to enter into a long-term lease and management arrangement with QAC.
- Used the Special Consultative Procedure (**SCP**).

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[2021] NZHC 852

QLDC's decisions

- Granted QAC a 100 year lease of the land on which Wanaka Airport is situated.
- Sold to QAC the airport buildings, the runway and associated infrastructure.
- Granted to QAC rights in relation to the future development of "Project Pure", the Wanaka wastewater treatment plant.

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[2021] NZHC 852

3 key alleged errors in QLDC decision-making

Unlawful transfer of ownership/control

QLDC had transferred ownership/control of strategic assets without that being explicitly provided for in the Long Term Plan (**LTP**).

Significant decision

QLDC's decision-making did not comply with the requirements for significant decisions.

Level of service alteration

Intention to develop Airport for use by jets, meant QLDC's decision amounted to a decision to alter significantly the level of service provision without the LTP providing for that.

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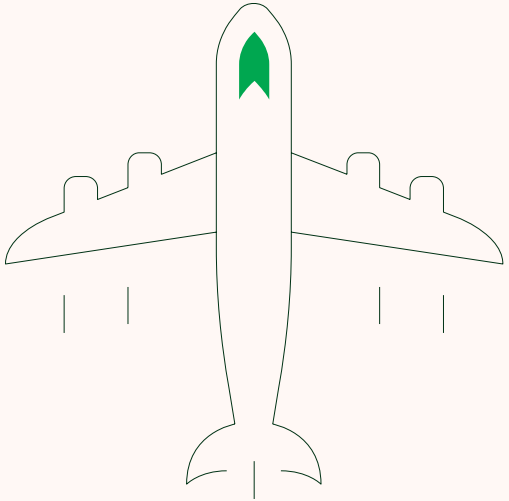
[2021] NZHC 852

Transfer of ownership of strategic asset



- Court held QLDC had transferred to QAC, ownership/control of a strategic asset without that being explicitly provided for in QLDC's Long Term Plan (**LTP**).
- QLDC's decision-making transferred legal ownership of the infrastructure that made the land an Airport.

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[176] I consider that transfer of ownership must mean a transfer of all of the essential elements that make up the asset being transferred… I conclude that because freehold title to the land, which is the essential requirement for the airport, remains with QLDC, the Lease did not transfer ownership of Wanaka Airport to QLDC.

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Transfer of control of the Airport

- Court held that the decision amounted to a significant alteration to the level of service at the Airport without the LTP providing for that.
- The Lease gives QAC much more than responsibility for operational management, long-term planning and governance – which were terms used in the Statement of Proposal.
- QLDC has transferred to QAC the power to direct, regulate and command the use and future direction of the Airport.

[185] For these reasons, I consider QLDC has transferred effective control of the Airport sufficient to trigger the requirement in s 97 of the LGA that such a transfer must take place only in the context of the long-term plan.

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[2021] NZHC 852

No unlawful transfer of control of Project Pure

- The Lease gave QAC unusual and substantial rights in respect of Project Pure.
- Lease did not affect the day to day operation of Project Pure.
- Even if QAC exercised its powers in relation to Project Pure, no alienation of ownership or operational control of the plant away from QLDC.

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[2021] NZHC 852

No decision to alter level of service provision

- QLDC/QAC had common expectation that Wanaka Airport would be developed to accommodate jets.
- No decision to alter services at the Airport, as the details of that proposal were left for future processes.

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[2021] NZHC 852

LGA decision-making requirements

- Statement of Proposal not a fair summary of the proposal:
  - Duration of proposed lease not apparent;
  - Not clear that the intent was for Wanaka Airport to be redeveloped to allow jet aircraft.
- The Lease went considerably beyond the scope of the Statement of Proposal.

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[212] There was nothing in those sections of the Statement of Proposal that gave any hint, let alone provided a fair representation, that QLDC may be contemplating a governance and management option that would determine the future of Wanaka Airport for the next 100 years or longer or that that future would include scheduled jet services.

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Exercise of discretion to grant relief

- Relief in judicial review proceedings is discretion.
- The Court made declarations that QLDC's decision to enter into the Lease was unlawful and that the Lease and associated arrangements were illegal and of no effect.
- Declined to grant an order restraining QDLC and QAC from taking steps to develop and operate Wanaka Airport for use by jets.

Young v Attorney-General

Measured Duty of Care

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Appendix A: Photographs of Mr Young's property[121]

Facts

- Mr Young owns land beneath cliffs – cliffs were damaged in the CTBRY earthquakes;
- earthquakes caused rockfall onto Mr Young's land;
- Crown acquired clifftop properties due to safety concerns;
- Crown made a "redzone" offer to buy Young's land (which also remains unsafe to live on);
- Young refused the Crown's offer;
- instead, he brought proceedings against the Crown in private nuisance; and
- claiming the Crown had not complied with its **measured duty of care.**

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Lower Courts

- High Court dismissed Young's claim;
- Held: Crown's measured duty of care extended only to doing what was reasonable to prevent or minimise the risk;
- Court of Appeal also dismissed Young's claim;
- Held: Nature of the measured, rather than absolute, duty means 'reasonableness between neighbours' may require some degree of cost sharing; and
- Notably, the Crown had purchased the adjacent unsafe land to its own economic detriment.

Supreme Court

- Young argued Crown's red zone offer did not meet its measured duty of care;
- SC dismissed his appeal;
- Court emphasised what is "reasonable" in any case will be heavily dependant on the facts;
- Where a hazard can be removed with little effort an no or minimal expenditure, it will be more straight forward;
- But here, the cost of removing the risk is significant, and will be more complicated.

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Factors considered relevant

- practicability of the proposed remedial action;
- extent and cost of the necessary works;
- (possibly) the locality – which may impact on the scale and therefore the reasonableness of remediation measures;
- whether hazard was solely on the defendant's property or shared across both properties;
- any underlying statutory framework (ie here the Crown purchased the land not to occupy or develop, but as a "rescuer"); and
- whether remedial work would benefit both parties.

Applying those principles

The Court found:

- remediating Young's land was not practicable in terms of cost and difficulties in implementation;
- there was a disproportionality between the remediation costs and land value;
- the hazard was shared across both properties, and the Crown had purchased the adjacent land in the context of a natural disaster, for equitable and safe outcomes;
- the Court did not consider that the Crown's red zone offer to acquire land (made under ERL) was relevant to the measured duty; and
- the "measured" duty of care required the Crown to do no more than warn Young of the risks.

Upcoming changes

- **Three Waters** – support of balance sheet separation without compulsion
- **MDRS** – To be reversed
- **SPA and NBE Act** – proposed to be scrapped
- '**Going for Housing Growth**' Reallocation of Kiwibuild, affordable housing, and Kāinga Ora land programme funds – to fund incentivising Councils t build more homes and support the funding of infrastructure.